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‘Statehood’, ‘de facto Authorities’ and ‘Occupation’: Contested Concepts and the EU’s Engagement in its European Neighbourhood

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ABSTRACT The legal concepts of ‘statehood’, ‘de facto authorities’ and ‘occupation’ are used for analysing both the type of control that unrecognized political entities in Europe exercise over their territory and population, and their relationship with the international order. The use of such terms in political discourse and policy documents will legitimize or delegitimize the claims of the parties to a conflict. They will have a direct political impact on how the EU mediates these conflicts and engages with the authorities and the population of unrecognized entities. Once they become part of a political practice, legal concepts may allow or even enlarge the scope of potential engagement, but they may also impose severe constraints on EU engagement, and even rule it out almost completely. Their application leads to disagreements within the EU. The concept of ‘occupation’ is particularly contentious: EU member states differ in their use of it with regard to particular conflicts, and in this respect divergences also appear within the institutional framework of the European Union—between the European Commission, the Council, the Parliament and other institutions. An analysis of the use of legal concepts in political discourse and policy documents goes beyond international law: an analysis within the field of political science is required.

Introduction

The European Union is divided on its recognition policies. Each of its member states has its own policies on the recognition of new states. Their divergence expresses itself most strikingly, where Europe is concerned, in the recognition of Kosovo by some member states and the refusal of recognition by others. The European Union managed to overcome this division, however, by engaging actively with the contested entity. Such a policy—where the EU is divided on the question of recognition but united on the question of engagement—may be defined as a ‘policy of engagement without recognition’.¹

Where all EU member states agree that the legal status of a state should be withheld and that the EU should refuse to recognize these entities as independent states, but should still engage with their population, it is more appropriate to refer to a ‘policy of non-recognition

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and engagement'. Agreement within the EU on the non-recognition of particular entities as independent states does not, however, preclude disagreement regarding the application of this position. Such divisions may arise between EU member states, but also between EU institutions. The European Commission, the European Parliament, the European Council, the Council of the European Union, the Court of Justice of the European Union (CJEU, formerly European Court of Justice) and the European Court of Auditors all approach the question of how to address this issue from a different institutional angle, and with diverse political concerns and terminology.²

International law is carved up by its own kinds of disagreements. For example, there are divergences on the question of recognition versus non-recognition from the perspective of rights and obligations (Talmon, 2005, p. 103). International lawyers generally regard the criterion of effectiveness as crucial to any definition of statehood, but there is no set of criteria that would allow a consensual response within that discipline to the question of what constitutes statehood. There are also divergences regarding the use of concepts such as 'de facto authorities' and 'occupation' in particular contexts. The following analysis is interested in such questions of terminology in international law, but from the point of view of political science. It looks at how debates on legality—which is the main interest of international law—relates to debates on legitimacy—the main concern in political science. To what extent do such scholarly terms legitimize or delegitimize claims to statehood? What is the practical significance of legal concepts relating to statehood for the parties engaged in a secessionist or irredentist conflict,³ and for the EU's policies of 'engagement without recognition' and of 'non-recognition and engagement'? To what extent do such concepts either allow or impose severe constraints on the scope of engagement, or even rule out such a practice almost entirely?

We will analyse in some detail the meaning of key concepts to be found in the academic literature on international law. The concepts of 'statehood', 'de facto authorities' and 'occupation' have been selected for their importance in this literature, but also because of their relevance for the political discourses and practices of the conflicting parties and the EU. We will analyse the various concepts one by one, and enquire directly into their practical use. We will limit our enquiry to conflicts—in Europe, over the international status of territories—that have turned violent and have led either to the creation of political entities whose statehood is disputed or to an annexation that is likewise contested: Northern Cyprus, Transnistria, South Ossetia, Abkhazia, Nagorno-Karabakh, Kosovo, Donetsk, Lugansk and Crimea. The piece concludes with a comparative analysis of the various uses of these concepts. What they have in common is that they either weaken or, on the contrary, strengthen particular claims to recognition and non-recognition. Where EU engagement is concerned, the use of the concept of 'de facto authorities' will enlarge its potential scope, while the concepts of 'illegal occupation' and 'illegal annexation' will, on the contrary, restrict it. Each of the EU institutions makes a selective use of these concepts in order to strike the right balance between a policy of engagement and a policy of non-recognition. The selection it makes will depend then on its own particular concerns and objectives.

Statehood: Declaratory and Constitutive Views and the Principle of Non-recognition

For a legal definition of statehood, scholars will generally refer to the 1933 Montevideo Convention on the Rights and Duties of States (Crawford, 2006; Grant, 1998/1999;

Grant, 1999). Statehood there is defined as having four characteristics: (1) a permanent population; (2) a defined territory; (3) a government and (4) a capacity to enter into relations with other states, and thus being able, for instance, to sign international treaties. All these characteristics referring to the effectiveness of statehood may be considered intrinsic, including the capacity to interact with the international community. Their factual presence can be assessed. Every characteristic must exist to a degree, and a certain threshold has to be reached before an assessment of statehood can be made. The definition does not imply any legal entitlement to recognition.

In discussions on the legal definition of statehood, most writers share the assumption that recognition does not create statehood—and in this respect, they are in agreement with the Montevideo definition (Grant, 1998/1999, p. 446). This definition is, however, widely challenged. There is first of all the view—at present, a minority one—that recognition is constitutive of international rights and duties associated with statehood. Hersch Lauterpacht, the most widely read scholar working in this tradition, does not disregard the characteristics referring to the effectiveness of statehood but considers recognition constitutive as it lifts those characteristics into international law, establishing international duties and obligations between the recognizing state and the recognized entity (Lauterpacht, p. 6). Recognition may be considered constitutive to the extent that it establishes rights and obligations both for the entity recognized as a state and between the recognizing and the recognized states—that it creates legal links with the international system and thus increases the effectiveness of the recognized state. It avoids a situation where international legal acts remain without effect (Crawford, 2013, pp. xxxvi–xxxviii).

A further contentious issue is whether substantive changes introduced into international law and politics since the signing of this convention in 1933, concerning the impact of the principle of national self-determination on the legitimate origin of states, have affected the definition of statehood itself. Since that time, in debating the statehood of a particular entity, international jurists have entered into a far more complex set of arguments relating to effectiveness and legitimacy criteria than previously (Crawford, 2006, pp. 62–95; Grant, 1998/1999, p. 450). One of the questions now raised, for instance, is the extent to which adherence to minimum international legal standards—e.g. on human rights—may be considered a prerequisite not only for recognition but also for statehood. Some writers analyse the Montevideo definition from this perspective, criticizing it for being underinclusive by not taking into account some crucial features of a state—compliance with *jus cogens* norms, for instance, are mentioned in this context—and claiming that it is thus incomplete (Grant, 1998/1999, p. 453; Grant, 1999, pp. 9–12). Others, meanwhile, criticize it for being overinclusive, as it includes for example criteria such as the capacity to enter into relations with other states, which is strictly speaking not a criterion for statehood but rather a consequence of it (Grant, 1998/1999, p. 435).

The thesis that independence should be considered one of the main criteria is also present in the debate on the legal definition of statehood. Independence may then be described as 'exercising authority over a territory to the exclusion of any other state' or 'having no other superior authority than international law' (Crawford, 2015, p. 282). According to Crawford, independence, in combination with other criteria of statehood, will allow an entity to be identified as a state, irrespective of whether or not it is recognized.

It cannot be expected that these discussions will come to an end, or that they may be settled politically by a new international convention (Grant, 1998/1999, p. 447). The debates among legal scholars—combined with the reluctance of states to restrict their

policies of recognition and non-recognition by defining exactly what they mean by statehood—rule out any new international codification of a legal definition of a state in the foreseeable future.

The declaratory and the constitutive approaches are of value not only for policies of recognition but also for policies of non-recognition. A policy of non-recognition means more than the absence of recognition (Talmon, 2005, p. 101). This is indicated by the fact that non-recognition may be considered a separate principle in international law (Lauterpacht, pp. 409–435). From a juridical perspective, statehood concerns not legitimacy but legality, and facts that are considered illegal cannot be used to give a positive assessment of statehood according to a declaratory approach. A duty of non-recognition arises out of the violation of *jus cogens* norms. When confronted with facts of this kind, a non-recognition policy aims to prevent the consolidation of an illegal situation (Berkes, 2017, p. 12; Talmon, 2005, p. 125). In the words of Lauterpacht, non-recognition is ‘the minimum of resistance which an insufficiently organised but law-abiding community offers to illegality’ (Lauterpacht, 2013, p. 431). Whether or not a particular situation should be regarded as illegal and should be resisted is, of course, a question of interpretation. This was the case for instance when the EU gave its support to the UNSC resolution that considered the 1983 declaration of independence by the Turkish Republic of Northern Cyprus (TRNC) to be incompatible with the two treaties that had established the Republic of Cyprus in 1960—the Treaty Concerning the Establishment of the Republic of Cyprus and the Treaty of Guarantee—and therefore legally invalid (Talmon, 2005, pp. 120 and 141). The EU endorsed the view that recognition of the TRNC would contravene international law.

The authorities in control of breakaway territories—those territories that, unlike Crimea, have not been formally annexed by another country—will do their utmost to prove that their institutions fulfil the criteria of statehood as defined by the Montevideo Convention. They will, if possible, also point out that these criteria were already fulfilled in the past—in other words, through independent statehood, in a certain historical period. The Abkhaz pro-independence discourse, for instance, is based on an interpretation of the history of the Caucasus region that makes use of this argument. The Abkhaz authorities refer to the fact that under the Soviet constitution their state was an Autonomous Republic, which had already acquired some of the key characteristics of statehood, such as a flag, a government and a parliament. They further refer to a more distant past, describing Abkhazia as an independent kingdom from the eighth to the tenth centuries and a principality from the thirteenth century up to 1864 (Chirikba, 2013, p. 4). In such a case, the declaratory approach proves useful for turning not only present but also past control over a territory and a population into legal claims to statehood.

The declaratory view also lends legitimacy to the political strategy of the authorities in charge of breakaway political entities when they find themselves confronting an EU policy of non-recognition. The declaratory approach supports the view that their unrecognized status should be seen as merely an intermediate step in the historical progress of their nation from lack of statehood to full recognition as a state. Non-recognized authorities argue that their state already performs all the objective functions of a state, whereas recognition, they claim, depends only on a favourable political constellation. The declaratory view of recognition thus justifies a policy of strategic patience, of ‘digging in’.

In the words of Stefan Talmon, the act of recognition is ‘status-creating’ according to the constitutive school and ‘status-confirming’ according to the declaratory tradition (Talmon, 2005, p. 101). The policy of non-recognition is ‘status-denying’ according to both schools.

It cannot be 'status-destroying' in the declaratory tradition, as this would go against its basic assumptions, but withholding recognition still makes it possible to express fundamental opposition to a violation of the principles of international law and denies political entities the legal effects of recognition (Talmon, 2005, p. 144). Facts that are illegal are thus not being taken into consideration. Except in the case of Kosovo, the European Union consensually regards the unilateral establishment of breakaway entities, or annexation, as breaches of the principle of territorial integrity. In the cases of Donetsk, Lugansk and Crimea, the EU additionally points out the illegal use of force.

A distinction has to be made between the recognition of a state—where the political and legal conditions for recognition may differ from one EU member state to another—and recognition as a state—where legal scholars define the conditions for statehood. But even if it is essential to distinguish between these two acts in theoretical and analytical terms, in practical terms, one must remain attentive to the close links between them. For instance: when the EU was confronting the dissolution of the Socialist Federal Republic of Yugoslavia, it strove for a coordinated response in member states' policies on the recognition of states, and made practical use of scholarly legal expertise. In August 1991, the EU set up the Arbitration Commission of the Conference on Yugoslavia to give legal advice on the consequences of the secession of some republics from the Federal Republic of Yugoslavia. The commission was asked by the EU to develop 'an approach regarding relations with the new states', a formulation that implied that the EU acknowledged the statehood of the breakaway republics without having recognized them as such. This is in line with the declaratory arguments regarding the question of statehood. The advice given by the Arbitration Commission was likewise in consonance with the declaratory approach (Talmon, 2005, pp. 106–107). The declaratory view also guided the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG, 2009), set up by the EU in 2009 to address the question of responsibility for the Russian–Georgian war of 2008. In this case too, only a fine line separated the questions regarding the recognition of a state from those regarding recognition as a state. The legal experts on the commission were asked to establish whether South Ossetia and Abkhazia were states under international law. According to their report, South Ossetia did not meet the legal criteria for statehood followed by the declaratory school, but Abkhazia did. On the issue of recognition, however, the report stated that neither of them should be recognized as states by the international community as they did not meet the legitimacy criteria when it came to human rights or minority rights, in particular as regards the return of Georgian displaced persons (IIFFMCG, 2009, pp. 127–134).

Statehood: The EU Policy

The EU's policy of non-recognition of breakaway entities is a necessary condition if a policy of engaging with their population is to succeed, as it facilitates the formal agreement of the central government to such a policy. Engagement aims at supporting measures to build trust between the sides, and allowing the population of breakaway entities to benefit from EU policies in the region. It is assumed that, if successful, the EU policy of engagement would thus create a better basis for status negotiations between the conflicting parties that would be in line with the non-recognition policy.

The EU's policy of engagement is also a precondition for the success of its policy of non-recognition. First, it is in agreement with the generally accepted view that a policy of non-recognition should not trump respect for human rights or humanitarian concerns. According

to the UN Secretary-General's report of 20 December 2001 on the promotion and protection of human rights, 'the sanction of non-recognition should never affect the basic rights of the population' (Talmon, 2005, p. 145). The EU's policy of engagement does address this concern. Second, the lack of any prospect of reintegration may be regarded by some states—including EU member states—as legitimate grounds for ending their policies of non-recognition. A policy of engagement tries to prevent such an outcome. A successful EU non-recognition policy thus depends largely on successful engagement.

But there is also a strong tension between the policies of engagement and non-recognition. A policy of engagement may imply a number of concessions in terms of the non-recognition policy, such as cooperation on an administrative level between officials of the central government confronting breakaway, or EU officials, and the *de facto* authorities. A policy of non-recognition may also involve strict limitations on a policy of engagement, making it impossible, for example, for the government confronting breakaway or the EU to cooperate effectively with *de facto* authorities on implementing concrete programmes. After carefully calculating costs and benefits, therefore, each central government confronting a breakaway territory will come to its own conclusions regarding engagement. Their counter-secession policies may then differ greatly. There is a wide disparity in this respect for instance between the position of the Georgian government—which formally supports a policy of engagement in its breakaway territories—and the position of the Ukrainian government, which does not, and EU engagement in Eastern Ukraine and Crimea is consequently extremely limited.

The tension between the policies of engagement and non-recognition is also apparent in the positions taken by the EU. The status-denying effect of the EU's non-recognition policy has direct consequences for its policy of 'non-recognition and engagement'. By denying statehood to these entities, the EU denies the legitimacy of their constitution and consequently of all elections or referenda on independence taking place there. The legal concept of statehood—as seen from the declaratory perspective on non-recognition, but also from the constitutive point of view—and the tensions between a policy of engagement and a policy of non-recognition, further imply legal constraints on all policies on state-building. Democratization and human rights policies are not allowed to support state institutions directly. This limits any form of EU engagement to assist local civil society groups or international humanitarian organizations present in the breakaway territories. Policies in favour of democratizing and strengthening state institutions are, insofar as Europe is concerned, possible only for Kosovo, which is strictly speaking subject not to 'a policy of non-recognition and engagement' but to 'a policy of engagement without recognition'. In this case, United Nations Security Council (UN SC) resolution 1244 regulates international engagement on this territory, including state-building efforts.

Furthermore, the legal view of statehood on which the EU's non-recognition policies are based constrains the EU's engagement and has a negative impact on the effectiveness of its projects. The policy of non-recognition excludes cooperation at the intergovernmental level—at the level of ministers or diplomats—but does not necessarily preclude cooperation at the administrative level among functionaries (Talmon, 2001, p. 749). But such a pragmatic approach to cooperation is not always easy to achieve if denying statehood is the main aim. The sustainability of EU support for economic development and the building of infrastructure in Northern Cyprus, for instance, is largely undermined by the lack of effective cooperation with the local authorities. In 2012, the European Court of Auditors did not challenge the legitimacy or legality of the EU's policy of non-recognition and

engagement, but it observed that the efficiency of EU programmes in Northern Cyprus had 'been significantly reduced because the TC administration is not officially recognised internationally'. Non-recognition excludes, for instance, the use of twinning contracts as a capacity-building instrument (see European Court of Auditors, 2012, pp. 12).

Such tensions between legal constraints and efficiency do not to the same degree affect the EU's policy 'without recognition' towards Kosovo. The EU is divided on its recognition but is united in its aim of resolving Kosovo's conflict with Serbia by bringing both parties closer to the European Union. This approach requires policies that remain neutral regarding any legal conception of statehood. Active cooperation between Serbia and Kosovo and the full normalization of their relations have been laid down as conditions for their future membership. This includes an international agreement between the parties that is legally valid—a condition that finds unanimous support within the EU—but that does not necessarily imply the recognition of Kosovo by Serbia—a condition that would not be acceptable to those EU members that refused to grant recognition to Kosovo.

In October 2015, the EU was able—on the basis of a qualified majority within the Council—to sign a Stabilisation and Association Agreement (SAA) with Kosovo as it has legal personality itself. An asterisk next to the name 'Kosovo' in the agreement indicates that the latter is status-neutral regarding the question of statehood. It was then argued that such an agreement could, according to the formal regulations, be concluded with 'other countries', an expression that would not require recognition by all member states. It was also argued that the EU does not even have to recognize Kosovo as a state, as it, in any case, does not have any competence regarding recognition (Dessus, Rexha, Merja, & Stratulat, 2017; Hoffmeister, 2016, pp. 279–280). But Kosovo is now seeking EU candidate status, and the legal basis for applying for membership is now Article 49 of the Lisbon Treaty, which explicitly limits access to 'European states'. In this case too, some analysts point out that the lack of full recognition by the EU's member states is in principle not a fundamental impediment to achieving such candidate status, as the EU has, in any case, no competence to recognize states.⁴ But such a view, advocating legal flexibility, is far from being consensual among international lawyers. And—taking into account the requirement of unanimity among member states in order to pass through the various stages in the accession process—it would mean that Kosovo would have to be accepted as a full 'partner' in the EU by all the countries refusing to recognize it as a state. Such political hurdles may prove more difficult to overcome than the strictly legal ones—in addition to the need to convince the member states that did recognize its statehood that membership by a country with weak political and judicial institutions constitutes an asset, and not a threat, to the European Union.

De facto Authorities

Non-recognition goes against legal claims to statehood but does not deny the de facto control of authorities over a territory (Kontorovich, 2015, p. 589). Non-recognition policies aimed at withholding the legal status of statehood do not necessarily mean that a non-recognized entity is treated as a legal nullity. Here, the traditional state practice of negotiating with the authorities in control of a territory and a population applies. There are a number of terms—such as 'de facto authorities' or 'a de facto administration'—that acknowledge that the institutions are actually in control of breakaway territories. These authorities are then ascribed a certain legal personality (Talmon, p. 147), and

may even be acknowledged as representing their entities and having limited treaty-making power in signing agreements.

In the case of cease-fire agreements, their limited legal personality may have far-reaching consequences for the regulation of the use of force. This may be illustrated by the case of the 2008 war in Georgia, when the legal experts of the IIFFMCG had to establish whether or not unrecognized entities exercising control over a territory, such as South Ossetia, were protected by the prohibition of the use of force in the UN Charter. In their view, some of the bilateral agreements signed between representatives of Georgia and Abkhazia or South Ossetia did imply a prohibition on the use of force. The Georgian military attack on South Ossetia in August 2008 was, therefore, to be regarded as a breach of international law (IIFFMCG, 2009, pp. 239–242).

‘De facto’ status does not imply any form of state recognition. The term simply indicates an acceptance, for practical purposes, of the authorities in control of a territory and, primarily, the need for some minimum interaction, and for negotiations. The term ‘authorities’ without the addition of ‘de facto’ can also be used for the same purpose. Other status-neutral terms are ‘regime’ and ‘entity’ (Talmon, 2005, p. 119). Governments confronted with secession, and their international allies, will have to take the existence of non-recognized institutions and their personnel into account, and may therefore agree to use the term ‘de facto’ within the framework of their negotiations. Moldova, for instance, refers in this context to the ‘Tiraspol de facto authorities’,⁵ replacing a reference to the breakaway entity of ‘Transnistria’ with a reference to Tiraspol, Transnistria’s capital.

In some cases, international organizations involved in negotiations to resolve a conflict involving unrecognized entities may, for negotiation purposes, grant ‘de facto’ authorities equal status with the recognized government. The current UN mediation on Cyprus, for instance, respects the equal status of the representatives of the Greek Cypriot and the Turkish Cypriot communities within the framework of the negotiations, despite the unequal status, in international law, of the political entities they represent, and the UN refers to the Greek Cypriot and the Turkish Cypriot presidents as ‘leaders’. Likewise, since April 2012 representatives of Moldova and Transnistria have been meeting each other on equal terms in the negotiations mediated by the OSCE, Russia and Ukraine. And in the case of the EU-mediated talks between Serbia and Kosovo, the two delegations also have equal status.

Governments confronting breakaway do not necessarily acknowledge the need to interact or negotiate with the authorities of the territory they have lost control of. Azerbaijan is engaged in negotiations with Armenia regarding the international status of Nagorno-Karabakh, but refuses to negotiate with the representatives of this breakaway entity—even though it accepted the signature of the ‘Nagorno Karabakh Army Commander’ to the 11 May 1994 cease-fire agreement aimed at ending the armed hostilities between the parties (Nagorno-Karabakh Republic – Ministry of Foreign Affairs, 1994). Ukraine likewise takes a very restrictive approach to the participation of representatives of Donetsk, Lugansk and Crimea, although in order to secure their commitment to the peace process it had to accept their involvement in the two rounds of the OSCE-led negotiations in Minsk. Ukraine even had to accept the signing of the texts of the agreement by their leaders—without, however, any indication of representative status next to their names (OSCE, 2014 and OSCE, 2015). Georgia has a different position from Azerbaijan and Ukraine regarding the participation of authorities from breakaway territories in international mediation. In the Geneva International Discussions—set up to deal with the consequences

of the 2008 Georgian–Russian war⁶—Georgia refused to negotiate within any framework that granted equal status to the authorities from these territories. Tbilisi denied the authorities in control of Abkhazia and South Ossetia the right to represent the local population, but it did not oppose their participation. Representatives from Tbilisi, Sukhum/i and Tskhinval/i have therefore met within the framework of working groups set up under these talks, in which they take part in a personal capacity.

When it comes to strengthening the legal position of de facto regimes, in some cases the EU institutions take opposing views on the proper balance between a policy of engagement and a policy of non-recognition. In 2010, a Commission proposal to allow direct trade with Northern Cyprus was not adopted by the European Parliament. Its legal experts, in contrast to those of the Commission, stated that this would imply that Northern Cyprus could be regarded as a separate legal entity, which would go against the EU's policy of non-recognition (Cyprus Mail, 2010; Vogel, 2010).

The question of whether and how to interact, to negotiate and to sign legally valid agreements with authorities from breakaway entities will thus be answered differently in all the cases under consideration here. All governments opposing breakaway will watch very carefully to see that their allies do not use any term that grants functionaries from non-recognized entities an official position in any statements or communiqués. They use a wide variety of formulations to deny statehood to the breakaway entity and any formal status to its representatives. Serbia, for instance, uses phrases such as 'Priština's representative', or puts 'Kosovo' between inverted commas (Ministry of Foreign Affairs of the Republic of Serbia, 2018). Governments confronting breakaway may even use terms such as 'de facto minister' or 'de facto president'. Here they will not equate 'de facto' with 'real', as a legal scholar adhering to the declaratory approach to recognition would do. From the perspective of engagement with a population under the control of non-recognized authorities, 'de facto' serves here, on the contrary, to nullify the formal status of titles. In a person-to-person meeting with non-recognized authorities, EU diplomats would not address these unrecognized officials directly with any title—instead, they would use simple terms such as 'Sir', 'Madam', 'Mr' or 'Ms'.⁷

Occupation: The Literature

Outside powers have deployed troops or military personnel on all European territories whose international status is disputed and where the EU is engaged. To assess this kind of situation, the legal concept of 'occupation' is widely used. And, as with the previous concept, it has a long history in modern international conventions, starting with the 1907 Hague Regulations, where it is stated in Article 42 that 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' Kontorovich distinguishes between situations of temporary, prolonged and indefinite occupation (Kontorovich, 2015, p. 592). Adam Roberts lists seventeen types of occupation, depending on the political context in which the concept is being applied. The most common type is 'belligerent occupation', defined as the occupation by a belligerent state of the territory of an enemy in an armed conflict, before the conclusion of a general armistice (Roberts, 1985, p. 261). Also relevant for our purpose of defining the status of disputed territories emerging from a violent secessionist conflict in Europe is Roberts' category of 'occupation with an indigenous government in post' (Roberts, 1985, pp. 284–288).

This refers to cases where the occupying power cooperates with the existing government, forms a new government or sets up a new state that is supposedly independent.

The legal concept of occupation has far-reaching implications for the responsibilities and duties, under international law, of occupying forces and third states. The occupying state acquires only provisional authority over a territory, which implies responsibility and accountability, but no sovereignty. It may not deport the population from the occupied territory or transfer its own civilian population to it by creating settlements. Regarding the legal consequences that may put constraints on EU engagement in such territories, international law further forbids changes in an occupied territory that would outlast the occupation. This may in principle apply to some types of major infrastructure projects.

There is substantial divergence in international law on the subject of the obligations of third states regarding their economic relations with occupied territories, and in particular, their liability when the occupation breaches international law. Through their economic policies, third countries could end up compounding the breaches of international law. The divergences in the legal analysis of such situations give considerable scope to political motives when practical conclusions are being drawn (Kontorovich, 2015, p. 593). Occupation is not unlawful by definition, but if it is unlawful in practice the EU may refuse to give it any form of direct support through international cooperation, particularly if such cooperation would not be for the immediate benefit of the population of the occupied territory. Practical forms of support for, or recognition of, settlements in occupied territories raise similar problems. It can be argued, for instance, that accepting product labels featuring only the name of the occupying power on goods from illegally occupied or annexed territories is likewise problematic, as it could indicate a kind of acceptance of the situation (Kontorovich, 2015, p. 595).

If the EU wants to apply sanctions against a particular entity or government, they have to be justified under WTO and other trade rules (Kontorovich, 2015, p. 587). The claim that a territory is occupied or annexed in breach of international law can be useful for this purpose. Such claims can also be used in order to demand restrictive clauses regarding occupied territories in trade agreements made with the occupying power (Kontorovich, 2015, p. 596).

Occupation does not imply sovereign authority, and therefore does not allow a change in the status of a territory, such as annexation (Chinkin, 2008, p. 201; Crawford, 2012, p. 7; Wrangle & Helaoui, 2015). Governments confronting breakaway draw significant benefits from this concept. It helps them to build what Kontorovich calls 'a robust non-recognition regime' (2015, p. 629). Describing a situation as illegal does not put an end to it, but it is one of the steps that a central government can take in order to achieve that (Crawford, 2012, p. 59). Central governments consider breakaway territories illegal from the perspective of constitutional law, and the term 'illegal occupation' makes their existence illegal from the perspective of international law too. Non-recognition ceases to be discretionary and is then turned into a legal duty for other governments. Moreover, it may help the central government to restrict the outcome of status negotiations to forms of reintegration, in line with the principle of territorial integrity,⁸ as opposed to open-ended negotiations. This implies severe restraints on EU policies if it should want to preserve the option of open-ended negotiations.

The negative connotation of the concept of occupation in common political usage is beneficial for counter-secession policies. Eran Halperin, Daniel Bar-Tal, Keren Sharvit, Nimrod Rosler and Amiram Raviv stress that the use of this term is not necessarily fully

in line with its legal meaning. It often indicates (1) the imposition of an unjust regime on the occupied country and its population; (2) a conflict of interest between the population and the occupying power; (3) a moral appeal for empathy with the country that has been occupied and its population and (4) the expectation that the occupation will come to an end after a limited period of transition (2010, p. 61). These characteristics are also present in the meaning of this concept in counter-secession policies, which strengthens the moral discourse against historic injustices perpetrated by an external power—with respect to our selected cases, Turkey, Russia or Armenia. A central government confronting secession may even defend an interpretation of a nation's history whereby the occupying power is mainly responsible for the country's partition.

How the Concept of 'Occupation' Is Used

The case of the Greek Cypriot government against the Turkish military intervention in 1974 is built entirely upon the concept of 'occupation'. The Greek Cypriot discourse refers to Turkey, rather than to the Turkish Cypriots, as holding the key to any solution (Kaymak, 2009, p. 251), even though this discourse also leaves some limited space for autonomous decision making by the Turkish Cypriot community.⁹ Turkey, by contrast, claims that the presence of its armed forces has been freely agreed by the TRNC, which is an independent state (European Court of Human Rights, 1996).

European courts, such as the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR), which is linked to the Council of Europe, have extensively addressed legal conflicts in Cyprus. Some of their judgments are directly relevant to EU engagement and to the resolution of the conflict through the full integration of the island into the EU, such as those regarding property claims brought by Greek Cypriots (see Ker-Lindsay, 2017, pp. 88–89). The ECHR regards Northern Cyprus as being under Turkish occupation and describes its authorities as 'a subordinate local administration of Turkey' (European Court of Human Rights, 1996).

When engaging with the north, EU diplomacy has to take the Greek Cypriot discourse and the European courts' judgments on occupation into account, but its interaction with the Turkish Cypriot authorities and population is mainly determined by the general principle of non-recognition, rather than by particular constraints imposed by overt opposition to occupation. EU engagement does not entail specific measures targeting Turkish settlers in Northern Cyprus, for instance (Kontorovich, 2015, p. 622).

The EU-mediated cease-fire agreements of 2008 to end the Georgian–Russian war provided for a withdrawal of Russian military forces from territories adjacent to South Ossetia and Abkhazia, but not from those territories themselves, and they excluded all terminology unacceptable to Russia—such as 'occupied territories'. After the war, when Russia recognized Abkhazia and South Ossetia as independent states, 'de-occupation' became the key term in the strategy of successive Georgian governments to recover the lost territories. Georgia regards Russia as an occupying power, and thus as a party to the disputes over Abkhazia and South Ossetia. In December 2009 the EU launched a policy of 'non-recognition and engagement'. Regarding Georgia's so-called de-occupation strategy, EU Special Representative Peter Semneby expressed the EU's hope that it would not unduly restrict international engagement in the breakaway territories (Semneby, 2011). The legal and political constraints—on the interaction of third parties with non-recognized entities—implied by the use of the term 'occupied territory' explain why the European Commission and the

Council do not adopt it in relation to South Ossetia or Abkhazia. Moreover, the Commission and the EU Special Representative repeatedly asked the Georgian government to review the Law on Occupied Territories, as the concepts of occupation and de-occupation could be perceived as counterproductive for the purposes of reconciliation with the Abkhaz and South Ossetian communities.¹⁰ The EU also voiced more formal concerns in official reports on Georgia over the period 2008–2011: the law would put undue limitations on humanitarian and rehabilitation programmes; it would lessen the effectiveness of any engagement strategy; and it would put unacceptable constraints on freedom of movement and on economic activities with and in the breakaway entities (European Commission, 2009, 2010; European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, 2011, 2012). The implementation of particular programmes required burdensome procedures to obtain derogations from the law on occupation. The Georgian authorities accepted derogations but refused to adopt substantial changes to the legislation.

For its part, the European Parliament was eager to express a stronger commitment to Georgia's territorial integrity than the Commission or the Council. It condemned Russia's occupation of Abkhazia and South Ossetia as being 'in violation of the fundamental norms and principles of international law' and appealed to the EU to 'recognise Georgia's regions of Abkhazia and the Tskhinvali region/South Ossetia as occupied territories' (2011). This recommendation did not, however, take into consideration the potential legal impact of such a definition on EU engagement, such as decreasing diplomatic flexibility in the negotiations.

The Azeri government uses the term 'illegal occupation' to describe Nagorno-Karabakh and its surrounding territories. It issues warnings to companies active in these territories (CBC TV, 2017), and it further accuses Armenia of building settlements there, in breach of international law (*Azernews*, 2011). Where the UN is concerned, the term 'occupied areas' is to be found in the 1993 UN SC resolution demanding the 'immediate withdrawal of all occupying forces from the Kelbadjar district and other recently occupied areas of Azerbaijan'. 'Recently occupied areas' refers to the territories surrounding Nagorno-Karabakh, but whether it also includes Nagorno-Karabakh itself is a matter of dispute. The latter issue is particularly contentious among the conflicting parties, as it relates to the right to national self-determination and the right to secession, but the first is not, or at least not in principle: the authorities of Nagorno-Karabakh and Armenia do not disagree on the fact that the Azeri-populated territories around Nagorno-Karabakh came under the control of their troops following the war. It is also unclear whether the 'withdrawal of all occupying forces' refers not only to the armed forces of the Armenian Republic but also to those of the de facto authorities in Nagorno-Karabakh. The Armenian side regards the question of withdrawal as being under negotiation within the OSCE Minsk Group (AGBU, 2010). As for the impact of occupation on EU engagement, it can be said that the case of Nagorno-Karabakh is quite particular. EU diplomats do not use the concept of occupation in this context, but the fact that Azerbaijan, unlike Georgia, does not, in any case, accept any form of engagement in the disputed territories, rules out an EU presence in and around Nagorno-Karabakh.

By contrast, the Moldovan government does not depict Transnistria as being occupied by Russia, even though it does not consent to the presence of Russian troops on this territory, which it regards as its own, and demands a full military withdrawal. The Moldovan government assumes that the use of such a term would add a new layer of complications to the

negotiations on reunification with Transnistria. Its avoidance of it is in line with the relatively high level of EU engagement in Transnistria—reflected primarily in trade facilitation measures agreed with this entity. The prudential approach of the Moldovan government contrasts with the repeated use of the term by the Moldovan parliament, which has a vital interest in delivering a strong public message of protest.

The legal literature questions the relevance of the distinction in principle between occupation by states and administration by international organizations, in the context of the deployment of UNMIK and KFOR in Kosovo after the retreat of Serb forces, in the period from 1999 up to Kosovo's declaration of independence in 2008. It points to similarities on the legal level, such as the relevance of international humanitarian law and human rights law (Ratner, 2005). Here one has to take into account the fact that the presence of UNMIK and KFOR in Kosovo in the period 1999–2008 was based on a decision by the UN SC to which the Serbian government gave its consent and which therefore cannot be associated with a form of 'illegal occupation'. Moreover, unlike the EU's policies in other cases addressed in this paper, its engagement with Kosovo during the period 1999–2008 was 'a policy of engagement without recognition', which, in the eyes of some EU member states, was a preparation for international recognition, and could not be equated with a principled policy of non-recognition. Here the EU consensually supported state-building. The concept of occupation has therefore never been useful for Serb policies of counter-secession (Ker-Lindsay, 2012, p. 80).

Regarding Eastern Ukraine, there is substantial legal discussion on the following questions: (1) whether Russia has direct control over the authorities of the breakaway territories, and whether it even directly planned and directed their military operations; (2) whether there is a non-international armed conflict involving the unrecognized entities in Eastern Ukraine; (3) whether the conflict between Russia and Ukraine amounts to an international armed conflict between those two entities. (International Criminal Court, 2016, pp. 36–38).

Regarding the choice of words to describe the presence of Russian troops in Ukraine, the respective positions of Ukraine and the EU on the use of the term 'occupation' have been clear-cut in relation to Crimea since its annexation in 2014, but far less so in relation to the Donbass region. Regarding the nature of the conflict it was involved in with Russia and the breakaway entities, rather than 'war', the Ukrainian government preferred to use the terms 'armed aggression' (with respect to Russia's military operations) and 'anti-terrorist operation' (with respect to Ukraine's military operation). The fear that a war might be considered lost, or that it might negatively affect Ukraine's standing internationally, played a role in this choice of words.¹¹

Regarding Crimea, the Ukrainian government uses the term 'illegal occupation' and 'temporary occupation' rather than 'illegal annexation' (Ministry of Foreign Affairs of Ukraine, 2018). This preference cannot be for legal reasons, as annexation does not cancel out the legal responsibilities, duties and constraints that follow from occupation. The characteristics associated with the term 'illegal occupation' are, moreover, no less negative, from the point of view of justice, than those that come to mind when speaking about 'illegal annexation'. The preference for occupation over annexation is probably due to the specific connotation of the latter, which, in contrast to the former, stresses the indefinite nature of the situation: such an association would not reflect Ukrainian objectives.

Regarding Eastern Ukraine, the Ukrainian authorities were at first somewhat reluctant to use the term 'occupation' for the breakaway territories in the Donetsk and Lugansk regions.

It was feared that this might unnecessarily complicate the application of the Minsk agreements, and might even favour the full integration of the breakaway entities into Russia (Koshiw, 2017). The Ukrainian president Petro Poroshenko changed his position, however, and initiated a law on the de-occupation of Eastern Ukraine that was passed by parliament on 18 January 2018. It made Russia responsible for the lack of protection of human rights in these territories and contained prescriptions regarding the attitude of the authorities—including the military authorities—towards the occupied territories and their population.

Russia itself uses the term ‘воссоединение’ (‘vossoyedineniye’ or ‘reunification’) to describe its unification with Crimea, in contrast to Crimea’s description as an ‘occupation’ or ‘annexation’. Regarding Eastern Ukraine, the Minsk agreements accommodated Russia’s interests (Kuzio p. 113). The texts of these agreements provide for the ‘pull-out of all foreign armed formations’ from the territory of Ukraine but they do not refer specifically to Russian troops or contain any other language that might imply Russian occupation. Russia was not formally considered a party to the conflict, but it was assumed that it could use its influence over the authorities of the breakaway entities to secure a better implementation of the agreements. Such a role has always been acknowledged by Russia itself. Moscow reacted angrily to the 2018 Ukrainian law on de-occupation. Its implication that Russia was a party to the conflict was seen as a flagrant contradiction of the Minsk agreements. Moscow rejected the notion that it bore any responsibility for the breakaway entities (UNIAN, 2018a). From its point of view, the conflict in Eastern Ukraine is a domestic Ukrainian conflict, where the authorities of the self-proclaimed republics represent the views of the local population.

The European Union has taken a unified stand on the crisis in Crimea. Unlike in other cases of breakaway, the various EU institutions do not describe the legal situation in different terms: all of them refer to the ‘illegal annexation’ of this territory by Russia.¹² The EU accompanied its condemnation of the Russian annexation with a set of far-reaching sanctions, which includes prohibitions on the importation of goods from this territory, and on investment in certain sectors and tourism services there. Nor can certain goods or technologies be exported to Crimea. The European Commission has drafted precise instructions on how these restrictive rules must be applied by EU companies with business interests in the annexed territory (Council of the European Union, 2018). When referring to the Russian role in the destabilization of Eastern Ukraine, by contrast, the Council refrains from using the terminology of occupation. This is because of the consequences such use could have on the Minsk agreement as a framework for negotiations: as already stated by Russia, it could jeopardize the peace process. The EU therefore reacted to the adoption by the Ukrainian parliament on 18 January 2018 of the law ‘On the special aspects of the state policy on securing the state sovereignty of Ukraine in the temporarily occupied territories of the Donetsk and Luhansk regions’ by stating simply that it took note of that law within the context of its further support for the full implementation of the Minsk agreements (UNIAN, 2018b).

EU engagement in Eastern Ukraine through humanitarian programmes and support for NGO activities is limited. In Crimea it is minimal. This is not only because of the limited scope of the programmes that are considered acceptable by the EU but also because of the difficulty of implementing them, for instance in arranging financial transactions. This has led to a general ‘hands off’ attitude, contradicting the idea that occupation in principle calls for more strenuous efforts to reach the local population.¹³

Conclusions

The attribution of rights and duties is central to all discussions in international law on the question of statehood. This makes the debate between a declaratory and a constitutive view of the role of recognition in constituting statehood particularly relevant. The question of whether EU engagement should strengthen political institutions—and their democratization—or should remain confined to supporting civil society organizations, is directly related to the question of how to define statehood in the context of non-recognition.

This normative dimension is also key to the use of the terms 'de facto authorities' and 'occupation' by all the parties engaged in these conflicts. The concept of 'de facto authorities', applied to the non-recognized entity, allows for some form of interaction between the conflicting parties, and with international organizations and/or third parties, including the signing of cease-fire and other agreements. It indicates that a policy of non-recognition does not imply that the unrecognized entity is a nullity from a legal point of view and that it may have a number of rights and duties which should be acknowledged from the perspective of international law. This is notably the case regarding the non-use of force and in particular the times when the unrecognized entity has the right not to be attacked by the state from which it has broken away. But the concept of a 'de facto authority' includes no reference to the political or legal status of the unrecognized entity outside the context of the negotiations: it enlarges the scope for engagement, without challenging the policy of non-recognition.

The concepts of 'illegal occupation' and 'illegal annexation' strengthen the policy of non-recognition by turning it into a duty for third parties, and they also restrict the potential scope for engagement. They are helpful to the central government in establishing additional control over the activities of third parties in the breakaway territory, as they are used to indicate particular responsibilities such external actors may have when consolidating an illegal situation. For the same reason, these concepts may present significant hurdles to the implementation of programmes beyond the humanitarian sphere. The description of a territory as being under a form of 'illegal occupation' or 'illegal annexation', combined with a severe sanctions regime, makes it almost impossible for the EU to engage with its population, even if such engagement may be considered crucial for conflict resolution purposes which are based on the principle of non-recognition.

In all the conflicts selected, the strong tension between the policy of engagement and the policy of non-recognition finds additional expression in the different positions taken by the various EU institutions, depending on their own concerns and interests. And here too, legal opinions on statehood and related issues play a role. In the 2010 debate on direct trade with Northern Cyprus, the legal service of the European Parliament defended a different legal opinion on the question of non-recognition from the legal service of the European Commission. For its part, in 2012 the European Court of Auditors pointed to the lack of sustainability in the EU's engagement in Northern Cyprus, which was a consequence of the EU's failure to establish effective working relations with the de facto authorities there. The CJEU and the ECHR have likewise been involved in disputes that are key to the possible integration of Northern Cyprus into the European Union, for example by laying down some rules on how property issues there should be addressed. These rules were based on a strictly legal interpretation of the principle of non-recognition. Similarly, divergent approaches and positions can be observed among EU institutions when it comes to Abkhazia and South Ossetia. In order to demonstrate its firm resolve to defend Georgia's territorial integrity,

the European Parliament maintains that these territories are illegally occupied by Russia, whereas the Council avoids this concept, in order to preserve its capacity to resolve the question of Georgia's territorial integrity at the negotiating table.

In the case of Kosovo, the policy of engagement in a political context that does not allow the recognition of its statehood creates problems of their own for the EU. But these are not as severe as in the case of an engagement policy based on the principle of non-recognition. The EU is interested in broadening the legal basis for the process of integrating Kosovo into the European Union and normalizing its relations with Serbia without having to recognize Kosovo as a state. The legal problems entailed in dealing with such objectives are not considered insurmountable enough to preclude further EU integration—which does not mean, of course, that this optimistic view is also valid for the many political problems involved.

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Notes

1. The EU policy of “non-recognition and engagement” was first officially formulated with reference to Abkhazia and South Ossetia (see Fischer, 2010), and was then also applied in the academic literature to other non-recognized territories, such as Transnistria, where the EU supports the counter-secession policies of the government confronting breakaway.
2. The non-recognition policies of individual EU member states will not be addressed in this paper. Eiki Berg and Scott Pegg have analysed the US policies of engagement and non-recognition (2016).
3. The conceptual distinction between secessionist and irredentist conflicts refers to national identity, ideology and strategy. It is not always easy to make a clear-cut distinction between the two types of conflict. A strategy aiming at national reunification generally includes a declaration of independence by the breakaway entity, to increase its legality and legitimacy. Russia's annexation of Crimea and Sevastopol was based on a treaty of accession with the Republic of Crimea, which had proclaimed itself independent. Annexation is not inconceivable for any of the conflicts dealt with in this paper, including those involving entities for which irredentism is not the dominant ideological motive for the breakaway.
4. A parallel is drawn here with Kosovo's successful application to the Union of European Football Associations (UEFA). The membership rules of this international football organization prescribe that football associations have to be based in a UN member state in order to be accepted, but UEFA's own legal department subsequently deemed this rule invalid owing to the UN's lack of competence regarding the recognition of states (Dessus et al., 2017, p. 5).
5. Statement by Ambassador Valeriu Chiveri, Head of the Permanent Delegation of the Republic of Moldova to the OSCE, 15 November 2012, <http://www.osce.org/pc/97537>.
6. The Geneva International Discussions are held—with the active participation of the EU, the OSCE and the UN—to resolve the conflict between Russia and Georgia.
7. In an exception to this rule, the European Union's High Representative for Foreign Affairs and Security Policy, Javier Solana, addressed the Abkhaz leader Sergei Bagapsh as “President” at their talks in Sukhum/i on 7 June 2008. The talks were part of a failed attempt to mediate in the conflict between Russia and Georgia, which escalated into open war in August 2008. This concession can be seen as part of the prize the EU was ready to pay to avoid open war.
8. I am grateful to Pierre d'Argent for this indication.
9. This can be illustrated by the numerous appeals from the Greek Cypriot side to the Turkish Cypriot side to defend “true Cypriot interests”. The Greek Cypriot side also pleads for “Cypriot ownership” of the negotiations, without Turkish interference: “A solution for Cypriots, by Cypriots.”

10. Interview with an EU official, February 2018.
11. Interview with an NGO representative, Brussels, January 2018. For a comprehensive analysis see Kuzio (2017, p. 112). See also Wesolowsky and Polyanska (2018).
12. The term "illegal occupation", however, is additionally found in resolutions of the European Parliament, in contrast to those of the Council. The distinction between "illegal occupation" and "illegal annexation" does not have noteworthy consequences for the legal assessment of the situation.
13. Interview with an NGO representative, Brussels, January 2018.

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