

Recognition in International Law: Recognition of States and European Integration - Legal and Political Considerations

Ermira Mehmeti, PhD. Cand.

Tirana State University

ermira.mehmeti@fulbrightmail.org

Abstract

Recognition of States in international law is a political act based on interests and assessments made by states individually. However, in granting recognition, it is the legal arguments that must prevail. The recognizing State should base its decision on a legal framework which makes the act of recognition valid and credible. At the same time, such political decision supported by legal arguments may in no way threaten international peace and security, and may not be in collision with the peremptory norms of international law. Following is a paper on recognition of States in international law as seen from the aspect of international peace and stability. The primary objective of the international community, particularly since the establishment of the United Nations Organization, has been the maintenance of peace and security in the world. Therefore, the international recognition of entities that have demonstrated wide and strong capacity to be states, and whose attitude has been to serve the greater interests of peace, security, harmony and prosperity among people, must be a principled decision, not conditioned by mere political interests. International recognition of states is a precondition for the prosperity of new states. As such, it must obtain the status of a stabilizing instrument of new entities as well. When it comes to small states, this act is even more significant, for it secures and protects them from potential threats, hence strengthening the commitment for peace and stability. In the context of European Union membership process, it must be underlined that recognition may not become an obstacle to the aspiring States, though it seems to be the case at present. Macedonia and Kosovo are case in point. Recognition must become a catalyst and incentive for a quicker, more efficient and full-fledged euro-integrating process, which is crucial for preserving long-term stability, functioning democracy and peace and understanding among people.

INTRODUCTION

The State is a central concept and the basic subject of international law. For a State to function and engage in treaties and relations with other states in a growing globalized world, it must be accepted and treated as independent by other states. But independence alone is not sufficient. While that might have been the case in the past, States today have become more integrated and function in an inter-dependent world of trade, exchange of information, environment, energy, or gas supply. For this reason, recognition of States is an essential concept of international law and a precondition to secure the functioning of a State in the international order.

The ethnic diversity of States in the Balkan Peninsula today is proof of border realignments that have taken place in Europe throughout the 20th and the beginning of the 21st century. In fact, territorial changes in Europe have been more or less a regular phenomenon, at least since 1792. The basic question one must ask here is, how has, or how does the community of nations, or the international community, as an organized system of states in the international sphere, deal with the emergence of new states?

In a 1963 American University Speech, President John F. Kennedy noted: "We must deal with the world as it is and not as it might have been had the history of the last eighteen years been different." While this rather generic statement might collide with geopolitical interests today, its validity cannot be overruled and finds its application equally today as in 1963 or 1989. This is what makes recognition such a central and controversial principle in international law.

In the Balkans, the contentions produced by the realignments that took place during the twentieth century, were at the focus and attention of the international community, particularly at the dawn of the new millennium. The great historical project called European Union succeeded primarily because it rested on the basic principle of reconciliation of peoples, and it has offered the peoples of the Balkans hope and perspective. There is an evident and strongly supported shift in narratives among Balkans nations today: the paradigm of conflict and confrontation was replaced by a paradigm of reconciliation and cooperation, while patterns of disintegration were given up in return for values of integration. What were the hostile nations of the past have agreed to become the friendly nations of the future. This is the overwhelming transformative effect that the prospect of European integration has offered to these young European nations.

This paper argues that, while recognition is a matter of policy and political assessment based on legal arguments, it must not become a constraint in the process of uniting Europe and making it complete. On the contrary, the positive and proper recognition is the promotion of peace, stability, and human rights in the international community. Hence, extending full-fledged recognition to young democracies does not collide with the established relations and rules in the international community, or the so-called balance of power, particularly among the super powers, but rather helps to consolidate Europe by putting an end to frozen disputes or unresolved questions on the soil of Europe.

Western European nations went through the period of self-reinvention and completed the complex nation-building process between sixteenth and nineteenth centuries. In the Balkans, this process began later¹. Hence it ended late, and produced tragic consequences for its people. But today, the countries of the Western Balkans are working together towards building a prosperous future. The rhetoric of hatred and intolerance has shifted to rhetoric of cooperation and common future, while people seem to have given up the idea of building national states in exchange for a multinational and integrated European future. This shift in discourse was only possible once these nations were promised European integration.

Slovenia and Croatia, the first two republics to secede from the former Yugoslav federation are European Union member states today, while the remaining countries are at different phases of carrying out the European reform agenda. Serbia and Montenegro have launched accession negotiations. Macedonia has been a candidate country since 2005, while its challenges today are mainly related to completing democratic reforms. Finally, Kosovo and Bosnia and Herzegovina are still negotiating the basic principles of potential accession². Macedonia's candidacy was endorsed back. However, both Macedonia and Kosovo are still struggling for international recognition of their Statehood. Macedonia's recognition has been disputed by its southern neighbor and European Union member state - Greece, while Kosovo's recognition that followed its unilateral declaration of independence in 2008, is being challenged as a result of Serbia's refusal to recognize it.

European Union and the Recognition of New States in Yugoslavia: The establishment of the European Union

Europe... will be built through concrete achievements which first create a de facto solidarity"

R. Schuman, 9 May 1950

The European Union is not a State. It is a political union, a rather unique model of organization of institutions founded in the aftermath of the Second World War, which in time acquired elements of both a federation and a confederation, and yet, it is neither the first, nor the latter. Initially designed as an economic Union that would achieve the historical reconciliation of France and Germany through economic cooperation, the Coal and Steel Community that was founded in 1950, slowly began to unite the remaining nations of the Continent, while also furthering the construction of its political institutions. The founding nations of the Union became France, Germany, Belgium, Italy, the Netherlands and Luxembourg. The first treaty following the establishment of the Coal and Steel Community was the Rome Treaty of 1957, which established the European Economic Community.

¹ Historical data on declarations of independence of some Balkans countries....

² The European Commission has offered all the countries of the former Yugoslavia plus Albania the perspective of joining the Union, provided that they meet the required political and economic criteria. Every year, the Commission publishes the Progress Report portraying the pace of reforms undertaken by the respective countries and projects the dynamics for the next year. The progress reports can be accessed through the web portal of the European Commission at www.europa.eu

Today, the most common term used to define the European Union is that this is a *sui generis* community.¹ However, even though the European Union is a political organization of European nations still in the making, the effects it has produced in terms of ending long standing hostilities between France and Germany after the Second World War, the long-term stability and peace on the European continent, the economic prosperity, the increased standard of living and stability of institutions, are proof of the European Union being a successful attempt to construct a political inter-state organization: "The successful formula that European nations had invented to overcome their depression was the integration of the formerly antagonistic nation-states into a union of peacefully interacting and competing nations. The multinational integration formula involves the gradual creation of imperceptible albeit innumerable links between the nations taking part in the process."² Today, the single currency, the home affairs and the common security and foreign policy, incorporated in the European Constitution or the Lisbon Treaty, speak of it as a serious, consistent, reliable and credible international organization.

The Community was further consolidated in 1992 with the adoption of the Treaty on European Union, commonly known as the Maastricht Treaty. This treaty laid the foundations for the establishment of the European Community as a single entity.

The policy of recognition with regards to the breakup of the Yugoslav Federation

The end of the Cold War and the subsequent collapse of communism brought about a new wave of state-formation in Central and Eastern Europe. In the aftermath of the Second World War, the decolonization process which granted independence and recognition to the former colonies was carried out under 'conditions' set forth by the United Nations, of which the most important was that self-determination as a right in international law can apply only if there is absolute respect for the territorial status quo – *uti possidetis juris*³. The United Nations Charter stipulated in Art. 1 (2) that "it is one of the purposes of the UN to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace", while the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res 1514 [XV 14 December 1960]) provided the actual framework and guidelines as to how the decolonization process, that is, the granting of independence to the nations was to proceed. This complex process, quite rightly absorbed the capacity of the international community to anticipate another major wave of dismantling and a new debate on State formation, particularly on the soil of Europe. While the disintegration of the Soviet Union was negotiated with minimal consequences, the extent of violence and suffering that unfolded in the Yugoslav Federation was indeed shocking for the international community. Hence, the Union helplessly watched as Yugoslavia was breaking apart and thousands of innocent civilians were being killed or forcefully displaced.⁴ The law of recognition was soon to be put to a serious test.

Paradoxically, a process that began with the unification of Germany ultimately ended up with a host of secessionist movements, independence warfare and bilateral disputes over historic legacies and heritage.⁵ According to Antonio Millososki, the former Minister of Foreign Affairs of Macedonia, "most members of the European Community and NATO were much more surprised than prepared for the dissolution of Yugoslavia and the consequences that followed. Perhaps this was due to the fact that the NATO and EU member-states were too focused on the process and consequences of Germany's unification, the events in post-Soviet Poland or the partition of Czechoslovakia." And unlike in Czechoslovakia,

¹ The term was coined by the German Federal Constitutional Court, on its ruling on the Treaty of the European Union. The Court held that the Union is not a State, especially not a Federal State and that the Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source. See Crawford, "The Creation of States in International Law", 2006, p. 495 - 496

² N. Moussis, "Access to the European Union: Law, Economics, Policies", 20th edition, Intersentia, Cambridge-Antwerp-Portland, 2013, p. 5

³ *Uti possidetis juris* is widely recognized as the principle according to which newly formed states must accede to the borderlines as defined by the colonizers and there would be no realignment of borders allowed

⁴ Authors as Grant do not fully agree with this position of European Union's helpless observance of the breakout. In support of this claim, Grant describes that already "in the summer of 1991, the European Community had assembled a troika of foreign ministers- Jacques Poos (Luxembourg), Gianni De Michelis (Italy), and Hans van den Broek (the Netherlands)- and the troika was sent numerous times to Yugoslavia in efforts to mediate. The foreign ministers had visited Yugoslavia in April 1991 to try to fend off the disintegration of Yugoslavia which some were then beginning to believe possible." See Th. A. Grant, "The Recognition of States: Law and Practice in Debate and Evolution", Praeger, Westport, Connecticut, London, 1999, p.152

⁵ By 1994, there were nineteen new or successor states that had emerged from the breaking up of the communist federations: Yugoslavia (Serbia and Montenegro), Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, the Czech Republic and Slovakia.

where transition to pluralism went in a rather smooth and democratic fashion, the disintegration of Yugoslavia was but a peaceful transition and was marred by grave ethnic conflicts. The secessionist movements that had emerged in the respective federal republics had ensued political bargaining on preserving or dissolving the federation, while on the ground fierce fighting had broken out and was receiving attributes of a major civil war and massive devastation. Whilst negotiations went on at the central level¹ in efforts to broker political and peaceful solutions, the fighting on the ground became dramatic.

As soon as heavy fighting had unfolded, the central authority in Belgrade, the capital of the Socialist Federative Republic of Yugoslavia, played rejectionist towards claims to self-determination of the federal units and used military force to confront the demands of the constituent republics, i.e. Slovenia, Croatia, and Bosnia and Herzegovina. The efforts by the European Community to broker peace and stall hostilities continued through active diplomacy, and involved options of looking at prospective peace negotiations under the auspices of the CSCE (Council for Security and Cooperation in Europe), or the United Nations Security Council as a framework for a possible Yugoslavia conference. The end result was the European Conference on Yugoslavia at The Hague headed by Lord Peter Carrington, a former Foreign Secretary of Great Britain and former Secretary General of NATO.

The European Community also established the Arbitration Commission, widely known as the Badinter Commission, named after the French Head of the Constitutional Court, Robert Badinter, who was appointed Chairman of this body. The Arbitration Commission was closely tied to the European Conference, and was to evaluate and conclude whether the seceding republics met the criteria for recognition. Based on its findings, the European Community was then to take the decision on the recognition of the seceding units of the former Yugoslav federation.

In such an environment, on 16 December 1991, the European Community Ministerial Council adopted the Declaration on the Recognition of New States in Eastern Europe and the Soviet Union, extending recognition to Slovenia, Croatia and Bosnia and Herzegovina. This Declaration served as a roadmap to collective recognition as a European practice on new states. A few months later, on April 8 1992, the Administration of President George Bush issued a statement on recognizing three Yugoslav Republics as independent – Slovenia, Croatia, and Bosnia and Herzegovina.²

Unfortunately, both the European Community and the United States declined to recognize Macedonia and consequently chose to postpone its recognition “out of deference of Greece, which already has a region named Macedonia and is concerned that an independent Macedonia would make claims to Greek territory.”³ More than twenty years later, the issue of independence and recognition of Macedonia as a seceding republic of the Yugoslav federation remains open. Macedonia and Kosovo, though for different reasons and in rather different contexts, are still considered ‘unfinished businesses’ and are struggling to become recognized as equal members of the international system. In fact, the international recognition of the last two entities that emerged from the federation as the final chapter in dealing with the consequences of the Yugoslav crisis, will contribute to a long-term stabilization, sustainable peace and ultimately would increase the prospects for development and progress of Western Balkans region.

Scholars seem to agree on the basic premise that independence is the central criterion for statehood. In that sense, today, both Macedonia and Kosovo are independent States with legitimate governments and engage in international relations. However, these entities still tend to be treated as open issues, for the process of their recognition is not fully completed. Partial recognition imposes partial participation in international organizations or forums. As a consequence, membership is not full - fledged but remains partial. Consequently, their democratic consolidation continues to pose a challenge for international law and international politics.

¹ The central government of the former SFR of Yugoslavia was based in Belgrade, the then capital of the Federation. After the death of Josip Broz Tito, the constituent units had agreed to a rotating presidency that would give possibility to every republic to govern with the country. For more on the functioning of the post-Tito Federation, see for instance Terret, Steve, “The Dissolution of Yugoslavia and the Badinter Arbitration Commission”, Ashgate, Dartmouth, 2000

² A New York Times Article available at: <http://www.nytimes.com/1992/04/08/world/us-recognizes-3-yugoslav-republics-as-independent.html>. Moreover, the Arbitration Commission (known as the Badinter Commission) that was mandated by the European Community to evaluate whether the seceding republics had met the conditions set forth in the Declaration on Recognition, i.e. the Statehood Criteria and the provisions proclaimed in the Helsinki Final Act, had concluded that Macedonia too met the conditions, however, the members states were reluctant towards its recognition due to Greece’s objections and refusal to do so.

³ Ibid.

Macedonia is a member - state of the United Nations. In modern international law practice, membership in the organization of nations is considered as *de facto* recognition and admittance in the international system. However, Macedonia is not recognized under its constitutional name but under the acronym the 'Former Yugoslav Republic of Macedonia', thus creating numerous perplexities in the international sphere. In addition, Macedonia cannot join either the European Union or NATO, due to a bilateral recognition issue with its southern neighbor – Greece. This, rather unique case of Macedonia, quite rightfully raises the question of whether today, one could distinguish between at least two levels of acceptance in the international system – one that is only formal, and another that is full. In other words, a country can formally join the United Nations, but not be fully endorsed as an independent and recognized State, because its right to call itself whatever it chooses to, is denied by one of its neighbors. Clearly, Macedonia represents an example where the clearly listed Montevideo criteria of statehood are not sufficient a foundation to recognize its existence in the international sphere. The so called 'name issue' over time has emerged into a major political rift spurring anger and consequently, political obstructions at the international level by Macedonia's southern neighbor, Greece.¹

Kosovo, on the other hand, is not a member of the United Nations, and is using active diplomacy to secure individual recognitions by member states of the United Nations. Its application bid at the United Nations was rejected by Serbia (calling itself the mother state), who objected the unilateral declaration of independence and recognition was consequently vetoed by Russia² at the Security Council. In turn, Kosovo's Ministry of Foreign Affairs launched a campaign of lobbying among United Nations members to secure the required number of recognitions in order to be admitted to the United Nations. Meanwhile, the Kosovo-Serbia Agreement reached in Brussels on 24 April 2013 offered Serbia a clear perspective of European integration by enabling it to launch accession negotiations with the European Commission. This put Serbia in a leading position in the integration process compared to the remaining countries of the Western Balkans, and particularly compared to Kosovo.

Today, recognition remains an issue challenging both the foreign and enlargement policies of European Union member - states.³ The European Union perhaps needs to explore new possibilities regarding its legal framework on recognition. Such a framework would primarily serve to protect and promote the crucial interests of the Union, which are to preserve security and build a coherent single foreign policy of the member states, particularly with respect to enlargement as one of the most important political instruments of the Union. In other words, enlargement as an all-encompassing, universal mechanism of strengthening the Union must not be entrapped in the endless debate of whether one country has individual reasons not to recognize another country. On enlargement, the Union must speak in one voice, and hence on recognition of potential member states of the Union.

EUROPEAN INTEGRATION – THE 'CARROT AND STICK' POLICY

The complex nature of the post Second World War reality produced the need for a new form of political organization in Europe. The old continent had to invent a *modus Vivendi* to restore its political authority and become a viable partner in the international scene. The need by governments to take joint actions for common planning was becoming the underlying reality for the conflicted nations. The need to reconcile the pride of victors with the humility of defeated was becoming imminent. These issues could no longer be dealt with exclusively through the diplomacy of bilateral negotiation. There was an ever growing need for multilateral negotiation. The League of Nations had been one such attempt; it was further strengthened and gained greater political weight with the founding of the United Nations Organization: "The increasing frequency during the nineteenth century of the need for multilateral negotiation produced ever more international conferences, which are nothing more than a device to adapt the diplomatic method to the need for multilateral negotiation, by ensuring that a number of States are continuously represented in the same place for a certain time by suitably qualified envoys. When the number of problems to be treated in this way increases beyond a certain point, there is need for such representation to become permanent and the result is a standing conference; when the standing conference is served by

¹ At the 2008 NATO Summit in Bucharest, Romania, which was expected to extend membership to Macedonia, Albania and Croatia, Macedonia's bid was rejected by Greece, who used veto in the decision-making to block the accession claiming that the first political criterion of membership is reaching a mutually acceptable compromise on the name of the country, referring to Macedonia

² Such support refers to the historical alliance and mutual partnership between Russia and Serbia

³ A more in-depth analysis of the enlargement challenges will follow in the next chapters. On this debate, see Christopher J. Borgen's article "From Kosovo to Catalonia: Separatism and Integration in Europe", which gives an illustration of the fears of domino-effect among EU members states if granted recognition to Kosovo

a permanent secretariat, it becomes an international organization.”¹ This claim describes the mere formal procedure of the conceiving of the European institutions, beginning with the Council of Europe in 1949 and continuing with the structuring of the remaining European Union bodies. From this aspect, it is yet another multilateral organization in charge of dealing with issues of multilateral concern in an ever integrating world. However, the founding ideas behind it are those of the great historical reconciliation of peoples, securing peace on the soil of Europe and economic revival and rehabilitation after the wreckage of the Second World War.

The model of historical reconciliation between France and Germany was applied to the efforts to end the wars in the Balkans at the end of the twentieth century.

STATEHOOD

The topic of recognition of states is closely linked to the concept of statehood. However, as Crawford states, it is questionable “how a concept as central as statehood could have gone without a definition, or at least without a satisfactory one, for so long.”² Crawford recognizes the deficiencies in the Montevideo Convention on the Rights and Duties of States and wonders: “is there a legal concept of statehood at all or does the meaning of the term vary indefinitely depending on the context?”³ Anyhow, “statehood is nonetheless a central concept of international law, even it is one of open texture,”⁴ Crawford concludes, and points to (at least) five ‘general legal characteristics of States:

In principle, States have plenary competence to perform acts, make treaties, and so on, in the international sphere: this is one meaning of the term ‘sovereign’ as applied to States.

In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter. This does not of course mean that international matters is prima facie both plenary and not subject to the control of other States.

In principle States are not subject to compulsory international process, jurisdiction, or settlement without their consent, given either generally or in the specific case.

In international law States are regarded as ‘equal’, a principle recognized by the Charter (Article 2(1)). This is in part a restatement of the foregoing principles, but it has other corollaries. It is a formal, not a moral principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations: States may consent to unequal voting rights by becoming members of organizations with weighted voting (the United Nations, the World Bank...). Still less does it mean that they are entitled to an equal voice or influence. But it does mean that at a basic level, States have equal status and standing...

Derogations from these principles will not be presumed: in case of doubt an international court or tribunal will tend to decide in favor of the freedom of action of States, whether with respect to external or internal affairs, or as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality.....”⁵

Crawford suggests these five basic principles to constitute “in legal terms the core of the concept of statehood, the essence of the special position of States in international law.”⁶

The capacity of states to perform acts and make treaties in the international sphere, the exclusive competence over their own internal matters, and treatment in front of international courts showcase the ability of a state to act and behave freely in the international sphere. This implies that statehood is independence: “It would seem that the concept of independence is an indispensable element in the notion of statehood under international law when the term “state” is used for a claim to

¹ Robertson, A. H. “The Law of International Institutions in Europe”, Manchester University Press, Oceania Publications, USA, 1961

² J. Crawford, “The Creation of States in International Law”, second edition, Clarendon Press, Oxford, 2006, p.40

³ Ibid.

⁴ Ibid.

⁵ J. Crawford, “The Creation of States in International Law”, second edition, Clarendon Press, Oxford, 2006, p. 40-41

⁶ Ibid.

comprehensive participation.”¹ Furthermore, in the *Customs Union* case², Judge Anzilotti gives a rather precise definition of independence: “[Independence]... may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law.

RECOGNITION– Legal Thinking and Historical Practice

*“No element of international policy has gone more askew in the break-up of Yugoslavia than recognition– whether, when, how, under what conditions – of the emerging parts”*³

There seems to be an underlying controversy regarding the concept of recognition in international law. Israel was recognized by the United States in a matter of minutes following its declaration of independence, but Palestine has ‘a special status’. Russia recognized Abkhazia and South Ossetia but refuses to recognize Kosovo. The United Nations recognize the sovereignty of the Republic of Cyprus on the whole territory of Cyprus, however the Turkish Republic of Northern Republic of Cyprus declared in 1974 has never ceased to exist. Why was the partition of Germany a politically and morally legitimate act after World War II, and forty-five years later it was proven illegitimate and replaced by the unification paradigm? In his critical remarks on Lauterpacht’s “Recognition of States in International Law”, Josef L. Kunz, acknowledges that recognition is indeed a controversial problem that has not been satisfactorily resolved neither in theory nor in practice: “The reason is that recognition “is a subject of enormous complexity, principally because it is an amalgam of political and legal elements in a degree which is unusual for international law.”⁴

The international system, however organized and stable, is not fully resistant to change. While its organization and functionality is based on treaties and charters, the United Nations Charter being the supreme act providing the framework for such organization and building relations between nations and states while preserving world peace and human lives, there are persisting challenges to which precise answers are difficult to be given. The decade - long warfare in Sudan resulted with a somewhat peaceful partition and independence referendum for southern Sudan. The end of the war in Syria could result with the creation of a state for the Kurdish peoples. The plebiscitary vote on independence of Catalonia in Spain could potentially succeed and produce the independent state of Catalonia. The Scottish referendum on independence in the fall of 2014 was only failed by a 1% difference for those in favor of the Union with Great Britain, mostly as a result of central state authority’s involvement and pledges for greater devolution and strengthening of Scotland’s position as a constituent part of the United Kingdom. The annexation of Crimea by Russian troops could end with a new sovereign unit on the territory of the former Soviet Union federation. The events in Syria, Iraq point to the possibility of the emergence of some type of transnational state that would transpose existing internationally recognized territorial boundaries. Such a creation clearly does not claim its right to exist on the Montevideo Declaration on Rights and Duties and States. What should be response of the international community to such an ‘entity’, that tends to revive some sort of a self-styled ancient regime state based primarily on violence and human rights abuse, and not on democratic values and freedom for all.

These are yet a few of the challenges of the international community in the global affairs of the world today which only prove that norms and regulations between states have not succeeded to provide precise and final answers to quests for independence and statehood. This has been the case for centuries in the past and it will most likely remain the case in the future. This is why recognition is such a challenging subject of international law.

What is recognition? How is it defined? Is it a principle, a right, or perhaps just a discretionary decision made individually by States? Is recognition a matter of law or a mere political consideration? Scholars often times refer to the ‘Doctrine of Recognition’. How has it developed? Who makes the decision? When is it legitimate? Can it be rejected or withdrawn? The examples, the nature, and the circumstances under which recognition is extended, seem to imply that recognition implies

¹ R. Cohen, “The Concept of Statehood in United Nations Practice”, *The University of Pennsylvania Law Review*, Vol.109, No.8 (Jun., 1961), pp.1127-1171

² *Customs Regime Between Germany and Austria*, P.C.I.J., ser. A/B, No.41 (1931), as quoted in R. Cohen, “The Concept of Statehood in United Nations Practice”, *The University of Pennsylvania Law Review*, Vol. 109, No. 8 (Jun., 1961), pp.1127-1171

³ “The Macedonian Question”, an editorial published in the *Washington Post*, 16 May 1992, shortly after the breakout of fighting and warfare in Bosnia and Herzegovina

⁴ Alwin V. Freeman, as quoted by Josef L. Kunz, “Critical Remarks on Lauterpacht’s “Recognition of States in International Law””, *The American Journal of International Law*, Vol.44, No.4 (October 1950), pp.713-719

various meanings and various actions: "The problem of recognition in international law has been the subject of a far-flung practice of states, of many decisions of national and international courts, of many treaties and of an enormous literature."¹ To those aspiring it, recognition represents a right; to those granting it, recognition is a matter of political evaluation and decision. Recognition is based on normal principles. It is rather rightly termed 'a controversial principle', for the contextual bases when it is granted and particularly how it is granted often contradict, are not uniformed, and create further contentions. Somewhere in between comes the law. Recognition is a subject of international law and the fundamental principles of international law must apply in extending or withholding it. According to Brown, "[I]n spite of the comments and theories of the writers on the subject of recognition the simple truth is that it is governed by no rules whatever. In the absence of a supranational state exercising supreme authority the act of recognition is political in nature and the prerogative of an independent sovereign state.

In 1934, John Fischer Williams began his considerations on the doctrine of recognition citing Lorimer, according to whom recognition is 'the basis of international law',² and went further to explain that "In international law, [therefore], recognition carries with it the clear implication that the recognizing Power has some concern or interest in the subject matter of the recognition."³ Williams maintains that the doctrine of recognition provides for "a common system of international rights and duties binding to all members of the Family of Nations."⁴ According to Oppenheim, "the grant of recognition establishes that the new state, in the opinion of existing recognizing states, fulfils the conditions of statehood required by international law,"⁵ and therefore "... it is recognition which constitutes the new state as a member of the international community."⁶ Dugard submits that "Recognition is the most maligned and controversial branch of International Law", and Terret recognizes the fact that "the dividing line between law and politics is often difficult to discern and nowhere more so than in international law"⁷. Such theoretical considerations strengthen the position according to which recognition is ultimately a matter of political evaluation and political interests, not so much a matter of mere legal principles.

Ti-Chiang Chen acknowledged in 1951 that the question of recognition arises every time there is a change of government, outbreak of civil war, or a dispute over territories.⁸ Chen explains the importance of recognition as essential for the validity of acts of a State in its relations with another State or with the community of States.

Some eighty years ago, the participating governments at the Seventh International Conference of American States, signed in Montevideo, Uruguay, the Declaration on the Rights and Duties of States. This Declaration, widely known as the Montevideo Declaration is still considered as the legal basis for the international recognition of States, as it lays out four basic elements for Statehood: a) a permanent population; b) a defined territory; c) government; d) capacity to enter into relations with other States.⁹ Not all scholars subscribe to these basic criteria, and some extend the list by also including self-determination, minority rights or the quality of democracy as basic preconditions. However, the four elements of the Montevideo Convention still serve as an indicator of whether a new entity could qualify to become an independent State or not. Article 3 of the Declaration stipulates that "[T]he political existence of the state is independent of recognition by other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts."¹⁰

However, the outlying controversy with regards to recognition of Statehood does not derive from the above criteria. The controversy begins when newly formed entities aspire to acquire international subjectivity and enter into treaty relations

¹ Josef L. Kunz, "Critical Remarks on Lauterpacht's "Recognition in International Law"", *The American Journal of International Law*, Vol.44, No.4, (Oct. 1950), pp.713-719

² *La Doctrine de la Reconnaissance* (1884), 16 *Revue De Droit International* (1st Ser.) p.333, as cited by John Fischer Williams, "Some Thoughts on the Doctrine of Recognition in International Law", 47 *Harvard Law Review* (1933-34), p.776

³ John Fischer Williams, "Some Thoughts on the Doctrine of Recognition in International Law", 47 *Harvard Law Review* (1933-34), p.777

⁴ *Ibid.*

⁵ Oppenheim, *ibid.* 130

⁶ Oppenheim, *ibid.* p.129

⁷ S. Terret, "The Dissolution of Yugoslavia and the Badinter Arbitration Commission", p4

⁸ Chen, "The International Law of Recognition: Special Reference to Practice in Great Britain and the States", obtained via <http://heinonline.org/HOL/License>, p.13

⁹ Article 1 of the Montevideo Convention, 1933, setting the qualifications of a State as a person of international law

¹⁰ Article 3, Montevideo Convention, 1933

with other states, a matter which requires the consent or the will of the other State to submit to such relations. This is when recognition become a matter of *Realpolitik*, and when the debate between constitutive or declarative form of recognition, really, loses ground. In exploring the debate among states on what makes a state, Thomas D. Grant is right to claim that “[T]he fact finding process remains open to the discretionary application of individual states.”¹ State practice tends to show that individual States look at the Montevideo criteria individually, not universally, when the actual act of recognition comes to the surface and more importantly, they inform their positions on recognition based primarily on political evaluations. At this point recognition becomes a legally challenging matter, or, as Grant observes: “If the problem is to find a model that reduces the *Realpolitik* aspect of recognition for which constitutivism was criticized, declaratory doctrine is no solution. Writers concerned about lack of legal principle therefore began to focus on the *process* of recognition.”²

Historical milestones seem to imply that there is no legal norm in international law regulating recognition of new States by existing ones. In the cases of seceding parts of a state to form a new one, a decisive political precondition is considered to be the prior consent by the mother state over the seceding one. Yet, achieving such consent is seldom in international politics. Another reason, but not independent of the first, might be the various ways of obtaining statehood. Professor Puto, for instance, defines three ways of state-creation: a) a disintegration of one State into two or more states, such as the disintegration of Austria-Hungary in 1919; b) a unification of two or more states into a single State, such the creation of the USSR in 1922; and c) a result of the liberation war of an oppressed peoples, such as Albania in 1912.³

According to Crawford, there are at least six modes of the creation of states in international law:

Original acquisition – “The acquisition of more than half the world and its peoples by a handful of European States – presents numerous difficulties, especially since the same States largely controlled the rules of the game,”⁴ Crawford argues, while classifying in this category issues related to the status of indigenous communities, including statehood and legal personality. He looks at the acquisition of territory from indigenous communities including the status of aboriginal treaties, legal effects of aboriginal treaties and grants of territory to private persons. Crawford places in this groups Liberia, The Boer Republics, the Free State of the Congo, Israel and Taiwan, as examples of original occupation of territory by a new State.

Dependent States and other dependent entities – Crawford admits that the problem of dependent states is a perennial problem in the law and practice of territorial status. “Precisely because of their dependence, many of these did not qualify as States under the criteria...”⁵ According to Crawford, these entities “appeared to possess a legal personality distinct from any other State, including the ‘dominant’ State.”⁶ However, Crawford maintains, “the older dependent States have now disappeared: modern practice has developed its own categories of shared governmental competence which are mostly different both in their purpose and in the modalities through which they have been established, and which can operate without the stigma of dependence. These categories include associated statehood, international administration of territory and special settlements involving groups of States or international organizations.”⁷

Devolution – Devolution, according to Crawford, is “the grant of independence by the previous sovereign.”⁸ The distinction between devolution and the following category – secession, is the presence or absence of metropolitan consent. The grants of independence, Crawford argues, can take different forms. “In particular it is useful to distinguish between immediate grants of independence and gradual devolution or accretion of power in a local unit to the point where it is eventually seen as a separate State. Immediate or relatively immediate grant of independence is by far the most common modern method of transfer of governmental authority.”⁹

¹ Th.D. Grant, “The Recognition of States: Law and Practice in Debate and Evolution”, Praeger, Westport, Connecticut, London, 1999, p. 122

² Ibid.

³ Puto, A. “E Drejta Nderkombetare Publike”, p. 167

⁴ J. Crawford, “The Creation of States in International Law”, 2006, p.259

⁵ Ibid., p. 282

⁶ Ibid., p. 282-283

⁷ Ibid.

⁸ Ibid., p. 330

⁹ Ibid.

Secession – according to Crawford, secession can be defined as “the creation of a State by the use or threat of force without the consent of the former sovereign”¹ and until 1914, it was considered the most common method of the creation of new States. But since 1919, “new States have been more often created with the consent of the former sovereign, especially in the course of decolonization,”² Crawford underlines. Some of these attempts have succeeded – Indonesia, North Korea, North Vietnam, Bangladesh, Guinea-Bissau and Eritrea. The case of Israel and Palestine is an exception, Crawford maintains, as “the creation or attempted creation of these States has occurred without the consent of the previous administration and as a result of armed conflict.”³ In the failed attempts to secession, Crawford lists Katanga and Biafra, or Somaliland and Chechnya.

The breakup of Yugoslavia is characterized by Crawford as ‘secession outside the colonial context.’ Despite the underlying controversy in terms of the means through which an entity would gain independence, including fighting an independence war, “international law was prepared to acknowledge political realities once the independence of a seceding entity was firmly established and in relation to the territory effectively controlled by it.”⁴ The example of Yugoslavia brings to the surface such underlying controversies: Croatia fought a war of independence and was recognized by the European Union while still not in control of its entire territory, while Macedonia did not fight a war of independence and was in control of its entire territory, yet it was not recognized alongside the other three seceding former Yugoslav republic: “The international response to the Yugoslav crisis was largely articulated through the Conference on Yugoslavia established on 27 August 1991 by the European Communities. The Conference on Yugoslavia established the Arbitration Commission...,”⁵ which in its Opinion No 1 dated 29 November 1991 “expressed the view that the situation in Yugoslavia was one involving the dissolution of the Federal Republic and the consequent emergence of its constituent republic as independent States, although that process was not yet complete.”⁶ This Opinion of the Arbitration Commission paved the way for the European Community to design the Guidelines according to which member- states would proceed with recognition. Crawford acknowledges that the response of the international community to the Yugoslav crisis continues to be seen with doubts, in particular “the early recognition of Croatia and Bosnia-Herzegovina by member States of the European Union remains controversial, as too the unduly delayed recognition of Macedonia.”⁷

Divided States and reunification – “The translation of ethnic or cultural affinity into territorial organization is, [however], not an easy one – especially since it tends to invade the claims for unity of other ‘peoples’ or ‘nations’.”⁸ In the cases of divided States Crawford lists the two Germanies, Korea after 1947, Vietnam after 1945, and China after 1948.

Unions and federations of States – in this category Crawford places the federations, confederations and other forms of political unions and States like Cyprus or Bosnia-Herzegovina. Under the chapter of Unions of States in international organizations, Crawford places The United Nations Organization and the European Union.

In the aftermath of the First World War, “aspirant States realized that the most effective way of obtaining recognition of their statehood was by means of participation in the Paris Peace Conference or by admission to the League of Nations.”⁹ Dugard notes that to the aspirant States, admission to the League was a method to secure international recognition:

“Even before the Covenant was finally drafted several of these entities, notably the Ukraine and Ireland, directed applications for League membership to the President of the Peace Conference in which they requested both international recognition and admission to the League of Nations. Liechtenstein emphasized the link between admission and recognition still further when it requested ‘admission into the League of Nations so as to obtain recognition of the sovereign rights of the Prince’, while the delegations of the Russian succession States of Estonia, Latvia, Lithuania, Azerbaijan, the North

¹ Ibid., p.375

² Ibid.

³ Ibid.

⁴ Crawford, p. 389

⁵ Ibid., p. 396

⁶ Ibid.

⁷ Crawford, p. 400

⁸ Crawford, p. 449

⁹ Dugard, p. 14

Caucasus, Georgia, the Kuban Republic and the Ukraine pleaded for admission, based on the desire of their peoples 'to enter, by their admission, into the Society of Nations, into the family of the other free and civilized peoples'.¹

Admission to the League of Nations was consensually accepted as the act of international recognition by the writers of the League of Nations period. Such membership then put the so called individual *de jure* membership to a secondary role, even though the post- League of Nations, and post World War II writers contest this position by emphasizing the relevance of the argument that recognition is in fact, an individual rather than a collective decision made by an organization.²

After the Second World War, Grant states, "writers [after the Second World War] approached recognition in a new way. Finding the discretionary or political element manifest in both theories of recognition and holding this undesirable, they emphasized the process of recognition, as much as the *content* of the definition of statehood."³ Whether collective or individual, scholars seem to agree that when recognition is granted, aspiring entities must meet the basic criteria for statehood as listed in the Montevideo Declarata. Procedurally, recognition might be discretionary, or a result of purely political evaluations, however, the fulfillment of basic criteria is an absolute precondition to secure international subjectivity of the newly formed States.

According to Professor Puto, international recognition gains relevance everytime new situations in international life unfold: "States might have to recognize an acquisition or loss of territory from another state, they might recognize a protectorate or the permanent neutrality of a given state."⁴ The most important cases of recognition however, are related to the creation of new states, Puto concludes: "International law does not study the issue of the birth of new states in its entirety. These are all problems related to political history, not to international law. International law only deals with these issues from one perspective: when a new State is born, the issue of its status in international law and in relation with other states is raised too."⁵ The recognition of the United States 'demonstrated the centrality of great powers in recognition of states,'⁶ Fabry underlines, and adds that "[T]hese powers carried most weight in international society and smaller states tended to follow their initiative and example."⁷

In 1992, after the breakout of heavy fighting in the federal units of the Socialist Federal Republic of Yugoslavia which followed the unilateral declarations of independence by at least three republics (Slovenia, Croatia, and Bosnia and Herzegovina), the European Community established a body called the Arbitrary Commission (The Badinter Commission), and mandated it to evaluate whether the seceding countries of the former Yugoslavia meet the conditions for recognition. The Commission had ruled that Slovenia, Croatia, and Bosnia and Herzegovina did meet the criteria for recognition. The Arbitrary Commission ruled that Macedonia also met those conditions and hence, it could be recognized. However, the European Community seemed reluctant to proceed with recognition when confronted to Greece's objections and claims that the seceding Republic of Macedonia, in fact had territorial aspirations against Greece. Hence, it decided to postpone its decision and practically sympathize with Greece's objections. More than two decades later, this bilateral dispute remains unresolved and the prospects of a possible solution and ultimately recognition of Macedonia by Greece remain rather vague. Ambassador Christopher Hill, the first United States Ambassador to Macedonia, recalls the nature of this dispute in the following way:

"The problem between the two countries might seem like a joke in the heads of a late-night comedian, but in the Balkans there was nothing funny about it. Greece objected to Macedonia's use of a name that first appeared in Greek antiquity and had since served as a place-name for an area that included northern Greece and southernmost Yugoslavia. Macedonia was the name of Alexander the Great's home kingdom, the Macedonians his tribe. When Tito fashioned Yugoslavia, he recognized that the Slavic people living in the southernmost part since around A.D.700 (a thousand years after Alexander

¹ Dugard, p.15

² Dugard, pp.21-23

³ Th.A. Grant, "The Recognition of States: Law and Practice in Debate and Evolution", Praeger, Westport, Connecticut, London, 1999, p. 122

⁴ Puto, A. "E Drejta Nderkombetare Publike", Tirane, Albin, 2008, p.166

⁵ Ibid.

⁶ Fabry, M. "Recognizing States: International Society and the Establishment of New States Since 1776", p. 35

⁷ Ibid.

the Great) were not Serbs, as the Serbs were inclined to insist; however, neither were they Bulgarians, as the Bulgarians insisted. They were Macedonians, that is, people living in a region known as Macedonia.”¹

On the other hand, Germany rushed to recognize Croatia, not awaiting the conclusions and recommendations of the Badinter Commission, even though the opinion had been positive and favoring for recognition.² The policy of the United States was not much different either. This selective recognition of states that followed the disintegration of Yugoslavia and the sense of application of biased criteria for evaluation, only strengthen the conviction that when recognition of states is concerned, it is not the legal arguments that prevail in the decision making process.

Jonathan Paquin calls the position of the United States with regards to the resurgence of secessionist movements in the post-Cold War era and consequently the recognition of newly emerging entities ‘contradictory’ and uses the examples of Croatia and Macedonia as proof of such contradictory policy. Furthermore, Paquin maintains that the United States’ policy is primarily based on what he calls ‘the stability argument’ as their paramount interest. The stability based argument proved to be true when later in 2005 the United States decided to recognize Macedonia under its constitutional name to prevent a plebiscitary vote that threatened to divide the country, and more so in 2008, when it recognized the unilateral declaration of Kosovo’s independence. This rather contradictory approach leads inevitably to Lauterpach’s conclusion who, back in 1947 contended that “recognition of states is not a matter governed by law but a question of policy,³” Almost 70 years since it was established, this premise remains ever more realistic today.

Today, recognition remains a controversial subject in international law. In February 2008, Kosovo declared unilateral independence. This seemed like the natural end of a cause that had lasted for almost a century, which involved decades of peaceful resistance, a campaign of ethnic cleansing against the civilian population of Kosovo, and a bombing campaign to oust Serb military forces which was conducted by NATO. As soon as this small autonomous province, traditionally considered as part of Serbia and hence denied its right to Statehood as a natural consequence of the breakup of Yugoslavia declared independence, the United States and key European member states went on to recognize it. The decision to recognize Kosovo came as a natural outcome of long years of efforts to accord a peaceful solution and overcome grievances. Unfortunately, such efforts failed and ethnic violence continued. In the recognition of Kosovo, the security argument prevailed and the history of Balkans bloodshed is the best support in favor of it.

Russia on the other hand, refused to recognize Kosovo’s independence on grounds that it was ‘illegal’, that it represented a breach of international law and hence, it represented a dangerous precedent. Only a few months later, however, when the South Ossetian (Georgian) War broke out and South Ossetia and Abkhazia declared independence, Russia was the first country to recognize the independence of these two Georgian provinces. No debate as to the breach of norms of international law or dangerous precedents was considered. The then Russian President Dmitry Medvedev signed decrees⁴ recognizing the independence of Abkhazia and South Ossetia as sovereign states and called upon other countries to follow its example.

This is a mere proof that when it comes to recognition, it is mere political arguments that prevail over legal arguments and there is no single formula or a set of universal principles that apply in the process, regardless of the clearly listed Montevideo criteria. The decision to recognize is often arbitrary and ultimately political.

Scholars and statesmen agree on the premise that in the vast majority of cases, recognition is subject to discretionary policies and relations between states and not a result of an exclusively objective legal examination of whether or not an entity meets the criteria for Statehood. One of the reasons for such an approach may well be the fact that secessionist movements could potentially challenge the existing international order and claims to the right to self-determination by

¹ C. Hill, “Outpost, Life on the Frontlines of American Diplomacy”, Simon & Schuster, 2014, p.94

² For more, see R. Caplan, “Europe and the Recognition of New States in Yugoslavia”, 2005. Caplan argues that the decisions of the EC on recognizing the seceding Yugoslav republics were driven from a conflict-management policy position, and that the criteria for recognition were practically political. The EC’s Arbitrary Commission which was founded to produce the legal basis and framework to move towards recognitions, did not serve its end, for the member states did not fully recognize and respect its authority, competence and functions, hence they acted in accordance with their own separate interests and not in accordance with the findings and recommendations of the Commission.

³ H. Lauterpach, “Recognition in International Law”, 1947, 1

⁴ See Russian Presidential Decree No.1260 on recognizing Abkhazian independence, and Russian Presidential Decree No. 1261 recognizing South Ossetian independence, of 26 August 2008

seceding groups could easily acquire features that would question the very principles on preserving peace and security in the world, as laid down in the United Nations Charter. According to Dugard, "Any writer who attempts to examine the mysteries of State practice on recognition with the intention of providing a coherent explanation of the behavior and expectations of States within a framework of legal principle and theory exposes himself to certain ridicule and vituperation."¹ Nevertheless, both scholars and policy makers share the view that, while the very act of recognition might be a matter of political assessment and interests on the side of the recognizing state, at the same time, there are legal norms that apply and perhaps more importantly, legal effects that recognition produces. In a similar manner, Oppenheim argued that, "[W]hile the grant of recognition is within the discretion of states, it is not a matter of arbitrary will or political concession, but is given or refused in accordance with legal principle."² In other words, while recognition is a legal principle, its materialization is a political act. "The matter is of legal importance because it is when an entity becomes a member of the international community that it thereupon becomes bound by the obligations, and a beneficiary of the rights, prescribed by international law for states and their governments," Oppenheim submits.³

Doctrine

*"At the beginning of the twentieth century there were some fifty acknowledged States. Immediately after World War II there were about seventy-five. By 2005, there were almost 200 – to be precise, 192. The emergence of so many new States represents one of the major political developments of the twentieth century. It has changed the character of international law and the practice of international organizations. It has been one of the more important sources of international conflict."*⁴

The above is among the best illustrations of how the international community of States has grown, and hence how and why norms of international law had to adjust to such changes. The function of the law therefore is to evolve and reflect upon the changing realities the world, while preserving the functional balance of power and not challenging the basic principles of jus cogens. Institutions need to evolve as societies evolve, but the rights and basic premises stay the same. In his overview of the International Court of Justice's Advisory opinion on the independence of Kosovo, Christian Walter explains that courts, apart from solving disputes by reaching a judgment, also fulfill a function of 'judicial law-making' and thus the Advisory opinions of the Court "contribute to the development of international law."⁵

Dugard notes that "[I]n 1913 the world community consisted of 48 States, of which 41 were situated in Europe and the Americas. By 1933, this number had increased to 66, made up of twenty-eight European, twenty-two American, twelve Asian and four African States."⁶ Today, the Organization of the United Nations is composed of 193 States, the United States included. Such increase in the number of States is an indication/show of the huge transformations of the world community that came as a result of breakdown of empires, decolonization, or independence warfare. The international law norms had to naturally adjust to such transformation and here the principle or the policy of recognition is no exception. More precisely, the international law of recognition evolved, but attention was paid by jurists not to allow for such evolution to infringe basic rules of preserving peace and security. As a consequence, parallel to the law of recognition, the law of non-recognition also was developed and it is today primarily reflected through the Stimson Doctrine, named after former United States Secretary of State, Henry Stimson, who devised the doctrine as the official stance of the American administration denying to grant recognition to the puppet state of Manchukuo, which was created by Japan as a result of its acquisition of territory by China. Non-recognition was historically also linked to certain conditions that were devised by the so called great powers: "The emergence of independent South American States resulted in the formulation of two important principles or norms relating to non-recognition. First, Britain, on the initiative of its Foreign Secretary, George Canning, made it clear to Brazil and Mexico that it viewed the abolition of the slave trade as a pre-condition for recognition. Secondly, the South American States themselves adopted the principle of *uti possidetis*, in terms of which colonial borders were to be honoured by the newly independent States in order to avoid territorial disputes. Any violation of this principle was to be sanctioned by non-recognition of the territory obtained by conquest."⁷ In addition to the principle of *uti possidetis* as the territorial status-quo

¹ Dugard,

² Oppenheim's International Law", Volume I, Peace, Ninth Edition, Edited by Sir Robert Jennings and Sir Arthur Watts, p. 130

³ Oppenheim... p.128

⁴ Crawford, J. "The Creation of States in International Law", Oxford University Press, 2006

⁵ Walter, Ch. "The Kosovo Advisory Opinion: What It Says and What It Does Not Say", in "Self-Determination and Secession in International Law", edited by Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov, Oxford, OUP, 2014

⁶ Dugard, Recognition and the United Nations", p.52

⁷ Dugard, p.25

for decolonizing nations, statesmen put a great emphasis on the importance of humanitarian considerations and the abolition of slavery. In addition to Canning, “[I]n 1840 Lord Palmerston made it clear to Texas that Britain expected her to denounce the slave trade as a pre-condition for recognition and in 1908 Britain refused to recognize the transfer of the territory of the Independent State of the Congo to Belgium until it was satisfied that the latter was fulfilling its treaty obligations with respect to the treatment of natives.”¹ Looking at the Criteria devised by the European Community on the Recognition of States in Former Yugoslavia and the Soviet Union, their essential demand was protection of human rights and minority rights, or the respect for the Helsinki Final Act. It was clear that the seceding states of communist federations had to improve their performances on human rights portfolios and enrich them by demonstrating in practice the concern and commitment to protect the rights of the non-marginalized communities. One could claim that this was a political demand for at least two reasons: first, it would help the former communist regimes create a new legacy of freedom and equal rights for all; and second, by ensuring such equal treatment, the new entities would demonstrate respect for the principle of internal self-determination, whose disfunctionality is most often a reason for emerging claims of independence and statehood.

Recognition as an institution has existed for a long time. According to Menon, “Its earliest use appeared to be in the Middle Ages when a political entity, in order to become an independent member of the family of Christian nations required *papal recognition*.”² According to Fabry, “To ascertain the precise historic origin of complex international practices is notoriously difficult.”³ He is very mindful of attempting to give an exact date of the origin of the institution of recognition as a principle in international law, for, he explains, “major disruptive events do happen, but international change is typically cumulative and institutional,”⁴ and “more often than not it consists of incremental and protracted institutionalization of new ways of doing things and gradual abandonment of old ones.”⁵ Going back to the origin of recognition, Fabry underlines that “It could emerge as a full-fledged and discrete practice only once European countries came to regard themselves as forming a larger association of formally like entities and once positive law of this association gained a distinct foothold over natural law as its defining institution.”⁶ Oppenheim seems to attempt to simplify his explanation of the international system of States and by doing so, to illustrate why recognition becomes such a controversial matter in international politics: “[T]he international community is composed primarily of states. Any changes in the composition of the international community are of immediate concern to existing states, whether those changes involve members of that community (usually states) or the authorities (usually governments) through which they act.”⁷ This rapport lays down the foundations for the controversy over the question of recognition and its relationship to notions of sovereignty and statehood, the two pillars of international law.

Constitutive and Declaratory Theories of Recognition

The legal theory of recognition today is still divided between two competing schools of thought, namely the constitutive and the declarative doctrines. Dugard admits that “there is an unresolved debate among legal scholars as to whether a political community that meets these requirements⁸ automatically qualifies as a “State” or whether, in addition, it requires recognition by other States to endow it with international legal personality.”⁹ The constitutive theory derives from the nineteenth century doctrines of positivism, particularly the writings of Hegel, who is considered among the most influential proponents of the legal doctrine of positivism. Hegel believed that the State is the absolute sovereign in the international sphere, and therefore, States engage in legal relations in accordance with their will, and thus recognition becomes a precondition for engagement. Thus, the will of the nation was the central focus of his legal thinking. Positivists believed that “consent is the

¹ Dugard, p.26

² P.K. Menon, “The Law of Recognition in International Law- Basic Principles”, The Edwin Mellen Press, Lewiston/Queenston/Lampeter,

³ Fabry, M. “Recognizing States – International Society and the Establishment of New States Since 1776”, Oxford University Press, 2010, p. 23

⁴ Fabry, p. 23

⁵ Ibid, p.23

⁶ Ibid, p.23

⁷ Oppenheim... p.128

⁸ Dugard lists the Montevideo Convention criteria as the principal conditions for statehood, i.e. a permanent population, a defined territory, a government and the capacity to enter into relations with other States.

⁹ Dugard, J. “Recognition and the United Nations”, Cambridge, Grotius Publications Limited, 1987, p. 7

foundation of the international order of rights and duties”¹ and “the act of recognition is seen as an expression of consent to observe the rules of international law in a relationship”.² Chen calls the relation between positivism and constitutive theory as “the extension of the positivist doctrine in the field of recognition.”³

In Lauterpacht’s view, who is recognized in legal theory as one of the proponents of the constitutive doctrine, “[T]here is, in law, no substance in the assertion that a community is a State unless we attach to the fact of statehood rights and competencies, within the internal or international sphere, which international law is ready to recognize. It seems irrelevant to predicate that a community exists as a State unless such existence is treated as implying legal consequences.”⁴ Lauterpacht thus underlines the importance for a State to become an international person and obtain international subjectivity, with rights and obligations in the international community of States, as fundamentally important for entities to be able to enter in treaty relations with other States. Furthermore, Lauterpacht maintains that such mutual recognition, which is constitutive in nature, is based on a treaty and is ‘binding by virtue of the fundamental right *pacta sunt servanda*’. Similarly, Anzilotti claims that “since the juridical norms of international law are created by means of an agreement, the subject of the international juridical order commences the moment the first agreement is concluded. Recognition is considered as none other than the conclusion of a pact based upon the rule *pacta sunt servanda*.”⁵

In Dugard’s view, the declaratory school “claims that an entity becomes a State on meeting the requirements of statehood and [that] recognition by other States simply acknowledges (declares) as a fact something which has hitherto been uncertain,”⁶ while “[T]he constitutive school, on the other hand, argues that recognition creates (constitutes) the State.”⁷

Crawford submits that “in every legal system some organ must be competent to determine with certainty the subjects of the system. In the present international system that can only be done by the States, acting individually or collectively. Since they act in the matter as organs of the system, their determinations must have definite legal effects.”⁸

According to the declaratory theory, States do not need to seek recognition in order to be admitted to the international community. The mere fact that they are independent and can perform their duties and fulfill their obligations, beginning with a stable government, makes their existence a fact. According to Menon, “Recognition is not constitutive but declaratory; it accepts but does not create. The theory stipulates that recognition has no legal effect on the creation of a State.”⁹ This doctrine was supported by the proponents of the natural law school of thought, who believed that the principles of law are an inherent part of nature and exist regardless of whether a government recognizes or enforces them. According to Chen, the declaratory theory finds a ‘natural alliance’ with the naturalist school of law: “For to argue that a State can become a subject on international law without the assent of the existing States, it is necessary to assume the existence of an objective system of law to which the new State owes its being. The existence of such a system of law is the basic condition for the validity of the declaratory theory.”¹⁰ The declaratory theory of recognition, according to Lauterpacht, is rather simple, because according to this doctrine, “[A] State exists as a subject of international law – i.e. as a subject of international rights and duties – as soon as it ‘exists’ as a fact, i.e. as soon as it fulfills the conditions of statehood as laid down in international law.”¹¹ The declaratory theory is based on the proposition that ‘The formation of a new State is... a matter of fact, and not of law,’¹² because it contends that ‘statehood is a legal status independent of recognition.’¹³ Crawford defines declaratory recognition as “a political act, which is, in principle, independent of the existence of the new State as a subject of international law.”¹⁴

¹ Menon, p.8

² Ibid.

³ Chen, p.18

⁴ Lauterpacht, p.39

⁵ Anzilotti, quoted by Chen, p.18

⁶ Dugard, p.7

⁷ Ibid.

⁸ Crawford, p.20

⁹ Menon, p.22

¹⁰ Chen, p.19

¹¹ Lauterpacht, p.41

¹² Oppenheim

¹³ Crawford, p.4

¹⁴ Crawford, p.22

The International Law Association's Committee on Recognition/Non-Recognition, refers to Antonio Cassese's definition of the constitutive doctrine, according to which, "[T]he Constitutive Theory's main idea is that the recognition *creates* the personality of a State. A *prima facie* objection to this notion might be that it is unfair, as it gives previously existing States the right to act as gatekeepers of the International Community and to deprive newer entities of entry into 'the family of nations'¹. Furthermore, it seems to be inconsistent with the principle of sovereign equality of States." With regards to the declaratory doctrine, the Committee refers to Crawford's definition of declaratory recognition as a political act that is not a necessary component of statehood.

One could rightfully argue that the contrasting position between the constitutive and declaratory theories derive from the effectiveness of an independent State. Namely, authors agree that, in line with the Montevideo Convention, a State is a State regardless of recognition, and in this respect, the declarative theory seems to be satisfactory. However, the primary interest of States is to engage in the international order, to establish diplomatic relations and be party to international trade, as a basic element for economic welfare. Such engagement is only possible through acquiring international subjectivity, as the exercise of its rights as a State would be questionable. As Chen concludes, "[P]ersonality under such disability would be devoid of meaning."²

John Fischer Williams outlines a distinction of, what he calls, 'two species of recognition' – recognition *de jure* and recognition *de facto*: "Recognition *de facto* is plain enough. It is the acceptance of such facts as that a State exists..."³ This definition seems to correspond with the declaratory theory's view according to which a State is recognized by the mere fact of its declaration as a person in international law. "But recognition *de jure* is a very different thing,"⁴ Williams admits as if to indicate on the controversy and endless debate that the principle of recognition produces in relations between States and in the international order. The difficulty according to Williams derives from the fact that extending recognition to a State or to those who govern it must be driven upon what he calls 'some legal standard', thus openly questioning the right to claim judicial position by any member of the Family of Nations. Similarly, Oppenheim explains that the distinction between *de jure* and *de facto* recognition "is in essence that the former is the fullest kind of recognition while the latter is a lesser degree of recognition, taking account on a provisional basis of present realities."⁵

According to Kelsen, recognition is comprised of two distinct acts: a political and a legal act: "[p]olitical recognition of a state or a government is an act which lies within the arbitrary decision of the recognizing state" and "can be brought about either by a unilateral declaration of the recognizing state, or by a bilateral transaction."⁶ This kind of expression of willingness does not constitute any legal obligation, Kelsen says, and concludes that, "[T]he political act of recognition, since it has no legal effect whatsoever, is not constitutive for the legal existence of the recognized state,"⁷ and thus the political act of recognition is declaratory. The legal act of recognition, Kelsen explains, is still a rather confusing matter in international law: "[I]t is the same] when the question arises whether or not in a concrete case the fact "state in the sense of international law" exists, whether or not a certain community fulfills the required conditions of being a subject of international law, i.e. of having in its relations with other states the rights and obligations stipulated by general international law; this implies equal rights and obligations stipulated by general international law; this implies equal rights and duties of these states towards the community in question."⁸ This establishment, Kelsen concludes, according to which a state in the sense of international law exists, represents what he termed as "the legal act of recognition,"⁹ and would be analogue to the constitutive doctrine of State recognition.

Briggs seems to be rather critical of the constitutive doctrine. While acknowledging the fact that the "act of recognition is a 'legal' act in [the dual] sense of being required of existing states by international law and of legally creating a new subject

¹ Cassese, Antonio, *International Law*, Oxford: OUP, 2001, as cited in International Law Association's Committee's on Recognition/Non-Recognition First Report, Sofia, 2012, p.3

² Chen, 16

³ Williams, 781

⁴ *Ibid.*

⁵ Oppenheim, 155

⁶ See Kelsen, H. "Recognition in International Law: Theoretical Observations", *The American Journal of International Law*, Vol.35, No.4 (Oct. 1941), pp.605-617, available at <http://jstor.org/stable/2192561>

⁷ *Ibid.*, p.605

⁸ *Ibid.*, p.607

⁹ *Ibid.*

of international law,"¹ he recalls that "no rules of international law prescribe or proscribe the creation of such a new state;"² thus "states have no legal origin", he concludes. In his critique to the constitutive doctrine, Briggs further claims that "[A]dherents of the constitutive theory of recognition are logically forced to regard the new state as without rights or obligations under international law until recognized;"³ and explains that "[N]ascent states, however indeterminate their status politically or legally, do not exist in a vacuum. Legal and political relations of varying intensity with neighboring or more distant states are of an immediate or inevitable necessity and practice even prior to recognition,"⁴

*"Thus, on May 9, 1922, the American Commissioner in Albania was instructed to protest to the governmental authorities of the unrecognized Albanian state against their action in depriving American citizens of Albanian origin of their American passports and forcing them to take Albanian passports. Although the printed correspondence describing the American protest and the Albanian engagement to recognize all United States passports contains no reference to international law, the evidence suggests that, despite non-recognition of Albania by the United States, international law was regarded by both states as regulating their relations and as establishing both the delictual responsibility and the contractual capacity of the unrecognized state."*⁵

According to Caplan, the distinction between the two doctrines, in fact has broad significance how one views the function of recognition may have implications for states' policies: "Declaratory theorists maintain that the role of recognition is simply to acknowledge the fact that a territorial entity has satisfied the criteria for statehood; recognition itself cannot and does not create state."⁶ Caplan agrees that the constitutive doctrine acknowledges a political role for recognition, even though it is not the absolute precondition for the creation of States: "[N]or did non-recognition of Macedonia from 1991 to 1993 mean that the former Yugoslav republic enjoyed no rights associated with statehood."⁷

In modern state practice, however, it seems that neither of the two major doctrines satisfactorily explains State conduct. No decision to recognize a state has been explained or justified in terms of either one of the legal theories. No statesman has ever spoken of theoretical considerations in making the decision. The recognition of the Republic of Philippines by the United States on July 4, 1946, for instance, was done through a bilateral treaty, called the Treaty of General Relations, signed at Manila, which stipulates that, "The United States of America further agrees to recognize, and does hereby recognize, the independence of the Republic of the Philippines as a separate self-governing nation..."⁸ The United States President Henry Truman recognized Israel immediately after it had declared its independence on 14 May 1948. No reference to theoretical considerations was made, to the contrary. The decision was made based on political evaluations, following the findings of the committee appointed by President Truman to study the Palestinian issue and the unsuccessful attempts of the United Nations Special Commission on Palestine to achieve, throughout 1947, a settlement based on its recommendation for a partition of Palestine into a Jewish and Arab state. The recognition of Israel by President Truman was even in contradiction to the views of the United States Department of State, which had recommended the creation of a trusteeship under the auspices of the United Nations with limits on Jewish immigration and the creation of a Jewish and an Arab province, but not states.⁹ The statement of President Truman contains merely two typed sentences, with corrections in handwriting, but is a proof of a *de facto* granting of recognition by the United States to an independent entity.¹⁰ The United States extended recognition to Macedonia under its constitutional name in 2004, in efforts to prevent a plebiscitary vote that threatened to carve the country up along ethnic lines, while the recognition of Kosovo in 2008 followed immediately after the Kosovo Parliament adopted the declaration on independence. Again, no reference to legal doctrine or theoretical approaches was made. This leads to the conclusion that recognition today is a matter of political evaluation. The example of Macedonia shows that it can often be used by the great powers as a mechanism to induce newly emerging

¹ Briggs, H.W. "Recognition of States: Some Reflections on Doctrine and Practice", *The American Journal of International Law*, Vol.43, No.1 (Jan. 1949), pp. 113-121, available at <http://jstor.org/stable/2193138> , p.114

² *Ibid.*, p.115

³ *Ibid.*, p.117

⁴ *Ibid.*

⁵ *Ibid.*, p.118, referring to the U.S. Foreign Relations, 1922, Vol. I, p.559

⁶ Caplan, p.56

⁷ Caplan, p.79-80

⁸ Department of State, *Treaties and Other International Acts Series*, No.1568

⁹ For more on the history of the Arab-Israeli conflict, the policy of the United States, the chronology of events that preceded recognition, the act of recognition, see: http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/index.php

¹⁰ <http://www.trumanlibrary.org/photos/israel.jpg>

states to behave properly and commit themselves to stability and prosperity. In various historic periods, such mechanisms acquired different shapes, from religious tolerance in medieval times to protection of minorities in twentieth century: "All of the successor states of the Ottoman Empire, beginning with Greece in 1832 and ending with Albania in 1913, had to accept provisions for civic and political equality for religious minorities as a condition for international recognition. The peace settlements following First World War included extensive provisions for the protection of minorities."¹

The above evidence naturally leads towards the unavoidable conclusion that, "[N]either theory of recognition satisfactorily explains modern practice."² Moreover, "[T]he consideration of the theory of recognition in international law has traditionally taken place in terms of conflict between the constitutive and the declaratory doctrines,"³ particularly when the political arguments which seem to prevail in the drafting of States' policies on recognition are considered. When politics prevail, it seems, legal theories go askew. In a similar fashion Brownlie draws a conclusion that:

*"In the case of 'recognition', theory has not only failed to enhance the subject but has created a **tertium quid** which stands, like a bank of fog on a still day, between the observer and the contours of the ground which call for investigation. With rare exceptions the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of the ordinary methods of legal analysis."*⁴

The corollary of the modern State practice seems to imply that, in spite of the positions of the constitutive and declaratory theories, governments neither align with the first, nor with the latter theory exclusively. While scholars attempt to construct theoretical frameworks to explain patterns of recognition in international law, statesmen are almost inherently driven by political realities, individual evaluation of criteria for statehood and whether those are met to some objective level, and ultimately by the contextual framework which precedes a decision to recognize, history being the prevalent criteria to study.

HOW TO RECOGNIZE A STATE?

'To recognize a political community as a State is to declare that it fulfils the conditions of statehood as required by international law' (Lauterpacht). These conditions of statehood have been listed in the 1933 Montevideo Convention. But today, not all political entities that claim their right to Statehood or meet such conditions are recognized as States. Questions such as: 'what entity is entitled to recognition?'; 'what authority decides upon recognition?'; 'why certain entities are denied the right to recognition?' are just a few dilemmas arising from the debate. The Kurds in the Middle East are still struggling for their right to self-determination and their own homeland. Nagorno Karabakh (Azerbaijan), Abkhazia and South Ossetia (Georgia), Northern Cyprus (Cyprus) or Transnistria (Moldova), are few on a longer list of entities that have not been recognized, yet function as independent States.

The increase in the number of States witnessed in the aftermath of World War II, particularly with the collapse of communism, points to the huge transformation of the international system as a result of the major historical changes or events that took place and had as their corollary the emergence of new States. Warfare, collapse of empires, peaceful secessions, ending colonial rule, or belligerence, all eventually resulted with the creation of new entities. Every single plea on independence and statehood rested on the rather slippery right to self-determination. Were the so called statehood criteria sufficient? What would be the attitude of States that had themselves sought recognition and acknowledgment at different times in history? The independence of the United States and the recognition process⁵ proves that such decisions have never been easy, or simple.

Recognition is in fact, about enabling a state to function in the international system. Independence, whether by secession, insurgence, belligerence or other means, demonstrates the will of the people of a given entity to live on their own, practice their own sovereignty, and decide freely of matters related to them or their country. And it is precisely the will of the people what does not always seem measurable or explicable through the legislative norms or scholarship. The 1933 Convention on Rights and Duties of States (Montevideo Convention), clearly lists four conditions that entities should meet in order to

¹ Krasner, S.D. "Sovereignty", 2001, Foreign Policy, No. 122 (Jan. – Feb. 2001), pp.20-22+24+26+28-29

² Crawford, J. p.5

³ Lauterpacht, 1947, p.38

⁴ Brownlie (1982) 53 BY 197, 197

⁵ See Fabry, Mikulas, 'Recognizing States: International Society and the Establishment of New States Since 1776'; Oxford, University Press, p26-41

be recognized as States. But, if a political community is not recognized a State, then how can it demonstrate its ability to enter into relations with other states, under the present arrangements of international order? What then is the relationship between recognition and popular sovereignty?

UNITED NATIONS AND RECOGNITION

The act of admission in the Organization of United Nations is rightly considered to be the practical mechanism of extending international recognition to [new] states. The United Nations is where the doctrine remains silent and the procedure takes over, while the political institutions of the United Nations¹ are those that have the authority to decide upon the admission of new members in the world organization.

The United Nations were established in the aftermath of the Second World War in an effort by the countries to prevent the recurrence of such tragedies and massive loss of human lives. It was founded with the objective of securing international peace and security and with the aim to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,”² and in order to achieve these goals, “to practice tolerance and live together in peace with one another as good neighbors, and to unite [our] strength to maintain international peace and security...”³

Membership in the United Nations is regulated in Article 3 of the Charter. This article draws a clear distinction between “the original Members” and states admitted to the Organization. According to Article 3 paragraph 1, “The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with article 110.”⁴

Furthermore, Article 4 describes the procedure for the admission of new Members:

Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendations of the Security Council.⁵

Membership in the United Nations is further classified as an “an important question” for which the General Assembly shall decide by a two-thirds majority of the members present and voting.⁶

The Charter does in no part speak of “recognition” of new States. Instead, it uses the term “admission”, which indicates that the organization does not deal with the evaluation of the fulfillment of the Montevideo criteria, “subject, *inter alia*, to the condition that the applicant be a state.”⁷ This distinction in terms, however, does leave open the question of whether a state could be a state and admitted to the United Nations, and still not be fully recognized by the other members of the international community at a bilateral level. At the same time, it is not totally clear in terms of procedure at what point and based on what criteria the Security Council would recommend to the General Assembly to admit a new member to the organization. Typically, it should look at the fulfillment of the Montevideo Criteria; however the practical cases seem to indicate that this has not been a universal criterion applied with regards to admission. During the first decade of the United Nations, although most of the original members had been recognized as states, there were six states, including India, which at the time of admission had not been fully independent:

¹ These are the organs of the United Nations as defined in Article 7 of the United Nations Charter: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

² Preamble to the United Nations Charter

³ Ibid.

⁴ United Nations Charter, Chapter II – Membership, Article 3 Paragraph 1

⁵ United Nations Charter, Chapter II – Membership, Article 4, Paragraphs 1,2

⁶ United Nations Charter, Chapter IV – The General Assembly, Voting, Article 18, Paragraph 2

⁷ R. Cohen, “The Concept of Statehood in United Nations Practice”, University of Pennsylvania Law Review, Vol.109, No. 8 (Jun., 1961), pp.1127-1171

*"Although India did not become fully independent until 15 August 1947, she had been an original and active member of the League of Nations and it would have been anomalous to exclude her from the United Nations. Similarly, the Philippines did not become fully independent until 4 July 1946, but in the light of her war record and promised independence, it would have been impolitic to refuse her original membership. Syria and Lebanon had both been Mandates under the league of Nations and, although their independence had been declared and generally accepted, final arrangements with the mandatory power, France, had yet to be completed in 1945. The admission of these States to original membership in the United Nations did not therefore seriously undermine the requirement of statehood contained in Article 3 of the Charter."*¹

At the same time, Article 4 paragraph 1 provides that membership to the United Nations is granted to 'peace-loving' states as well as states able to carry out the obligations of the Charter. The question remains, however, what objective criteria do member-states use to evaluate that states are in possession of such capabilities, and moreover, that they are peace-loving states? In its advisory opinion of 1948 on Conditions of Admission of a State to Membership in the United Nations, the International Court of Justice refers to the Security Council Rules of Procedure for an interpretation of the establishment of the criteria of a 'peace – loving' nation: "The Security Council shall decide whether in its judgment the applicant is a peace – loving State and is able and willing to carry out the obligations contained in the Charter, and accordingly whether to recommend the applicant State for membership."² The Court finds, furthermore, that "Article 4 does not forbid the taking into account of any factor which it is possible reasonable and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor – that is to say, none connected with the conditions of admission – is excluded."³ The Court in its Opinion acknowledges what it calls the 'elastic' nature of the prescribed conditions and indicates that the interpretation of such conditions is not immune to political interpretation.

Dugard is therefore right to conclude that "the questions whether the applicant is a peace-loving State and whether it is able and willing to carry out the obligations contained in the Charter depends on the discretion of the Security Council and the General Assembly; and the history of the United Nations, particularly during the first decade of its existence, points to the broad interpretations that may be placed upon these conditions by States politically determined to block the admission of applicants judged to favour an alien ideology or to support a rival bloc."⁴ Furthermore, Dugard recognizes that the judicial organ of the United Nations, i.e. the International Court of Justice can do little "to curb the excesses of political decisions exercised through an arbitrary veto."⁵ Indeed, in its 1948 Advisory Opinion, the Court held that "a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article."⁶

While the political realities after the Second World War were such that the statehood criteria could be bypassed and a country could become an original member of the United Nations even without having met the formal requirements, the question remains how to respond to demands for statehood in an ever changing world and what should be the role of the United Nations Organization and the application of the United Nations Charter? The quest for political balance and no impairment of the international system seems to have been and remains the corollary of all times, while political bargaining between the great powers, the original members or the members of the Security Council is an ongoing activity even today. Brown is right to conclude then, that "[I]n spite of the comments and theories of the writers on the subject of recognition the simple truth is that it is governed by no rules whatever. In the absence of a supranational state exercising supreme authority the act of recognition is political in nature and the prerogative of an independent sovereign state."⁷

¹ J. Dugard, "Recognition and the United Nations", Hersch Lauterpacht memorial Lectures, Cambridge, Grotius Publications Limited, 1987, p. 53 - 54

² 1948 I.C.J. Reports, 63

³ Ibid.

⁴ Ibid., p. 55 - 56

⁵ Ibid.

⁶ 1948 I.C.J. Report, 65

⁷ Ph. Marshall Brown, "The Recognition of Israel", the American Journal of International Law, Vol. 42, No. 3 (Jul., 1948), pp. 620 - 627

While at the time of the original membership, the United Nations could also agree to bring Ukraine and Byelorussia as members of the United Nations even though they were formally constituent units of the Soviet Union,¹ the prevailing dilemma remains how to reconcile demands for statehood more than a half a century after the founding of the United Nations? The ICJ Advisory Opinion of 1948 did not favor the plea of the Soviet Union to include all sixteen constituent republics individually and hence held that: "a Member of the Organization, cannot, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the addition condition that other States be admitted to membership in the United Nations together with that State."² The Charter, originally drafted to secure lasting international peace and security, seems to have not anticipated, and therefore could not address fully the situations of putative emergence of new states that were the result of the end of the Cold War and the breaking up of socialist fashion federations. The Charter did not anticipate such a situation and hence, it fails to address completely the question of statehood – the conceiving but also the dismemberment of an entity.

At the dawn of the United Nations era, there were also ideas and attempts to address the putative emergence of new states through a collective organ of the international community, rather than leave it in the sphere of discretionary policies of individual states. At the Dumbarton Oaks Conference in 1945, Norway had even suggested that the United Nations is vested an exclusive authority by member states to grant recognition to new States, however that proposal gained little support.³ It follows from here that Lauterpacht was right to assert that, "To recognize a political community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition. In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfill that function in their capacity as organs of international law."⁴

Rosalyn Cohen submitted in 1961 with regards to admission in the United Nations that, "the political organs of the United Nations have completely ignored juridical criteria when they have been called upon to assess statehood, and that they have granted or withheld recognition of statehood solely on political grounds which have borne little relation to community interests."⁵

The quest to designate an international authority that would be vested with the power to grant international recognition to newly emerged states did not cease in time. On the contrary, the idea was seen by scholars as a way to de-politicize recognition and by transferring it into the collective responsibility of an international organization, also assume that recognizing a state would be an unbiased and objective process: "[M]any jurists who examine the vacillations of State practice on the law of recognition express the hope that some international agency will emerge to collectivize the recognition of States and thereby remove the arbitrary nature of the individual State's decision. However, although they acknowledge the United Nations as a potential 'international recognizer', they hesitate to accept that its standard admission procedure is in itself capable of fulfilling this role, and instead suggest the adoption of special procedures for this purpose."⁶ Unfortunately, it seems that political interests prevail when admission of new states to the United Nations is concerned and this makes the legal conditions secondary, if not irrelevant. This makes recognition a political rather than a legal principle in international law.

Since the idea of a designated collective international organization authorized to extend recognition gained little support among the members of the international community, the policy of granting individual recognitions by members of the

¹ Ibid., p. 53 -54, here Dugard explains the compromised solutions achieved at the Yalta and the San Francisco Conferences between the United States and the Soviet Union. The Soviets insisted that all sixteen constituent units of the Federation be admitted individually, to which quest the United States President Roosevelt had responded with the demand for all 48 American states to be admitted individually to the United Nations.

² 1948 I.C.J. Report, 65

³ See the United Nations Conference on International Organization, Amendments and Observations on the Dumbarton Oaks Proposals (Norway), 4 May 1945, available at: http://archive.org/stream/documentsoftheun008818mbp/documentsoftheun008818mbp_djvu.txt

⁴ Lauterpacht,

⁵ R. Cohen, "The Concept of Statehood in United Nations Practice", University of Pennsylvania Law Review, Vol. 109, No. 8 (Jun., 1961), pp.1127 -1171

⁶ Dugard, p.41

international organizations became a pretty much adopted model of dealing with the newly emerged entities. The case of Kosovo's recognition by the member states of the European Union is a typical example of this approach.

According to Dugard, "scholarly opinion on the question of the relationship between admission to the United Nations and the recognition of States is sharply divided and ranges from outright hostility to the very idea of collective recognition by the United Nations to the claim that admission is a modern form of recognition."¹ The founding principles of the United Nations were the prevention of new wars, the maintenance of international peace and security, the practice of tolerance and living together with one another as good neighbors, and the economic and social well – being as declared in the United Nations Charter. It follows from here that with regards to admission of news states, the United Nations should be guided by these noble principles and the commitment to world peace and mutual respect and understanding. The reluctance to extend admission to states that formally have met the criteria for statehood as prescribed by the Montevideo Declaration and the postponement of a decision without further due could easily impair the prospects for more peace and good neighborly relations.

CONCLUSION:

The recognition of Macedonia and Kosovo is an imperative for the European Union's enlargement and foreign policies. It is a mechanism that will contribute to lasting peace and security and basic postulates of international law and relations among nations. The longer the postponement, the greater the risk of the Union become a sponsor of lasting instability and frozen conflicts on its own soil. Therefore it is not in the interest of the community to maintain a status-quo position but on the contrary, it must become a stimulating tool to produce a more proactive policy of bringing these new countries to its community, thus ending unresolved disputes on the territory of geographical Europe.

¹ Dugard, p.43