STATE-BUILDING

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The Dilemma of International Recognition of States Emerged on the Right of Peoples to Self-Determination: The World After Yugoslavia

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The article discusses the process of international recognition of states emerged on the rights of peoples to self-determination, particularly, the issues of collision between political state practice and normative international law. This process is proposed to be viewed within three interconnected phases – the declaration of independence, international recognition and stateness process. The article represents a rendition of criteria enshrined in the Montevideo Convention on Rights and Duties of States, which takes into account the existence of legal and political factors of international recognition, as well as explains the reasons for longevity of the period between the declaration of independence and international recognition. The processes of recognition of the states emerged on the basis of self-determination are reviewed, analyzing a number of disputable cases starting from the opinion submitted by the Badinter Commission after the collapse of Yugoslavia.

Keywords
International recognition, right to self-determination, legal and political factor, non-recognized states.

Introduction

The highest rate of ethno-national claims was registered in the first half of the 1990s[1], but the studies affirm their "longevity": in 2009 18 countries in the world were still engaged in ethno – political conflicts for self – determination[2], and already in 2016 "Freedom in the World"

[1] **Gurr T., Marshall M.,** Peace and Conflict 2005: A global Survey of Armed Conflicts, Self-Determination Movements, and Democracy, College Park: Department of Government and Politics: Univ. of Maryland, 2005, p. 99, http://www.cidcm.umd.edu/publications/papers/peace_and_conflict_2005.pdf, (17.08.2016).

[2] **Marshall M., Cole B.,** Global report 2009: Conflict, Governance, and State Fragility, Center for Systemic Peace and Center for Global Policy, George Mason University, 2009, p. 40, http://www.systemicpeace.org/Global%20Report%202009.pdf, (17.08.2016).

report – annually represented by "Freedom House"[3] – outlines 2 related and 13 disputed territories[4], to which we should add also the Republic of Kosovo, which has yet gained only partial recognition. However, the problem is, of course, not only driven by numerical data, but has fundamental reasons, as we can assume that the development trends of modern geopolitical system objectively contribute to the emergence of new states. According to Lloyd Cox, neoliberal globalization increases the chances of states emerged on self-determination principle for four main reasons:

- The relative reduction of some state powers, which first of all relates to weak and fragile political units. The new conditions made it significantly difficult for these countries to maintain the legitimacy, governance and administration effectiveness, economic functionality, to control the cultural diversity and shape national identity, to preserve the monopoly of legitimate use of physical force, as well to confront the external threats and sanctions.
- Following the collapse of the bipolar world order, the changed "conditions" gave some states a chance to support some secessionist movements.
- The rise of local, national and regional nationalist movements – determined by the differentiated perception of the globalization process, which refers first of all those entities, where ethnic politics is exclusively carried out.
- The opportunities of usage of technical and cultural products of globalization era (satellite and fiber – optic communication, internet, etc.) as a means of revival of nationalist movements[5].

The profound changes taking place in the world have resulted in power deterritorialization. State boundaries are no longer coinciding with

[3] Freedom in the World, https://freedomhouse.org/report/freedom-world/freedom-world-2016, (17.08.2016).
[4] Freedom in the World 2016, https://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf, p. 24, (17.08.2016).
[5] **Cox L.,** Neo-Liberal Globalisation, Nationalism, and Changed «Conditions for Possibility» for Ceseccionist Mobilization, On the Way to Statehood: Secession and Globalization, A. Pavković, P. Radan (eds.), Ashgate, Aldershot, 2008, p. 17.

the boundaries of government's power, and government stops being the only decision-maker in economic, political and cultural spheres. In the afore-named spheres they are competing with financial capital and transnational corporations: decision-making process is affected by media magnates, international non-profit, political and terrorist organizations, with which a number of states – being fragile – simply cannot compete.

The rapid development of the international law since the second half of the previous century, in particular, the full codification and multiple application of right of peoples to self-determination especially in the afore-mentioned prolific circumstances became stimulus for the declaration of new states. The experience of state establishment and development shows that the declaration of independence and international recognition do not automatically lead to security, prosperity and ensuring of natural development. Moreover, current situations and development tracks strictly diverse in states, which makes it even more difficult to improve the complex and at the same time fragile system such like states, and it is quite natural that during the last decades the rapid growth of scientific researches, aim to the creation of models, indexes and methods of productivity or stateness assessment of state activity, have been detected. The aim of the afore-named researches is not only to assess the situation, but also to discover the existing causes of shortcomings and to provide an objective basis for the solutions of the above mentioned problems. The problem is more complicated for newly emerged, but yet not recognized states, as there exist additional difficulties for stateness (particularly, conditioned by stringent limitation of international relations).

Of particular complexity are the studies on stateness and recognition, as well as the studies on their interconnection. State recognition, i.e. recognition of legal personality, obviously is a new important opportunity for development and sustainability, but the study of existence or absence of opposite effect is of notional importance. Therewith, the international recognition of states emerged on the right of peoples to self-determination occurs only decades ago. Not only it shakes the faith in the efficiency of international law and UN activities and becomes a serious hindrance for the development of newly established states, but also, because of the latter, does not allow eliminating the

tension in the regions and the suffering of the people living there – questioning the rectitude of the objectives enshrined in UN Charter. It is therefore crucial to find out the reasons behind such disruption between legitimate self-determination and the international recognition of a state emerged on right of peoples to self-determination And another resultant question: does it have to do anything with the fact that the non-recognized state is yet not sustainable? Or, as the recognition is the adoption of legal personality and its features are enshrined in the Montevideo Convention on Rights and Duties of States[6], then maybe the issue of compliance to these features conditions the longevity of decades between the processes of declaration of independence and international recognition. The answers to these questions need to be sought within the context of collision between legal and political factors, as, if self-determination is a matter of employment of fundamental principle of international law: the right of peoples to self-determination, the international recognition (admission to UN) instead is a merely political process, which is manifested by voting imposing no criteria or conditions of UN member states. It is necessary to find out, whether the basis for such vote or the delay of the recognition process is solely the clash of states' interests, or, nevertheless, the norms defining self-determination are incompletely represented in international law or, as it is sometimes claimed, are uncertain.

Stages of Natural Evolution of States

The study of the complex and multi-vector political processes as stateness and international recognition (especially the study of their connection or the lack of it) should be implemented by a precise stepwise logics – as based on the fact that the natural evolution of each state should proceed with the following stages: declaration of independence, international recognition of the state (admission into UN) – as a mandatory condition for being a person of international law, and stateness process.

[6] Montevideo convention on the rights and duties of states, http://www.taiwandocuments.org/montevideo01.html, (23.06.2016).

Since the legitimate declaration of independence, as a rule, should be exercised within the international law, i.e. on the basis of right of peoples to self–determination, then the first stage of study should be the relevance of the process to these norms. Though it seems that there exist all the possibilities to undertake prompt decisions on international recognition, as the norms of self – determination comprehensively define all the legal basis for regulation[7].

The UN Charter defines the principle of self – determination of peoples as a basis for implementation and development of UN goals. Article 1.2 reads as follows: "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"[8], and Article 55 defines that "With a view to the creation of conditions of stability and well – being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"[9]. And it is also significant that Article 103 constitutes that for UN member states UN Charter prevails over other international agreements: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"[10].

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[7] **Torosyan T**., Resolution of Intractable Conflicts. *Iran and Caucasus,* 2013, **17**, 1, 120-129.

[8] UN Charter, Article 1.2, http://www.un.org/en/sections/un-charter/un-charter-full-text/, (17.08.2016).

[9] UN Charter, Article 55, http://www.un.org/en/sections/un-charter/un-charter-full-text/, (17.08.2016).

[10] UN Charter, Article 103, http://www.un.org/en/sections/un-charter/un-charter-full-text/, (17.08.2016).

The development of the concept of the right of peoples to self-determination continued in a number of resolutions adopted by the UN General Assembly, among which worthy of special remembrance are "637A (VII). The right of peoples and nations to self – determination[11]" adopted on 20 December 1952, "1514 (XV). Declaration on the granting of independence to colonial countries and peoples[12]" adopted on 14 December 1690 and "1541 (XV). Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter[13]" adopted on 15 December 1960. Principle VI of the latter defines that: "A Non-Self Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State", which, in fact, served as a basis and found its further development in "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" adopted in 1970. UN General Assembly has adopted in different years a series of resolutions under the same title: "Universal realization of the right of peoples to self-determination" – every time reaffirming "that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such right"[14].

[11] 637A (VII). The right of peoples and nations to self-determination, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/079/80/IMG/NR007980.pdf?OpenElement, (20.08.2016).

[12] 1514 (XV). Declaration on the granting of independence to colonial countries and peoples, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1514(XV), (20.08.2016).

[13] 1541 (XV). Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1541(XV), (20.08.2016).

[14] Universal realization of the right of peoples to self-determination, http://www.un.org/documents/ga/res/51/ares51-84.htm, (20.08.2016).

The next UN basic document representing the right of peoples to self-determination is the International Bill of Human Rights[15] – consisting of Universal Declaration of Human Rights[16] (10 December 1948), International Covenant on Civil and Political Rights[17] (16 December 1966) and International Covenant on Economic, Social and Cultural Rights[18] (16 December 1966). The last two documents in their Article 1 enshrine "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". So, it is noteworthy that neither the Charter, nor the covenants do not define any restriction or redundancy of that right.

And of particular importance is the Declaration on Principles of International Law concerning Friendly Relations and Co–operation among States in accordance with the Charter of the United Nations[19] adopted on 24 December 1970, which has a codifying character and defines equal rights and self-determination of peoples as a principle of international law – stating that self-determination refers to all peoples and its implementation is required by the UN Charter: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter". It is also important that the Declaration defines not only the possible forms of implementation of self – determination right, but also

[15]International Bill of Human Rights, Fact Sheet No.2 (Rev.1), http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf, (20.08.2016).

[16] Universal Declaration of Human Rights, http://www.un.org/en/universal-declaration-human-rights/, (20.08.2016).

[17]International Covenant on Civil and Political Rights, https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf, (20.08.2016).

[18] International Covenant on Economic, Social and Cultural Rights, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en, (20.08.2016).

[19] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, http://www.un-documents.net/a25r2625.htm, (20.08.2016).

the mechanism: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self – determination by that people".

The Final Act of the Conference on Security and Co-operation in Europe[20] signed in Helsinki on 1 August 1970 defines 10 principles regulating relations between member states - including the right of equal rights and self-determination of peoples. Strikingly this document frequently becomes a source of diverse political maneuvers, particularly related to the supremacy of the principle of territorial integrity of states. But Helsinki Final Act itself specifies that "The participating States, declare their determination to respect and put into practice, each of them in its relations with all other participating States, irrespective of their political, economic or social systems as well as of their size, geographical location or level of economic development, ***the following principles, which all are of primary significance***, guiding their mutual relations", i.e. the principles do not have any supremacy over one another. And in the lights of the fact that the two principles regulate issues addressing entirely different areas (self – determination – issues concerning peoples, territorial integrity – issues concerning states), then any debates and discussions on any type of "competition" or "supremacy" become fairly obscure. It is also noteworthy that the territorial integrity of states is not included separately among the 7 principles Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, but is a part of the principle of "Territorial integrity of States" – enlisting it as one of the elements of interstate relations.

Consequently, the international law clearly and exhaustively defines all legal bases for the implementation subject, forms and mechanisms of self–determination right. So, the latter is evident, as in the case of legitimate implementation of self-determination right, when the people, who apply it, can freely express one of the above – mentioned ways, such as proclamation of independence, any legal obstacle or

[20] Helsinki Final Act, http://www.osce.org/helsinki-final-act?download=true, (20.08.2016).

uncertainty can not be found to deny it. Nevertheless, there are certain circumstances that can delay the recognition process, e.g. when "mother' state does not recognize the sovereign state, which got independent from it. Particularly, in order to gain an exhaustive opinion on the legal grounds for independence, the "mother" state may apply to the UN General Assembly, so the latter can claim for the International Court of Justice (ICJ) expert opinion on the compliance of that particular self-determination act with international law. In the last four decades ICJ has provided an exhaustive expertise on any case of self-determination, which the UN General Assembly has requested such an opinion for. As a rule, ICJ forms the opinion within a period of about two years. Though it has advisory significance, it is still considered to be a full and exhaustive legal assessment on the issue[21]. Nevertheless, even after the publication of the ICJ opinion, the international recognition of the state proclaiming independence on the basis of the right of peoples to self–determination may last for decades. Why?

International Recognition: Legal or Political Issue?

The search for a definition of international recognition gets bogged down almost immediately in a long – running debate that deeply divides the international legal scene: is recognition an essential requirement for statehood – the constitutive school – or rather a confirmation of a pre-existing factual situation – the declaratory school? Before examining State practice on the matter, it is necessary to refer again to the underlying conflict over the nature of recognition. A further effect of nineteenth-century practice has been to focus attention more or less exclusively on the act of recognition itself, and its legal effects, rather than on the problem of the elaboration of rules determining the status, competence and so on of the various territorial governmental units. To some extent this was inevitable, as long as the constitutive position retained its influence, for a corollary of that position was that there could be no such rules[22].

[21] Adopting consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue. http://www.un.org/press/en/2010/ga10980.doc.htm, (20.08.2016).

[22] **Crawford J.,** The Creation of States in International Law, Oxford University Press, Oxford, 2nd edition, 2006, p. 19.

According to the declaratory school, statehood is fully determined by a set of factual conditions: ***permanent population, a fixed territory, a government, and the ability to enter into relations with other states***. These criteria, which are commonly accepted to belong to customary international law, are listed in Article 1 of Montevideo Convention on Rights and Duties of States and are further elaborated in doctrine and jurisprudence[23]. In fact, the Montevideo Convention not only listed the requirements for statehood, but also referred to recognition of statehood, and in doing so drew attention to what is arguably the most complicated, and assuredly the most politicized aspect of statehood: recognition. At the same time it gives rise to several questions, such like what exactly is recognized: a state or a government; recognition *de jure* or *de facto* (i.e. the legality of a government, or its practical existence); what are the precise legal effects of recognition[24]. Under the declarative theory once an entity fulfils these criteria, it is a state *erga omnes*. Recognition is, in this theory, nothing more than an official confirmation of a factual situation – a retroactive act that traces back to the moment at which the factual criteria were fulfilled and the entity became a state. A formal recognition admittedly has some practical consequences as to the relations between the recognizing and the recognized state, yet it is not a necessary element of statehood[25].

The so – called rival theory is the constitutive theory, which posits, in a nutshell, that since the community of states is essentially a political community, membership is dependent on acceptance by the existing members. In this view, recognition is vital: even if all four requirements are royally met, an entity that is not recognized will have a hard time existing, as Biafra found out to its dismay. In 1967 it proclaimed independence after a bloody war of secession with Nigeria only to discover that it did not meet with recognition from more than a handful of states – and within three years after proclaiming independence, Biafra became part of Nigeria again[26]. So according to this theory, an entity becomes a state only when it is recognized as such.

[23] **Ryngaert C., Sobrie S.,** Op. cit.
[24] **Klabbers J.,** Op. cit., p. 72-73.
[25] **Ryngaert C.,** Sobrie S., Op. cit.
[26] **Klabbers J.,** Op. cit., p. 73.

Recognition is therefore a *conditio sine qua non* for statehood. This theory is supported by the traditional positivist conception of international law as a consensual *jus gentium voluntarium*: an entity can only develop into a state with the agreement of other states. As a practical side effect, the difficult and complex question of statehood is reduced to the more pragmatic question of whether the entity has been recognized by other states. As is well known, the constitutive theory has some serious drawbacks, especially when an entity has been recognized only by part of the community of states, like the example with Biafra. At a very concrete level, questions arise as to how many recognizing states are needed before an entity 'transforms' into a state and whether the decision to recognize should be based on facts, norms, geopolitical considerations, or a combination of factors. At a more fundamental level, the theory leads to the somewhat counterintuitive conclusion that statehood is a relative, rather than an absolute concept[27].

In current doctrine and jurisprudence, the declaratory theory is the dominant theory. An important aspect of its success lies in the fact that it deprives states of the prerogative of deciding on statehood based on political arbitrariness, in favor of objective legal norms. And yet, this theory has its own discontents. First of all, it is often pointed out that non-recognized entities have no international legal personality and thus cannot be considered to be a state, even if they meet all the requirements outlined above. Another problem is that the theory does not look at the way the entity has acquired the necessary requirements, as a result of which states can come into being through grave violations of international law. State practice responds to such events by not granting recognition to these entities – a sanction that cannot be fitted into the pure declaratory theory. More fundamentally, the problem seems to be reducible to the basic declaratory assumption that an entity can have the legal qualification 'state' as such. This idea of 'statehood as a fact' seems to confuse facts with law – *ex factis jus non oritur*[28]. Moreover, the one thing that is clear that recognition is, essentially, a political act: the legal criteria offer some guidance (and few entities are recognized without scoring at least reasonably well on some of the requirements), but that

[27] **Ryngaert C., Sobrie S.,** Op. cit.
[28] Ibid.

decisions on whether to recognize or not are eminently political decisions, predominantly guided by political motivations[29].

The wide gap between the constitutive theory – in which recognition is fully normative – and its declaratory counterpart – in which recognition has no normative value at all – seems unbridgeable. Some authors propose a 'third way' to bridge this gap, in which recognition is neither merely constitutive nor merely declaratory. In this view, statehood is seen in terms of effectiveness, with recognition as a political act that strengthens the international effectiveness of an entity. As such, recognition is both constitutive – since it creates stately relations between the recognizing and the recognized state – and declaratory – since it does not, by itself, bestow statehood on the entity. However, instead of attempting to find a solution to this deadlock, one could question the practical relevance of this theoretical debate. Moreover, another interpretation can be proposed, which not only affirms the practical significance of the international law, but also discloses Montevideo Convention's significance as a linking document between the right of self-determination and recognition of self-determined state.

State recognition is indeed political process, as it is implemented through the UN member states' voting, which, in its turn, is not restricted by any condition. It may seem that as international law has set standards that all the states must meet, then the recognition of the state should be conditioned by the existence of these criteria. The afore-mentioned criteria is enshrined in the Montevideo Convention on Rights and Duties of States, the article 1 of which reads as follows: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states[30]. However, there are some circumstances that point to the fact that these requirements are the basis not only for recognition process, but also have another significance. It is not difficult to notice, that here the criteria for "government" is used not only in the sense of supreme governing body, but also in regard of their full functioning throughout the territory of the state, which is a hard

[29] **Klabbers J.,** Op. cit., p. 73.
[30] Montevideo convention on the rights and duties of states, http://www.taiwandocuments.org/montevideo01.html, (23.06.2013).

assessable criteria. The same holds true for the last criteria too, i.e. "capacity to enter into relations with the other states", especially for the non-recognized states, as, as a rule, the UN member states retrain from establishing formal relations with non-recognized states. Perhaps the only reasonable interpretation of the significance of this convention is that these criteria characterize the nature of the period between declaration of independence and international recognition, during which stable situation is ensured. The afore-mentioned is also affirmed by the fact that clarity of the first two is a necessary condition for the realization of right to self-determination – for the expression of will of people implementing their right to self-determining. Consequently, the connection of the four criteria enshrined in the Montevideo Convention with international recognition can be interpreted as follows: the state is recognized, if it has proclaimed its independence by a free expression of will of the permanent population (criteria a) living on a defined territory (criteria b), where the latter is fully governed by government (criteria c), which is capable to establish relations with the other states (criteria d). The last criterion is necessary, as the last chord of recognition – voting of UN member states for the admission of the candidate state, is possible only in the case of willingness of these states. This interpretation of the Convention eradicates the false contradiction of that document with the right to self-determination: at first glance it may seem that the criteria enshrined in the Convention put forward for the implementation of right to self-determination, whereas the latter has the highest status of international law norm and all the previously – mentioned documents do not impose any limitation for its implementation. The proposed interpretation indicates that there is no contradiction between these fundamental documents of international law. Moreover, the Montevideo Convention outlines the pathway, which leads from declaration of independence to recognition.

Modern state practice indeed offers a plethora of 'hard cases' that, in their entirety, cannot be fitted into either one of the legal theories, but are somehow accommodated by the international legal order. Israel offers an excellent example: it has all attributes of statehood, yet it is not recognized as a state by some Arabic states. These states, however, have held Israel responsible for violations of international law. Such a practice,

in which recognition is said to be normative without, however, blocking legal personality, cannot be explained fully by either the constitutive or the declaratory theory. This is not to say that state practice should be the only norm when dealing with issues such as state recognition. International law is built upon the delicate balancing act between holding onto normative principles, embedded in theoretical frameworks – without which international law would lose its status as 'law' – and adapting to ever-changing state practice – without which international law would lose its effectiveness and, eventually, its legitimacy. This is all the more true when it comes to state recognition, where political state practice and normative international law inevitably blend together[31]. To this end, a couple of cases will be considered hereinafter.

Analyses of International Recognition Cases

The collapse of USSR and Yugoslavia resulted not only in the increase of the number of ethno–political conflicts within, across and nearby Europe, but also in more aggravation of collapse between legal and political factors. The afore-named can be brightly manifested by some examples of state recognition processes all over the world.

European Community's reaction in the context of the dissolution of Yugoslavia marked the beginning of a fundamental evolution within international law in general and state recognition in particular, the results of which are still not fully crystallized – witness developments in Kosovo and Georgia. On 15 January 1992, the European Community, positively advised by the Badinter Commission[32], decided to recognize Slovenia and Croatia as new, independent states, which, in fact, made it clear that the promising new criteria could indeed be applied in a very flexible way. Croatia, for its part, did not have a stable government able to control the whole of its territory at that time. Therefore, the decision to grant recognition was clearly deviating from the traditional requirements,

[31] **Ryngaert C., Sobrie S.,** Op. cit.
[32] The Opinion of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples, http://www.thomasfleiner.ch/files/categories/IntensivkursII/Badinter_Badi.pdf, (03.09.2016).

particularly the ones enshrined in the Montevideo Convention. In addition, that same decision to recognize Croatia departed from one of the newly created norms as well, since the Badinter Commission had noted that the Croatian constitution did not fully meet the requirements on minority protection. The recognition of Bosnia and Herzegovina on 7 April 1992 shows the same free interpretation of the legal framework on state recognition. Bosnia and Herzegovina did not have an effective government able to control even a substantial part of its territory – something even its president had to admit by stating that his country could not protect its independence without foreign military aid. The bloody civil war that had resulted from this state of affairs furthermore did not provide an environment in which human rights were adequately protected. Whereas two of the three recognized republics did not fully meet the normative framework, either the traditional or the new one, Macedonia became the victim of an opposite phenomenon: even though the entity fulfilled all possible criteria, it was initially only recognized by a handful of states. Although the Badinter Commission had given positive advice on the matter, recognition was vetoed by Greece – a deadlock that was only broken in 1993[33].

In the aftermath of Yugoslavia's dissolution, a fierce debate has erupted over the effect of the European Community's recognition policy on the crisis in the Balkans. One glance at legal doctrine on the matter shows that the sudden creation of a completely new normative framework, together with the way in which state practice has interpreted these norms, has created a lot of confusion:

I. A first source of uncertainty is the concrete content and interpretation of the fundamental rights of international law, particularly of the right to self-determination. Recognition practice in Yugoslavia has shown that this right is no longer confined to colonial situations. The afore-named was conditioned by two circumstances: first – the process of formation of new states has been pushed out from the European-colonial context, second – the international law does not impose any restriction on

[33] **Ryngaert C., Sobrie S.,** Op. cit.

that process, whereas some representatives of number of states distort the process with their various renditions.

II. A second point of confusion that has arisen is the relationship between the new requirements and the traditional criteria. More specifically, the state practice mentioned above raises the question of the relevance of the Montevideo requirements as a limit on state discretion. Have the new criteria replaced the traditional requirements? Or do the new criteria merely add clarity to the traditional framework instead of replacing it?

III. A third and final issue touches upon the very foundations of international law and its uneasy relation to political discretion: to what extent can the criteria for state recognition still be considered to be normative rules (to ensure their measurability), when, apparently, these criteria can be readily set aside for the entity that should or should not be recognized, depending on the political situation? Therefore, it may seem that the new rules that the European Community has created are mainly, or even entirely, political criteria, notwithstanding the legal discourse and the interventions of the Badinter Commission[34]. The outcome of this evolution remained highly uncertain in the years following Yugoslavia's dissolution and it remained to be seen whether and how subsequent state practice would clear things up.

The symbolic beginning of the second phase of impetuous developments can be considered 17th of February 2008, when Kosovo declared its independence from Serbia. It marked the beginning of a year in which the international community would find itself faced with a series of very delicate cases with regard to state recognition. These events also provided an opportunity for state practice to bring some sort of order out of the chaos in which the norms on state recognition had found themselves since the dissolution of Yugoslavia, almost 20 years earlier.

After Kosovo declared its independence from Serbia, the UN General Assembly, at the behest of Serbia, requested the International Court of Justice to give an advisory opinion on the legality of this declaration under international law. Controversially, in its 22 June 2010

[34] **Craven M.,** The European Community Arbitration Commission in Yugoslavia, *British Yearbook of International Law*, 1996, 66, 333-413.

opinion, the International Court of Justice held this declaration to be not incompatible with UN Security Council Resolution 1244 (1999)[35], which established the UN Mission in Kosovo[36], with the Constitutional Framework for Kosovo (2001)[37], or with general international law. But, more importantly, the International Court of Justice kept silent about the consequences of the declaration of independence, including on the recognition of Kosovo. In fact, it is not impossible that the declaration itself is lawful (which it was, according to the Court), while the recognition of Kosovo as a state is unlawful. Indeed, with respect to Kosovo's purported right to secession, the Court stated that 'it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it'[38]. In any event, under the traditional model, as discussed above, international law only prohibits recognition as lawful of a situation created by a serious breach of an obligation arising under a peremptory norm of general international law[39]. It is open to doubt whether a secession amounts to a serious breach of norms of *jus cogens*. In fact, if one reads the International Court of Justice's Kosovo Opinion carefully, it is even open to doubt whether a secession is a breach of international law in the first place. According to the Court, 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'[40]. This seems to imply that a unilateral secession, which belongs to the sphere of

[35] UN Security Council Resolution 1244 (1999), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement, (05.09.2016).
[36] UNMIK (United Nations Interim Administration Mission in Kosovo, https://unmik.unmissions.org/, (05.09.2016).
[37] Constitutional Framework For Provisional Self-Government In Kosovo, http://www.assembly-kosova.org/common/docs/FrameworkPocket_ENG_Dec2002.pdf, (05.09.2016).
[38] Accordance with international law of the unilateral declaration of independence in respect of Kosovo, http://www.icj-cij.org/docket/files/141/16010.pdf, (05.09.2016).
[39] Responsibility of States for Internationally Wrongful Acts, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, (05.09.2016); Crawford J., Articles On Responsibility Of States For Internationally Wrongful Acts, http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf, (05.09.2016).
[40] Accordance with international law of the unilateral declaration of independence in respect of Kosovo, http://www.icj-cij.org/docket/files/141/16010.pdf, (05.09.2016).

intra-state relations (a sub-state entity separating from the mother state), does not violate the principle of territorial integrity. Either way, recognition of Kosovo would not be unlawful under international law, except, of course, if one believes that the presumably illegal use of force by NATO against Serbia in 1999 - without authorization of the UN Security Council[41], which led to the creation of a UN transitional administration and ultimately to the independence of Kosovo, has a bearing on the argument: such use of force might violate a norm of *jus cogens* and, arguendo, prohibit states from recognizing the ensuing situation, namely Kosovo's statehood. However, it is obvious, that in this case Kosovo hasn't been the one to use force, and whoever represents that argument need to prove, that NATO's action has affected the free expression of will of the Kosovo people. In practical terms, however, the law has taken a back seat in the process of recognizing Kosovo. To be true, upon learning of Kosovo's declaration of independence, the EU Council has noted 'that Member States will decide, in accordance with national practice and international law, on their relations with Kosovo'. In reality, 'national practice' – this is diplomatic parlance for political expediency – has sidelined the role of international law in the recognition process. This made a uniform EU recognition practice a non-starter. An exhaustive and elaborate normative framework, as used by the European Community to deal with the dissolution of Yugoslavia a decade ago, was nowhere to be seen. When browsing through the international reactions to Kosovo's declaration of independence, both European and non-European, the scarcity of references to international law is striking. References are often limited to a mere mentioning of 'international law', 'the rule of law', or a vague reference to the right to self–determination or the protection of minorities. States that recognized Kosovo have almost invariably justified their decision to grant recognition – if such a

[41] See Nato Action Against Serbian Military Targets Prompts Divergent Views As Security Council Holds Urgent Meeting On Situation In Kosovo, http://www.un.org/press/en/1999/19990324.sc6657.html, (08.09.2016); Roberts A., NATO's 'Humanitarian War' over Kosovo, The International Institute for Strategic Studies, *Survival*, vol. 41, no. 3, 1999, 102-123; Simma B., NATO, the UN and the Use of Force: Legal Aspects, *European Journal of International Law*, 10 (1), 1999, 1-22; Wippman D., Kosovo and the Limits of International Law, Fordham *International Law Journal*, Volume 25, Issue 1, 2001, 129-150.

justification was given at all – by referring to political considerations, most notably the need for stability, peace, and security in the region, and the positive effect recognition would have on these parameters. Conspicuously, however, states that refused to grant recognition relied to a much greater extent, and in much greater detail, on international law in their line of reasoning. More specifically, the notions of state sovereignty and territorial integrity – core principles of the Westphalian legal order – were often mentioned as reasons not to recognize Kosovo. Nonetheless, international law quite probably does not prohibit the recognition of a secession, since a secession does not rise to the level of a violation of a peremptory norm of international law. Therefore, the main reason for non-recognition is not so much situated in the sphere of international law as in the sphere of domestic politics, especially taking into account that a substantial number of these states have to deal with minorities and secessionist claims themselves. They were indeed quick to point out the dangers of a precedent-setting recognition of a breakaway region such as Kosovo for international and domestic stability[42].

Several recognizing states acknowledged this danger and explicitly stressed the 'unique character' of Kosovo in their declarations of recognition, anxious to refute the claim that a dangerous precedent was being set. Obviously, this emphasis on the *sui generis* character of the recognition of Kosovo diminishes the international–law relevance of such a recognition. In an awkward statement of 18 February 2008, the Council of the European Union, for instance, stressed the fundamental importance of the international principles of sovereignty and territorial integrity, while at the same time arguing that these principles would not fully apply to the *sui generis* case of Kosovo: The Council reiterates the EU's adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions[43]. Obviously, though references are made to legal norms, the statement is

[42] **Ryngaert C., Sobrie S.,** Op. cit.
[43] **Ryngaert C., Sobrie S.,** Op. cit.

purely political, as there are no legal justifications for the *sui generis* character. Moreover, ICJ opinion on Kosovo does not include any formulation regarding the uniqueness of the case.

The events in Kosovo made it painfully clear that the international community of states was seriously divided on the issue of state recognition and that international law played only a minor role in the process of recognition. Though we should not underestimate the legal aspect of the issue. Suffice to note, that though more than hundreds of states have recognized Kosovo's independence by establishing bilateral relations, the majority of UN member states highlighted the legal aspect by voting in favor of the request of ICJ opinion on the case.

This uneasy state of affairs was emphasized again by the events in Georgia, only a few months later. Once again, the right to self-determination was used in a non – colonial context and was seen as the basis for South Ossetia's and Abkhazia's remedial secession claims. The right to remedial secession – that is, a secession that derives its lawfulness from the illegitimate character of the governing regime – is arguably codified in the Friendly Relations Declaration[44], which, in the International Court of Justice's view, constitutes customary international law. This document, however, also stresses the principles of sovereignty and territorial integrity, which the non-recognizing states readily relied on to condemn Russia's recognition. This position was shared by NATO – an attitude that Russia regarded to be 'a politically motivated, selective interpretation of international law, based on double standards', in view of NATO's earlier involvement in Kosovo[45]. At the same time, the double-standards criticism can apply with equal force to Russia, which refused to recognize Kosovo, but just a few months later recognized South Ossetia and Abkhazia. Ultimately, whether or not the circumstances of a given case warrant remedial secession and, in particular, whether or not a regime is legitimate and sufficiently protective of minority rights are in the eye of the beholder. Accordingly, the vagueness of the applicable

[44] 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, http://www.un-documents.net/a25r2625.htm, (08.09.2016).

[45] **Weitz R.,** Global Security Watch – Russia: A Reference Handbook, Praeger Security International, Santa Barbara, Calif, 2010, pp. 150-157.

legal standard serves all protagonists well to claim the moral high ground and, as the case may be, to vindicate or reject the lawfulness of the secession and their subsequent (non–)recognition[46].

As in the Kosovo crisis, legal discourse on the recognition of South Ossetia and Abkhazia could be reduced to playing off the right to self-determination against the principle of territorial integrity. This account exposes once more the fundamental uncertainty on the role, content, and scope of the legal norms on state recognition. It should be noted, however, that the final report of the Independent International Fact-Finding Commission does contain a rather elaborate legal argumentation in which both traditional and post-Yugoslavian criteria are used to evaluate whether or not the entities should be recognized. Unfortunately, this nuanced legal discourse was not taken up by the community of states, much unlike the impact that the Badinter Commission had on the state and institutional discourse and practice during the dissolution of Yugoslavia. An important reason for this might be the fact that the report of the Fact-Finding Commission was only published almost a year after the events in Georgia took place[47]. The developments in Yugoslavia, Kosovo, and Georgia have put an end to a period during which state practice on recognition was relatively consistent and united. As a direct consequence, there is a growing uncertainty as to which norms regulate state recognition nowadays. If international law wants to maintain its credibility and its role as a stabilizer of international relations, it needs to adapt itself to these recent developments, without, however, abandoning its normative aspirations[48]. Recent state practice shows that the international state community currently finds itself confronted with the very same uncertainties.

Another case, but already more successful one of international recognition is South Sudan, which seceded from Sudan in 2011, was a more or less autonomous part of Sudan, but two horrendous civil wars suggested that there was 'little love lost' between the central government in Khartoum and the people of South Sudan. A referendum about secession took place in early 2011; 98,83 percent of the electorate voted

[46] **Ryngaert C., Sobrie S.,** Op. cit.
[47] **Ryngaert C., Sobrie S.,** Op. cit.
[48] **Crawford J.,** The Creation of States …, Op. cit, p. 98.

for independence[49], and independence was declared on 9 July 2011. Just a few days later – on 14 July South Sudan was admitted into the UN[50], and had been recognized already by 130 UN member and 7 non-member states. The first of these, importantly, was Sudan, which thereby signified that the secession of South Sudan occurred with Sudanese consent. Whereas, neither Kosovo, nor Abkhazia and South Ossetia haven't been recognized by Serbia[51] and Georgia[52] respectively. Recognition of Sudan was quickly followed by that of regional power Egypt and by Germany – at that time the president of the UN Security Council. Other major powers (China, the USA, Russia) followed suit, thereby indicating that in the eyes of the global powers, South Sudanese statehood was not against their state interests and therefore was acceptable[53].

South Sudan case gave rise to a new round of debates, especially while comparing the international community's prompt acceptance of South Sudan into the UN with the heated controversies surrounding Palestine's bid for statehood – raising very interesting questions. So, on the one hand, South Sudan is a region plagued with extreme infra-structural and economic underdevelopment, an unstable government,

[49] Results of the Referendum of Southern Sudan, http://southernsudan2011.com/, (09.09.2016).
[50] UN welcomes South Sudan as 193rd state, http://www.un.org/apps/news/story.asp?NewsID=39034#.WADJ--V97IU, ((08.09.2016).
[51] "Resolution of the National Assembly of the Republic of Serbia on Basic Principles for Political Talks with Interim Institutions of Self-Government in Kosovo-Metohija" defines six basic principles for political talks with Priština, the first of which is "The Republic of Serbia, in accordance with international law, the Constitution and the will of the citizens, does not recognize and will never recognize Kosovo's unilateral declaration of independence" see Resolution of the National Assembly of the Republic of Serbia on Basic Principles for Political Talks with Interim Institutions of Self-Government in Kosovo-Metohija, https://www.ceas-serbia.org/images/Resolution_on_the_basic_principles_for_political_talks_with_the_Provisional_Institutions_of_Self-Government_in_Kosovo.pdf, (09.09.2016); **Armakolas A., Maksimovic M.,** Serbia's Resolution on Kosovo and Metohija & the Belgrade-Priština dialogue: Is there a solution after the Resolution?, ELIAMEP Briefing Notes, Hellenic Foundation for European and Foreign Policy (ELIAMEP), Issue 9, 2013.
[52] Abkhazia, S. Ossetia Formally Declared Occupied Territory, Civil Georgia, http://www.civil.ge/eng/article.php?id=19330, (09.09.2016); South Ossetia is not Kosovo, The Economist, http://www.economist.com/node/12009678, (09.09.2016).
[53] **Klabbers J.,** Op. cit., p. 75.

inadequate service delivery, an literacy rate of 44.35%[54], and exorbitant levels of child malnutrition and infant mortality[55]. More than half of the population lives below the poverty line and violent strife among the various tribal groups, especially the dominant Dinka, Nuer and Shilluk, is pervasive. Indeed, far from securing peace, secession has intensified the animosities among South Sudan's many ethnic populations and has thus increased instability within the region[56]. Needless to say, the country lacks a tradition of democratic rule and avenues for political contestation are quite weak[57]. On the other hand, some partly recognized states, such as State of Palestine[58] and Republic of Kosovo, or – what is the paradox - some non-recognized states, among which especially Nagorno-Karabakh Republic, are in a way better shape than South Sudan. In light of these assessments, it is natural to ask why South Sudan can be recognized as a state while Palestine, Kosovo or NKR cannot. Admittedly, South Sudan seceded from North Sudan with the latter's consent (after nearly four decades of civil war), whereas Palestine, Kosovo and NKR have not reached such an agreement with Israel, Serbia and Azerbaijan respectively. The same holds true for the other internationally recognized states emerged on the principle of people's right to self-determination – the State of Eritrea (internationally recognized in 1993[59]) and the

[54] UNESCO data center: Literacy rate, South Sudan 2015, http://data.uis.unesco.org/Index.aspx?queryid=166, (09.09.2016).

[55] Levels & Trends in Child Mortality, Report 2015: Estimates Developed by the UN Inter-agency Group for Child Mortality Estimation, United Nations Children's Fund, p. 24, http://www.childmortality.org/files_v20/download/IGME%20report%202015%20child%20mortality%20final.pdf, (09.09.2016).

[56] **Manby B.,** The Right to a Nationality and the Secession of South Sudan: A Commentary on the Impact of the New Laws, Open Society Initiative for Eastern Africa, 2012.

[57] Freedom in the World 2016: South Sudan, https://freedomhouse.org/report/freedom-world/2016/south-sudan, (09.09.2016); Fragile States Index 2016: South Sudan, http://fsi.fundforpeace.org/2016-southsudan, (09.09.2016).

[58] Strangled: Gaza collapsing in the grip of a humanitarian crisis, Euro-Med Monitor for Human Rights, May 2015, http://euromedmonitor.org/uploads/reports/Strangled_En.pdf, (11.09.2016);

[59] Admission of Eritrea to membership in the United Nations, http://dag.un.org/handle/11176/193150, (11.09.2016), UN Security Council

Democratic Republic of Timor Leste (internationally recognized in 2002[60]), which gained recognition from their "mother states" – Ethiopia and Indonesia, but, like in South Sudan, the governance efficiency and sustainability level is mildly saying not in the best shape. However, the role of "mother" states in this case is ambiguous, as the afore-listed states have given their "agreement" only under international community's harsh pressure. E.g., Indonesia "granted" recognition to East Timor only after the UN threatened to proclaim Indonesia as a state committed genocide in East Timor. Therewith, the vital point is that the fundamental documents of international law affirm as a basis for implementation of right to self-determination only the free expression of will of the people. Consequently, no state, including "mother" state has no right to doubt the implementation of that fundamental right of international law – the declaration of independent state, and consequently – its recognition.

Conclusion

The study of the recognition processes of states emerged on the right of peoples to self-determination testifies, that the natural evolution of each state should proceed with the following stages: declaration of independence, international recognition of the state (admission into UN) – as a mandatory condition for international legal personality, and stateness process. The most durable and complicated one is, indeed, the recognition process, as the new emerged state with stringent limitation of international relations should be able to get support from the other states.

The main complication of this process can be found in the collision between legal and political factors – since the second stage. Meanwhile, as international law comprehensively represents the scope

Resolution 828 (1993), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/828(1993), (11.09.2016).

[60] UN General Assembly Resolution 57/3 (2002): Admission of the Democratic Republic of Timor-Leste to membership in the United Nations, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNMembers%20ARES573.pdf, (11.09.2016); Unanimous Assembly Decision Makes Timor-Leste 191st United Nations Member State, http://www.un.org/press/en/2002/ga10069.doc.htm, (11.09.2016).

(referring to all the peoples), the status (compulsory and mandatory norm of international law, the content (determination of political status) and the mechanisms of implementation (the free association or integration with an independent state or the emergence into any other political status freely determined by people) of the right of peoples to self–determination, then in each case, when the declaration of independence would be in line with the international law, the recognition process should not be long–lasting. The UN Charter enshrines, that one of the main obligations of member states is the respect for the right to self-determination and the establishment of friendly relations. Even arbitrary (political) voting does not free the member states from the fulfillment of the obligations undertaken when joining the UN.

However, some states and sometimes even some researchers try to avoid the afore-mentioned fact. Consequently, the requirement of extremely limited interpretation of the right of peoples to self-determination is explicitly accompanied by the typical rules of the "awakening of security threatening factors" propaganda – the fragile peace would be at risk, humanity would be deprived of the normal and sustainable development, etc. Whereas, it is the prolonged for decades solution to the issue that retains tension and the war resumption threat in the region – essentially limiting the possibilities of development of legitimately self – determined people and newly emerged states. As conditioned by stringent limitation of any type of international relations, these states in an indeed cumbersome plight launch their processes of state-building and stateness alongside with the "ideal" pack of challenges: reconstruction and rehabilitation of the whole country after the military phase, worldwide deepening of the globalization process, and in the case of the countries of Post-Soviet space the pack accrues with the process of Post-Soviet transformation. Such approach would definitely not help to fight against security threats and destabilization, which is vital not only for the non-recognized state, but also for fostering regional and international peace and security. So, these states long for guidance and assistance – not manipulation games.

The reference to the Montevideo Convention – as a condition for state recognition, in addition to the norms of self-determination, is derived from the proposed interpretation of the Convention. The linkage

of four requirements enshrined in the Montevideo Convention on Rights and Duties of States with the recognition of state independence is as follows: the state is recognized, if it has proclaimed its independence by a free expression of will of the permanent population (criteria a) living on a defined territory (criteria b), where the latter is fully governed by government (criteria c), which is capable to establish relations with the other states (criteria d). The last criterion is necessary, as the last chord of recognition – voting of UN member states for the admission of the candidate state, is possible only in the case of willingness of these states. However, it should be taken into account, that the afore-mentioned is restricted by the obligations enshrined in the UN Charter. The proposed interpretation indicates that there is no contradiction between these fundamental documents of the international law. Moreover, the Montevideo Convention outlines the pathway, which leads from decla ration of independence to recognition.