



ASSESSMENT OF THE LAW ON OCCUPIED TERRITORIES  
FROM RIGHTS AND HUMANITARIAN PERSPECTIVES

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# Assessment of the Law on Occupied Territories from Rights and Humanitarian Perspectives

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## Introduction

The domestic and foreign political situation created after the 2008 war has given rise to completely new concepts in the Georgian political field - de-occupation, occupied territories, a policy of non-recognition. The peace policy has developed in these directions, which was legally supported under the Law on the Occupied Territories. The August war, in addition to leaving the pain and tragedy inherent in the war to our peoples, changed the pre-existing peace rhetoric and shifted the narrative of the Georgian-Ossetian and Georgian-Abkhazian conflicts entirely within the framework of Georgian-Russian conflict. The Georgian government has recognized on legal and political levels, that it has two occupied territories within its jurisdiction, in the form of Abkhazia and the Tskhinvali region, and has made every effort to pursue a policy of strict non-recognition.

The reversal of the policy from a completely different perspective was conditioned by the recognition of occupied territories by the Russian Federation as independent states. After this event, Russia unequivocally came out from the position of so-called Negotiator, which it held since the 1990s in the Georgian-Abkhazian and Georgian-Ossetian peace processes and for Georgia, and consequently, for the international community, it has become an occupying force, while for Abkhazia and Tskhinvali a backbone, without which independent existence for these two regions would be at least very difficult.

This creates a feeling that Russia has "punished" Georgia for its anti-Russian and pro-Western policies. The law on the occupied territories turned out to be a retaliatory "punitive" measure for these regions, as the aim of the law, according to the new policy of non-recognition, is to isolate them from the rest of the world. Any kind of cooperation with them without the permission of the Georgian government has become a matter of political and legal responsibility. In fact, the law aims to constitute the existence under the sovereignty of Georgia as the only way of survival for occupied Abkhazia and the Tskhinvali region.

Exactly 12 years have passed since the adoption of the law. During this period, in parallel with the existence of the law, the Georgian government numerously attempted to offer new peace proposals to the illegal regimes in the occupied territories. However, as Thomas de Vaal writes, the "strange endurance of de-facto regimes"<sup>1</sup> left practically no space for such initiatives. Along with the peace initiatives, the law on the occupied territories was becoming more humane as a result of gradual changes. However, it is debatable to what extent it created an opportunity for a positive transformation of the conflict and legal and humanitarian perspectives in the process. The purpose of this article is to analyze the stages of law development, its legal and humanitarian dimensions, and its place in a unified peace policy.

### **The stages of development of the Law from 2008 until now**

The first draft of the law (2008-2010)

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<sup>1</sup> Thomas de Vaal, *Uncertain Ground, Engaging with Europe's de-facto states and breakaway territories*, 2018, Carnegie Europe.

The first version of the law was adopted by the Parliament of Georgia on October 23, 2008. Its purpose was to determine the status of the territories occupied by the military aggression of the Russian Federation and to establish their special legal regime. According to the law, a state of emergency was declared in the occupied territories for the duration of this law, i.e., until the full restoration of Georgian jurisdiction over the occupied territories. The state of emergency imposes several restrictions, including restrictions on freedom of movement, economic activity, and property rights.

The draft law of 2008 restricted the movement to the foreign nationals or stateless persons in the territory of Abkhazia and the Tskhinvali region from any direction other than those prescribed by law. In particular, entering the occupied territories from the uncontrolled territory of Georgia became a punishable act under the Criminal Code. Article 4 of the law allowed only one exception when a special permit was issued by a legal act of the Government of Georgia to enter the occupied territories if the visit falls within the state interests, de-occupation, peaceful resolution of the conflict, or humanitarian purposes.

The law also restricted property rights-related transactions. In particular, any real estate transaction was considered void upon conclusion, and the right to inherit was restricted, except for the inheritance by law. The law also restricted the right to engage in any economic activity, whether or not for profit, income, or compensation, if such activity required a license or permit, authorization or registration under the Georgian legislation. The law also banned the organization of remittances, the use of state resources, and air, sea, and land transportation. The exception here was only a special permit issued in accordance with the rules established by a government legal act, for the same purposes as in exceptional cases of freedom of movement.

The law imposes liability on the Russian Federation for human rights violations in the occupied territories, and the Georgian government undertakes to periodically provide international organizations with information on rights protection. Although the law recognizes the occupied territories as an integral part of Georgia, where Georgian legislation applies, the government limits its responsibility to protect rights to the regular reporting to international organizations. However, it is uncertain, how the state can manage this in the condition of lack of control. Besides, a positive responsibility for the protection of the rights remains in areas where the state's effective control does not extend and which has been repeatedly ruled by the European Court of Human Rights. On the other hand, the determination of the Russian Federation's responsibility in the national legislative act does not have legal consequences and only has the role of a political statement. This record was also criticized by the Venice Commission in its opinion published on March 17, 2009, where it clarified that the issue of Russia's responsibility for the violation of the rights is ruled under the international law and it does not fall under the national legislation. Also, the provision related to Russia's responsibility for moral and material damage on the occupied territories is not regulated by national law, as national courts cannot discuss the responsibility of the Russian Federation based on the state immunity under international law.<sup>2</sup>

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<sup>2</sup> OPINION ON THE LAW ON OCCUPIED TERRITORIES OF GEORGIA, Adopted by the Venice Commission At its 78th Plenary Session, (Venice, 13-14 March 2009), para 37-39.

The draft law of 2008 also defined “illegal bodies” and annulled any act issued by them, without any exceptions. In addition, the law recognized to act retroactively related to the real estate transactions, economic activities, and legal acts issued by illegal authorities, i.e., the restrictions imposed by law also applied to relationships arising from 1990.

The Venice Commission had critical comments on the first draft of the law, some of which were reflected in the amendments in subsequent years, although a number of recommendations that contradicted political decisions were not envisaged in the law.

The Venice Commission originally issued an interim opinion on March 4, 2009,<sup>3</sup> stating that the law was more punitive in nature and unilaterally imposed large-scale restrictions on movement, economic activity, and the sale and purchase of the real estate. Hereby, the Commission compares the law of Georgia with the Law adopted in 2005 in Moldova on the Special Legal Status of Settlements on the Left Bank of the River Nistru (Transnistria). According to the Commission, unlike the Georgian law, the Moldovan law is not punitive, it is an element of confidence-building in the context of conflict resolution, giving the separatist regime a special autonomous status within the Republic of Moldova. However, it should be noted that the content and context of Georgian law is different from the case of Moldova, which will be analyzed in more detail below.

Later, on March 17, the Venice Commission published a more comprehensive assessment of the law, criticizing the strict restrictions imposed on freedom of movement, economic activity, property rights, as well as the retroactive force of the law. It should be noted that in addition to the Venice Commission, the 2009 report of the UN Secretary-General's also states that such restrictive records may jeopardize access to humanitarian aid in the conflict zone.<sup>4</sup> The Venice Commission report clarifies that restrictions on freedom of movement apply to three groups of people: 1) third-country nationals, including representatives of international organizations or non-governmental organizations; According to the Commission, if the law were extended to the staff of international organizations that enter the occupied territories for humanitarian purposes from a prohibited area, it would be a violation of Georgia's obligations under parliamentary resolutions of the UN Security Council and the Council of Europe.<sup>5</sup> 2) Russian citizens; 3) People living in Abkhazia and South Ossetia who have received Russian citizenship. Although the Georgian authorities explained to the Venice Commission that in this case the procedural requirement of the law regarding the deprivation of Georgian citizenship was not met, the legal status of these people is unclear and restrictions on freedom of movement apply legally to them as well. According to the Commission, if restrictions on freedom of movement were extended to people living in South Ossetia and Abkhazia, it would worsen their humanitarian situation. It was also vague in the provision of the law that a special permit is required to enter from a prohibited area or even from a legal area.

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<sup>3</sup> COMMENTS ON THE LAW ON OCCUPIED TERRITORIES OF GEORGIA, Strasbourg, 4 March 2009 Opinion no. 516/2009, para 3.

<sup>4</sup> Secretary-General on the situation in Abkhazia, Georgia, pursuant to Security Council resolution 1839 (2008), S/2009/69 para 9.

<sup>5</sup> OPINION ON THE LAW ON OCCUPIED TERRITORIES OF GEORGIA, Adopted by the Venice Commission At its 78th Plenary Session, (Venice, 13-14 March 2009), para 18.

Also, according to the Venice Commission, the restriction of freedom of movement did not provide for cases of asylum seekers under the 1951 UN Convention, who may find themselves in a prohibited area on the territory of Georgia and therefore be held criminally liable. Nor did the law provide for cases of victims of trafficking (although this exception was then provided for in the Criminal Code). Also, the Criminal Code did not envisage the cases of urgency (force majeure) when a person would enter the occupied territory of Georgia from a prohibited direction to save his or her life.

Concerning the restriction of economic activity, the Commission clarifies that the broad wording of the Article covers virtually all areas of activity, commercial and non-commercial. For example, a ban on international transport may also apply to humanitarian activities. According to the Commission, this record could criminalize activities that could be vital to the people. Commission opines that with this provision, such activities can be criminalized that may have vital importance for humans. Hereby, the Commission also notes that it is important that the sanction does not have a negative effect on civilians who have already suffered the consequences of the conflict. In addition, UN resolutions point to "the urgent need for Abkhazia's economic development."<sup>6</sup>

With regard to illegal authorities, the Commission is of the opinion that the State has the right to designate the competent authorities and to recognize the legal acts issued by them. There is no obligation under international law to recognize such legal acts, however, non-recognition of certain legal acts is connected to the gross violation of human rights, for example, the right to private life, right to education, etc. Including, such legal acts are birth, death, marriage certificates, education certificates, etc. International law principles and established practice also indicate the obligation to recognize legal acts vital for the daily life of human beings.<sup>7</sup>

The Venice Commission also strongly criticized the retroactive effect of the law, especially concerning actions that were a matter of criminal liability, and considered that it did not comply with either the Georgian Constitution or international human rights standards. The retroactivity of the law was contradictory to the property right in real estate transactions.

The Commission also considers that this law should be more transitional and should be constantly updated in parallel with the progress made in resolving the conflict. That is why the provision, which says that the law will be in force until full restoration of the jurisdiction of Georgia, is not considered to be right.

### **Legislative changes in 2010 and 2011**

Amendments to the law in 2010 in line with the recommendations of the Venice Commission softened strict provisions. Prior to the amendments to the law, in 2009 the Venice Commission issued interim and final opinions, in which it positively assessed the amendment drafts, however, it considered them

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<sup>6</sup> Security Council Resolution S/RES/1808 of 15 April 2008

<sup>7</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971.

insufficient. The amendments specify that a special permit is required only for entry from prohibited areas, and the "Purpose of Confidence-building" was added to the list of exceptions, which would allow entry to the occupied territories with a special permit. As a result of the amendments, criminal liability was excluded if an asylum seeker entered the occupied territories illegally (further amendments here clarified the requirements of the 1951 UN Convention), before obtaining the status of a victim of trafficking, as well as a person providing emergency humanitarian aid in the occupied territories, in particular, providing the population with food, medicine, and necessities. Despite the Commission's recommendation, the term "emergency humanitarian assistance" remained in the law, although the Commission considered that it limited the scope of humanitarian assistance. In exceptional cases, these persons are obliged to inform the Georgian authorities in advance about entering the occupied territories from the prohibited direction or after entering - within a reasonable time. However, the law does not specify the legal consequences in the event of non-reporting, whether these individuals will still be held criminally liable, which has also been criticized by the Venice Commission and respective amendments have not entered the law yet.

Amendments of 2010 also eased restrictions on economic activity and no longer held accountable those providing emergency humanitarian assistance to the Occupied Territories to ensure the right to life of the population, in particular by providing food, medicine, and basic necessities.

Also, in accordance with the conclusion of the Venice Commission in 2011, in relation to the acts issued by illegal authorities, it was clarified that the possibility of establishing facts of civil significance in the occupied territories is provided in accordance with the Law of Georgia on Registration of Civil Acts.

In addition, the provision related to retroactivity has been amended and it does not affect any of those articles, which indicates criminal liability. However, the Venice Commission has criticized the retroactive effect on real estate transactions, arguing that the cancellation/invalidity of long-standing transactions without compensation could conflict with property rights.<sup>8</sup> As noted above, due to political views, the recommendations of the Venice Commission on certain issues were still not reflected in the law, including the extension of retroactivity to real estate transactions, which is contrary to the standards established by property rights. Also, the law excludes criminal liability for violation of the rules of movement and economic activity only in the case of "emergency humanitarian aid". Also, despite the Venice Commission has repeatedly pointed out that the issue of Russia's responsibility is regulated by international law and its determination in national law is only a political statement and has no legal consequences, these provisions still remain in the law.

On July 1, 2011, several more amendments were made to the law. The list of exceptions from the limitation on freedom of movement has expanded and liability no longer applies to persons who hold a neutral ID card or a neutral travel document. In addition, an act issued by illegal authorities has become

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<sup>8</sup> FINAL OPINION ON THE DRAFT AMENDMENTS TO THE LAW ON OCCUPIED TERRITORIES OF GEORGIA, Opinion no. 552 / 2009, Venice 11-12 December 2009; OPINION ON THE LAW ON OCCUPIED TERRITORIES OF GEORGIA, Adopted by the Venice Commission At its 78th Plenary Session (Venice, 13-14 March 2009), Opinion no. 516 / 2009, paras 21-29.



permissible on the territory of Georgia if it is used for the purposes of issuing a neutral ID card and / or a neutral travel document in accordance with the rules established by the legislation of Georgia. Neutral documents were initiated in 2010 in order to facilitate the movement of people living in the occupied territories and to receive various services in the territory controlled by Georgia.

### **Substantial amendments to the law planned for 2013 and not yet in force**

In 2013, the Georgian government began preparation of new amendments to the law on the occupied territories, for which it asked the Venice Commission for its opinion. The changes significantly softened the movement policy, as an entry from the prohibited areas into the occupied territories was transferred to the area regulated by the Code of Administrative Offenses and prescribed fine with the amount of 400 GEL, and in case of recurrence, it will be moved in the area regulated by the Criminal Code. Respective amendments were prepared to the Criminal Code<sup>9</sup> and the Code of Administrative Offenses.<sup>10</sup>

These changes were positively assessed by the Venice Commission in its opinion of December 2013, as it aimed to liberalize accountability and, moreover, called on the Georgian authorities to remove issues related to freedom of movement from the criminal justice system at all. According to the Venice Commission, decriminalization would promote flexibility and increase engagement policies in the occupied territories.<sup>11</sup> The Commission also recommended that force majeure be considered as one of the exceptions to restrictions on freedom of movement.

The Venice Commission finally adopted a policy of easing sanctions in 2013, however, it also noted that not all recommendations issued in 2009 are reflected in the legislative amendments. It is also interesting to note that in the 2013 Neighborhood Policy Implementation Report, the European Commission called on Georgia to "reconsider" the Law on the Occupied Territories, however, specific issues are not defined by the European Commission.<sup>12</sup>

Despite the positive assessment by the Venice Commission, the amendments planned for 2013 were not introduced to the law, the Parliament resumed the discussion of the issue only in 2016 and approved it in the first hearing, but due to the resistance of the opposition forces, the discussion of the law was suspended.<sup>13</sup>

In 2018, the list of acts issued by illegal authorities was expanded, which may be recognized by the Georgian authorities in order to protect legal interests, in particular, when a specific act can be considered in accordance with Georgian for the purposes of establishing the fact Georgian citizenship, ID card, neutral travel document, birth, marriage, of divorce, death, legal residence of a person in the Autonomous

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<sup>9</sup> <https://info.parliament.ge/file/1/BillReviewContent/20823?>

<sup>10</sup> <https://info.parliament.ge/file/1/BillReviewContent/20830?>

<sup>11</sup> OPINION ON THE 2013 DRAFT AMENDMENTS TO THE LAW ON THE OCCUPIED TERRITORIES OF GEORGIA Adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), Opinion no. 744 / 2013, paras 9-15.

<sup>12</sup> [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_14\\_224](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_224)

<sup>13</sup> <https://netgazeti.ge/opinion/159330/>

Republic of Abkhazia or the Tskhinvali region and its registration. This was the last important and minor amendment to the law aimed at protecting human rights and humanitarian interests. Consequently, a political consensus could not be reached from the punishment of the occupied regions to the perspective of resolving conflicts and caring for the citizens living there.

### **The role of law in peace politics and the Moldovan experience**

The Law on the Occupied Territories, as mentioned above, establishes a special legal regime in the conditions of occupation and, consequently, restricts certain rights. Its ultimate goal is to make Georgia the only way for individuals living in the occupied territories to establish international contacts and cooperation, including in the areas of movement and economic activity. Clearly, this can be perceived as the response of a sovereign state to occupation and the violation of its territorial integrity. There is also a deep-seated fear in sovereign states that international recognition is achieved not only by a single note or declaration explicitly issued by the official bodies of third states but also by implication, through communication and cooperation with the de facto regime. There is a deep-seated fear in sovereign states that international recognition is achieved not only by a single note or declaration explicitly issued by the official bodies of third states but also by implication, through communication and cooperation with the de facto regime. However, there is no direct answer neither in practice, nor in the scientific literature, nor in international law to what threshold the communication and cooperation with the illegal regime should reach in order to imply recognition. The purpose of this article is not to discuss these international legal issues, although the law on the Occupied Territories is fueled by the fear of a sovereign state, not to allow recognition of the illegal regime under its jurisdiction, even implicitly/indirectly, by allowing travel to third countries or establish economic cooperation.

Whether the law fulfills the purpose of preventing such consequences, the answer to this question should probably be sought not only in the statistical figures that indicate the implementation of the law but also in the general situation and development stages in the occupied territories. The second question is whether the law on the occupied territories is compatible with the strategic goals of the state for reconciliation, confidence-building, and peace-building. It is difficult to talk about rebuilding the trust in a situation where the law and the policy of non-recognition enforced here restrict people living in Abkhazia and the Tskhinvali region from education, health care, travel abroad, access to sports, and other opportunities that are otherwise part of everyday life.

The blurred lines between the policy of non-recognition, which in this case is the principle of critical importance for a sovereign state, and the restoration of confidence and the protection of human rights, is the one that has so far been decided in favor of a policy of non-recognition. Georgia, with the participation of international partners, has not yet been able to establish such negotiating platforms with the regimes of the occupied territories that would facilitate the protection of this balance.

The law of the Republic of Moldova, referred to by the Venice Commission in its assessment of Georgian law, was adopted in 2005 and deals with the Transnistrian separatist regime, which is subject to effective control by the Russian Federation and has been confirmed by the European Court of Human Rights in

various cases.<sup>14</sup> The Republic of Moldova states that in drafting the law, it was guided by the aims of establishing unity between peoples, territorial integrity, common economic, defense, social, humanitarian, and other spaces. The preamble to the law recognizes the importance of human and minority rights and that a political solution to the Transnistrian conflict is possible only through peaceful means, following the democratization and demilitarization of the separatist regime. The Moldovan government aims to achieve Moldovan territorial integrity and civic unity, as well as the access of the entire population to democratic institutions. It is for humanitarian, political, legal, social, and economic assistance to the people of Transnistria that this law was created to help them cope with the consequences of the conflict. Deriving from these objectives, the law determines the legal status of Transnistria under Moldovan jurisdiction, once its demilitarization from Russian troops is complete and democratic governance is established. The law grants Autonomous status to Transnistria and defines a number of powers and rules regarding its governance.

Although the conflicts in Moldova and Georgia may have much in common, including the common Soviet past, the important role of language and identity in the conflicts, Russian military involvement, and the emergence of self-proclaimed independent regimes, these conflicts have had different trajectories of conflict transformation since the ceasefire in the 1990s. There is also a critical difference in the sense that Russia does not recognize the independence of Transnistria. Since the adoption of this law in Moldova in 2005, Russia, the OSCE, and the European Union have been actively involved in the conflict resolution process. The "5 + 2" format was created in 2006-2011, which has made significant progress, including the so-called "With small steps" aimed at a major political settlement (for example, communication between Chisinau and Tiraspol was strengthened, Moldova recognized the Transnistrian educational documents and started a direct dialogue between the parties in a "1 + 1" format). Unlike in Abkhazia, the movement of people and trade is maintained, according to the postal agreement, a letter from Tiraspol can be sent to Paris and London with the Moldovan seal and the Transnistrian rubles. Many people in Transnistria use Moldovan passports because they travel to the Schengen area without a visa. They have also been enjoying a trade agreement between Moldova and the EU since 2017.<sup>15</sup> It is a fact that in Moldova, people living in a separatist regime enjoy more flexibility with the status-related issues than Abkhazians and Ossetians. However, none of these collaborations defined the status of Transnistria as an independent territorial unit. It should also be noted that all these relations and cooperation take place through Moldova as a "parent state" and not independently.

Moldova's soft approaches at the legislative level and cooperation with the separatist regime make political negotiations more favorable, while Georgia's law on the occupied territories strictly defines the red lines beyond which negotiations cannot continue.

In parallel with the existence of the law, several initiatives were proposed by the Georgian side for de facto regimes, including access to education and trade. The Step to the Better Future is one such package

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<sup>14</sup> *Ilascu vs. Russia and Moldova, Catan and Others v. Moldova and Russia; Ivanțoc and Others v. Moldova and Russia*

<sup>15</sup> Hanna Shelest and Maryna Rabinovych, *Decentralization, Regional Diversity and Conflict*, Palgrave Macmillan, 2020, pp: 115-116.

of proposals, which at the same time included minor changes to the law, including the recognition of documents issued by illegal authorities. However, increasing the interest in these initiatives with regimes that have imposed sanctions in parallel, is a difficult task.<sup>16</sup>

## Conclusion

Analyzing the internal regulations of Moldova and Georgia related to the non-controlled territories, the researchers point out that the internal regulations can play several functions in terms of conflict transformation - either leaving the space completely open or opening up opportunities for international negotiations to resolve the conflict, also to determine the “red lines” beyond which the “parent state” will not go during the international negotiations, to encourage the legal qualification of the conflict under international law (for example, in the case of Georgia "occupation") and to hinder or facilitate the transformation of the conflict from various perspectives, including through forms of cooperation such as trade and investment.<sup>17</sup> In this sense, the sharp red lines established by the Occupation Law and the closure of cooperation routes since 2008 have given the conflict an entirely international dimension and limited the ways of its transformation within the country. However, it should be fair to note once again that Russia's influence and rigid involvement in the case of Georgia complicate this path much more than in Moldova.

The Law on Occupation has practically established for a decade the perspective that the two regions of Georgia under the state of emergency differ from other regions in that certain rights are limited here. At the same time, peace initiatives developed since 2008 are not of interest to people living in the occupied territories, including because Abkhazians and Ossetians do not enjoy visa-free travel and free trade opportunities with the EU. Similar cases have been used differently by the Moldovan separatist regime and also by the unrecognized Republic of Northern Cyprus. Georgia's de facto regimes in the occupied territories themselves are less flexible on status issues, unlike in Transnistria and Northern Cyprus.<sup>18</sup> Perhaps these initiatives are unacceptable precisely because they were delayed and if not the experience of the 2008 war, the history of the conflict transformation could have developed in a completely different way. On the other hand, the flexibility of the Georgian side in the negotiation process is hampered by the legal and political approaches defined in 2008 and awaits new turning points.

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<sup>16</sup> This position, for example, was openly expressed in Abkhazia during the last so-called presidential elections, by the “presidential candidate” Adgur Ardzinba, who said the initiative - a step towards a better future - was hardly credible when young people in Abkhazia could not participate in the competitions in Europe.

<sup>17</sup> Hanna Shelest and Maryna Rabinovych, *Decentralization, Regional Diversity and Conflict*, Palgrave Macmillan, 2020, pp: 115-116.

<sup>18</sup> Tomas de Vaal. p. 20, 30.