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EU and the Recognition of New States

Jessica Almqvist
Universidad Autónoma de Madrid

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SOVEREIGNTY & SELF-DETERMINATION



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About the author

Jessica Almqvist is Associate Professor of Public International Law at Universidad Autónoma de Madrid.

Emails: jessica.almqvist@uam.es

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Abstract

The collapse of the Soviet Union and the Yugoslav conflict at the beginning of the nineties unleashed multiple demands for self-determination and political independence, forcing EU states to react. Since then new demands, both within and outside the EU, have continued to proliferate prompting the need to address and respond to these dynamics in a more principled manner while allowing flexibility in every case. A critical question for EU states is whether or not to support the aspirations of more recent movements to become states through recognition acts and if so, why. As will be argued in this study, although that issue has required attention by European policy-makers for nearly thirty years, a fully satisfactory approach is still lacking. The dominance of security-driven approaches and pragmatic reasoning on recognition is difficult to sustain not least in relation to pressure for secession within the EU. A sound approach must take into account how policy-making in this area may affect peace and security and also how to safeguard the rule of law and respect for human rights.

Keywords: Recognition of new states, EU policy, pragmatism, Self-determination, rule of law, human rights.

EU and the Recognition of New States

1. Introduction

In the context of the more than sixty years-long history of integration towards an ever-closer Union, the European heritage of colonialism, nationalism, and suppression of minorities continue to generate claims for recognition, respect, and even political independence for collective identities in an effort to “freely pursue their economic, social, and cultural development” in a globalized world.¹ A critical question that crops up in relation to contemporary secessionist movements both within and outside the EU is whether or not to accept their demands to be recognized and treated as states. Notwithstanding the attempt to advance an ad hoc approach to non-colonial cases in European policy-making on matters of recognition, the way the EU and its members tackle different demands for self-determination and political independence will influence the development and consolidation of principles of governance of territories and populations in globalized settings. What are, then, the main considerations that should inform European decisions, whether taken unilaterally or collectively, regarding recognition of new states in these settings?

The present study explores the origins, characteristics, and implications of current trends in Europe on the advancement of sound policies regarding recognition of new states. It defines the approach that has come to govern in recent years as traceable to the European reactions to the demands for self-determination and political independence set forth in the wake of the collapse of the Soviet Union and the Yugoslav conflict. The method that has come to dominate since that time places security and peace at the centre of European decision-making on questions related to recognition. As will be argued, this preference is reasonable in the light of the moral uncertainty about the rights of contemporary secessionist movements and non-colonial peoples more generally to achieve statehood. Furthermore, to the extent that demands for political independence do tend to affect peace and security, whether as drivers of conflicts or as conflict-resolution tools, a security-oriented focus is both sensible and logical.

At the same time, and as will also be suggested, the approach in its current formulation is not fully satisfactory. Insofar as third states tend to differ in their perceptions on

¹ Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966).

what is required by peace and security, it fails to temper disagreements on when and why recognition in any given case is needed and hence is prone to produce unfortunate situations of contested statehood. Moreover, given the absence of international procedure to settle claims for statehood, there is no guarantee that apparently similar cases will be treated alike. For this reason, the present outlook is counterproductive to the furtherance of respect for the rule of law in international relations. Finally, in its current formulation, it fails to pay consistent and sufficient attention to the complex impact of state-formation processes on basic principles of international law, including human rights. These considerations are the upshot to the argument set forth at the end of this study about the need for a more principled approach to recognition that takes respect for human rights and the rule of law seriously.

2. The origins of security-based approaches to recognition

The collapse of the Soviet Union and the Yugoslav conflict at the beginning of the nineties unleashed multiple demands for self-determination and political independence, forcing EU states to react. The basic international instruments endorsing the right to self-determination of peoples as a legal right—most importantly, the UN Charter of 1945 and the two human rights covenants of 1966—were of no avail. The general understanding was that this right had been formulated as an entitlement to statehood for the benefit of populations whose territories had been colonized without any consideration of non-colonial cases. Except for the Baltic states whose sovereign rights were seen as being restored following fifty years of illegal occupation, a deeply wrongful act under international law, the remaining twelve Soviet republics and the six Yugoslav republics demanding self-determination lacked solid international legal foundations for their claims.² Instead, their moves were seen as *de facto* processes that had been provoked by a political crisis at the centre of the Soviet Union and the violent disintegration of Yugoslavia, and thus as evolving in the margins of international law.³

² Antonio Cassese, *Self-determination of Peoples. A Legal Reappraisal*, Cambridge University Press, 1995, pp. 260-264. Lithuania declared independence on 11 March 1990, affirming the restoration of the pre-1940 independent Lithuanian state. Latvia and Estonia issued more cautious independence declarations. Instead of unilaterally declaring independence, the constitutional authorities of these states passed legislation that initiated a gradual process of secession from the Soviet Union (260).

³ *Ibid.* p. 264. The Soviet republics are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. The six Yugoslav republics are Slovenia, Slovakia, Croatia, Bosnia-Herzegovina, Macedonia, and Yugoslavia (Serbia and Montenegro). Unlike the Soviet constitution, the Yugoslav constitution did not uphold the right to self-determination of peoples.

The interpretation of the international law in force did not settle the question whether the outbreak republics should be recognized as new states and, if so, on what basis. Rather than dwelling on the absence of clear legal foundations for the post-colonial developments, European policy-making in this area came to be governed by pragmatic considerations with a focus on peace and security concerns. Quite radically, the general thrust was that these goals were more likely to be achieved if the state-creation processes that were unfolding at the time were supported rather than suppressed. In pursuance with the legal opinions of the Badinter Commission, attention was also paid, at least to some extent, to more principled concerns related to recognition, such as human rights, minority protection, and other international principles related to how the populations in the new states must be governed. With these considerations in mind, EC member states affirmed their readiness to:

“Recognize, subject to the normal standards of international practice, and the political realities in each case, those new states which, following the historical changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.”⁴

The *EC Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union* (hereinafter “EC Guidelines”) approved in December 1991 constituted a remarkable innovation in European policy-making. Not only did their adoption reveal an interest in building a common European view on recognition; additionally, it placed questions on this matter firmly within the realm of security and peace while simultaneously contradicting the conventional view that these values are best preserved through respect for the territorial integrity of states and the maintenance of the status quo with respect to territorial borders. More importantly, in the light of the Yugoslav conflict, the creation of new states was seen as a conflict resolution device meant to prevent or put an end to situations of war and violence. Recognizing the outbreak Yugoslav republics *qua* states would transform the internal conflict into an international one, endowing the parties with additional rights and obligations, including opportunities for third-party intervention. In this light, the EC recognition policy would further the ultimate goal of stabilizing the Balkans and resolving the historical problems in that part of the world.⁵ Additionally, making recognition conditional on the fulfilment of

⁴ Declaration on the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’, adopted by the EC on 16 December 1991. Reproduced in *The European Journal of International Law*, vol. 4 (1993), pp. 72-73.

⁵ Danilo Türk, ‘Recognition of States: A Comment’, *European Journal of International Law*, 4, (1993), pp. 66-91, at 68.

specific human rights-related to requirements allowed the EC a degree of leverage to mould the strategic environment conducive to peace. That said, however, the European policy was polemical. Notably, it went against warnings of global actors, including the UN Secretary-General and diplomats in the field, that the EC recognition policy was “a matter of bowing to the inevitable” and “an act of reckless diplomacy.” It was also criticized as being counterproductive to peace and stability in the Balkan region and even accused of contributing to triggering the Bosnian war.⁶

3. Key aspects of the pragmatic approach

The European turn to pragmatic reasoning on matters of recognition can be seen as a rational response to radical changes of international political realities. However, it was also the result of moral uncertainty about the scope of the rights of post-Cold War secessionist movements. Specifically, the claims of these movements lacked that pedigree of moral backing that states born out of the decolonization process had enjoyed, and which had assisted them in their struggle to attain political independence from Western colonial powers. Their claims for statehood found legal support in the UN Charter and, since the beginning of the sixties, in UN General Assembly policy as well as international human rights law. According to international law, third states are free to grant or withhold recognition in each case. Even so, once the “subjection of peoples to alien subjugation, domination, and exploitation”⁷ exerted by colonial powers had been declared as gravely illegal and must be brought to an end without delay, it is possible to speak of the existence of a *moral and legal obligation* to recognize the territories that were still colonized by Western powers as new states. By contrast, the post-Cold War demands were not immediately and broadly seen as motivated by a need to righting historic wrongs.

Even so, a general policy of non-recognition and the maintenance of territorial integrity of existing states seemed unsatisfactory. In an exchange between two prominent international lawyers, Thomas Franck and Rosalyn Higgins, which was published in 1995, it was agreed that although international law did not establish a general right to secession, the post-Cold War developments had revealed the need to rethink the legal settlement regarding title to territory in view of its relationship with human personality

⁶ Richard Caplan, *Europe and the Recognition of New States in Yugoslavia*, Cambridge University Press, 2005, p. 3.

⁷ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, adopted by UN General Assembly resolution 1514 (XV) of 14 December 1960, par. 1.

and group identity. The mere repetition of the formula that boundaries must not be changed by military force seemed insufficient as a legal response.⁸ Nevertheless, subsequent scholarly contributions on the topic revealed the absence of agreement about the *authenticity* of the aspirations of these movements and of the moral character of their claims. While some social scientists interpreted their demands as expressions of primordial and non-negotiable sentiments that subordinated additional human concerns,⁹ others held that “nations are not descendants of ancient families who establish a historic right to rule in modern clothes.” Instead, they are “modern political movements that rely on myths and common ancestry in order to legitimate their domination over society through the means of state apparatus.”¹⁰ The diversity of interpretations of the true motives for the struggles for independence at the beginning of the nineties was reproduced in morally-orientated discourse on the meaning and scope of the rights of these movements, adding to the difficulty of forging shared views on substantive aspects of the law in force.¹¹

The difficulties of reaching agreement on the deeper relationship between nation, group identity, and human personality contributed to the consolidation of pragmatic attitudes towards recognition. From this perspective, the EC Guidelines implied a sense of agnosticism about the ulterior motives for granting political independence in favour of a “freestanding” view, which was detached from any epistemological claim about moral rights.¹² The European governments came to view recognition as a problem that must be tackled “in a sensible way that suits the conditions that really exist, rather than following fixed theories, ideas, or rules.”¹³ Arguably, the approach that emerged reflects a more general turn to pragmatism in global and European governance since the end of

⁸ Thomas Franck, ‘Postmodern Tribalism and the Right to Secession’, in: Catherine Brölmann, René Lefeber and Marjoleine Zieck eds, *Peoples and Minorities in International Law*, Martinus Nijhoff Publishers, 1993, pp. 3-28; and Rosalyn Higgins, ‘Postmodern Tribalism and the Right to Secession. Comments’, in the same volume, pp. 29-35.

⁹ See e.g. Harry Eckstein, *Division and Cohesion in Democracy. A Study of Norway*, Princeton University Press, 1966, p. 34, arguing that ethnic and cultural cleavages are more “objective” than those of interest groups and class, adding that while social mobility may be possible, cultural mobility is not.

¹⁰ Adam Przeworski et al, *Sustainable Democracy*, Cambridge University Press, 1995, p. 20.

¹¹ See, e.g. Will Kymlicka, *Multicultural Citizenship*, Oxford University Press, 1995; Charles Taylor, ‘The Politics of Recognition’, in his *Philosophical Arguments*, Harvard University Press, 1995, pp. 225-256; and Jeremy Waldron, ‘Minority Cultures and the Cosmopolitan Alternative’, *University of Michigan Journal of Law Reform*, vol. 25 (1992), pp. 339-369.

¹² For an account of “freestanding” view in theories of justice, see John Rawls, *Political Liberalism*, Columbia University Press, 1993.

¹³ For a literary definition of “pragmatism,” see Cambridge online dictionary.

the Cold War.¹⁴ In this spirit, Thomas Franck notes that international lawyers should assist governments confronted with secessionist movements to look for constructive alternatives beyond a mere reaffirmation of the conventional formula of state sovereignty and territorial integrity. Furthermore, since international law condemns violent reactions and the use of force in response to irredentist movements due to the risks of provoking foreign interventions by third states, creating refugee flows, and disrupting international trade, it will not withhold recognition of a secessionist government that has demonstrated effective control over its territory and guaranteed that it will protect minority rights.¹⁵

Nevertheless, in its preference for “constructive” solutions, the pragmatic approach risks glossing over some of the most salient conditions for recognition of new states that had first been endorsed in the Montevideo Convention on the Rights and Duties of States of 1933 and then reiterated a few years later in 1936 by the International Law Institute in Paris. According to these rules, which came to dominate state views and practices throughout the Cold War, states are free to recognize an entity as a new state provided that the so-called statehood criteria have been met in each case, that is: “the existence of a definite territory of a human society politically organized, independent of any other existing state, and capable of observing the obligations of international law, and by which they manifest their intention to consider it a member of the international community.”¹⁶ From this perspective, the function of recognition acts is merely to *declare* that the recognised entity meets the statehood criteria. Since these acts are not themselves a criterion for statehood, “the existence of a new state with all the juridical effects which are attached to that existence is not affected by the refusal of recognition by one or more states.”¹⁷

Nevertheless, the European impulse to give general support the post-Cold War secessionist movements meant downplaying the question about the statehood criteria not least with respect to the empirical verification of the existence of an effective govern-

¹⁴ See e.g. Mathias Albert and Tanja Kopp-Malek, ‘The Pragmatism of Global and European Governance: Emerging Forms of the Political ‘Beyond Westphalia’, *Millennium: Journal of International Studies*, vol. 31, No. 3 (2002) pp. 453-471; and Kavi Joseph Abraham and Yehonatan Abramson, ‘A Pragmatist Vocation in International Relations: The (global) public and its problems’, *European Journal of International Relations*, vol. 23 (2015) pp. 26-48.

¹⁵ *La reconnaissance des nouveaux Etats et de nouveaux gouvernements* (Rapporteur: M. Philip Marshall Brown), L’Institut de Droit international, Session de Bruxelles, April 1936. An English translation of this resolution (and used here) is available in the *American Journal of International Law*, 30 (1936), 185-187. Also see Montevideo Convention on the Rights and Duties of States, signed at the International Conference of American States in Montevideo, 26 December 1933.

¹⁷ See *La reconnaissance des nouveaux Etats et de nouveaux gouvernements*, cited supra fn 19.

ment. A critical case in point was the European recognition of Bosnia and Herzegovina, which, in all fairness, was still premature. The phenomenon of precipitated recognitions provoked a debate about the changing legal effects of recognition acts in favour of the constitutive thesis according to which a state exists if and only if it has been recognized as such. For example, when reflecting on the case of Bosnia and Herzegovina, Roland Rich notes that “recent events seem to point towards a trend to attempt to *constitute* states through the process of recognition.”¹⁸ However, recognition acts alone are not sufficient to create a state, empirically speaking, and risks undermining the real meaning of statehood. As Christian Hillgruber points out, granting the status of a state to entities whose governments control only some parts of the national territory converts the status of statehood into a *legal fiction*.¹⁹

In any event, it is doubtful whether it is possible to infer a more general change of stance as regards the legal effects of recognition acts from a few cases. To this should be added that the requirement of effective government had already been relaxed during the decolonization process and was not a novel phenomenon.²⁰ The post-Cold War development may not reveal so much a modification of the effects of recognition acts as much as indicating a need for a more complex account of what these effects are. As Jean D’Aspremont explains, the longstanding discussion on that question hides the fact these acts may be both declaratory and constitutive in character.²¹ That said, the constitutive thesis has taken on renewed attention in the context of international state-building projects and the use of recognition of new states as a conflict resolution tool and as a response to situations of massive human rights violations against minorities. In this context, recognition acts are performed with the aim of achieving sustainable peace or of providing a remedy to grave injustice. In these scenarios, the acts in focus usually intersect with other unilateral acts, such as promises, more specifically, to treat the entity qua state and thus as endowed with sovereign rights and obligations, and to give financial and other assistance on the road to achieving effective statehood. Because of the primacy of peace and security, the pragmatic approach permits this kind of flexibility in response to conflict situations, even if it means diminishing the requirement of effective government.

¹⁸ Roland Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’, *European Journal of International Law*, vol. 4 (1993), pp. 33-66, at 64. According to Rich, the case of Ukraine could also fit into this category of recognitions.

¹⁹ Christian Hillgruber, ‘The Admission of New States to the International Community’, *European Journal of International Law*, 9 (1998), pp. 491-509, at 493.

²⁰ Antonio Remiro Brotons *Derecho Internacional* (Valencia: Editorial Tirant Lo Blanch, 2007), pp. 97-101.

²¹ See fn 18 of the First Conference Report on Recognition/Non-recognition in Contemporary International Law, International Law Association, Sofia, 2012.

4. Implications: disagreement and contested statehood

The pragmatic approach may be a viable strategy to forge a shared view to recognition of a new state in the context of state-building when there is agreement from the parent state. The declaration of independence by South Sudan in January 2011 did not meet resistance at the world stage since the parent state—Sudan—agreed to the secession. Also relevant is that South Sudan's decision to separate had legal backing in the 2005 Comprehensive Peace Agreement that ended the decades-long civil war between the North and the South. According to this agreement, a referendum was held in 2005 in which 98% of the voters supported political independence. Taken together, these conditions were conducive to a rapid move towards universal recognition and integration of this new state into international society. On 14 July 2011, the UN General Assembly admitted South Sudan as the 193rd member of the UN. A few days before, on 11 July 2011, all EU and its member states united in warmly congratulating the people of South Sudan on their political independence referring to their support for the implementation of the Peace Agreement and the outcome of the referendum.²²

Other cases are telling of the lack of guarantees that the present approach will produce effective outcomes, not least when the parent state refuses to accept the secessionist demands. Since political and strategic considerations are placed at the forefront, a pragmatic outlook may serve to bolster divisions and disagreements on when recognition acts are owed or desirable and when they must be withheld. If secessions are violent or traumatic, instead of peaceful and based on agreement, third states are expected to react to the differing political interests. Both national interest-driven motivations and international human rights protection stakes can be involved, and each state will decide how to react in line with their own priorities and concerns. Since the perceptions of what is at stake will differ depending on each state's particular interests, including in keeping alliances with the most powerful states, some might be eager to support claims for statehood while others will strongly object to them. The political stakes also explain premature recognitions of entities only in the process of becoming new states and not yet a *fait accompli*.²³ The reality of competing stakes without any international procedure to issue authoritative decisions on whether recognition is owed to a given entity

²² Declaration by the EU and its Member States on the Republic of South Sudan's independence, 12679/1/11 REV I, 9 July 2011.

²³ See e.g. Colin Warbrick, 'Kosovo and the Declaration of Independence', *International & Comparative Law Quarterly* (2008), 675-690, at 690 and James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, pp. 415-416, when commenting on the emergence of Bangladesh which the UN did not define as a case of self-determination, but as a *fait accompli* created as a consequence of foreign military assistance in special circumstances.

and when it must be withheld is the background to “politics of recognition,” and hence to irreconcilable disagreements.²⁴

The 2010 Advisory Opinion of the International Court of Justice on the question about the legality of Kosovo’s declaration of independence was expected to make some progress in this regard. Instead, the majority of the judges of this court avoided any discussion on the existence of a legal basis for Kosovo’s separation from Serbia,²⁵ only noting that “debates regarding the extent of the right to self-determination and the existence of any right of ‘remedial secession’ [...] concern the right to separate from a State [...] and that issue is beyond the scope of the question posed by the General Assembly.” Instead, the Court limited its assessment to the international legality of independence declarations as such without considering it “necessary to address such issues as to whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly.”²⁶ Unsurprisingly, the Advisory Opinion has been criticised as unnecessarily narrow and formalistic, and only of practical significance in the development of a more principled response to demands for self-determination in contemporary life.²⁷ It failed to temper the politics of recognition, including within the EU, that ensued in reaction to Kosovo’s independence declaration and which still hold sway.

Nearly a decade on, a majority of UN member states (113 at the moment) have recognized Kosovo as a state while about forty states continue to object. The case has flared up old Cold War divisions, and also undermined the prospects of forging common European positions on recognition similar to those agreed upon in the EC Guidelines. Whereas 23 EU states proceeded to early recognition of Kosovo, a handful of EU members (Cyprus, Greece, Romania, Slovakia, and Spain) decided to object and have not changed their position since then. The security-oriented concerns are accentuated in the statements of the recognizing states. More than a dozen states, among them Germany and France, held that an independent Kosovo would strengthen security and

²⁴ Jessica Almqvist, “The Politics of Recognition: The Question about the Final Status of Kosovo”. In: *Statehood, Self-determination and Minorities: Reconciling Tradition and Modernity in International Law*. Ed. Duncan French. Cambridge University Press, 2013, pp. 165-186.

²⁵ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of 22 July 2010. For a comprehensive analysis, see Marco Milanovic and Sir Michael Wood, eds. *The Law and Politics of the Kosovo Advisory Opinion*, Oxford University Press, 2015.

²⁶ Kosovo Advisory Opinion, pars. 83 and 51.

²⁷ See e.g. M. G. Kohen and Katherine Del Mar, “The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of “Independence from International Law”?” *Leiden Journal of International Law* vol. 24 (2011) pp. 109-126.

peace in the Balkan region. From a legal perspective, it is striking that the recognizing EU states did not refer to international law when explaining the motives for their decisions although Germany and Sweden's references to failed negotiations between Pristina and Belgrade indicate some concern about the deviance from the principle of peaceful settlement of disputes. The modest attention paid to international law by recognizing states should be contrasted with the arguments set forth by the objecting EU states that stressed the duty of compliance with territorial integrity and equal sovereignty of states as well as the UN Security Council resolution 1244 (1999) according to which a final settlement would entail giving Kosovo "substantial autonomy." These legal arguments were coupled with a warning that Kosovo could become a precedent for other secessionist movements, also within their own national jurisdictions. At the same time, the objectors did not consider it a problem that the statehood criteria had not been met when the declaration was issued although it may well have been a legitimate concern since the Kosovar government was not in control of all its territory at the time of its declaration and remains under international supervision.²⁸

Given the pervasive nature of the disagreement, the general conclusions of the EU Council issued immediately after the Kosovo independence declaration fell short of representing a common position on whether or not to recognize Kosovo as a new state. However, what was agreed upon in these conclusions and was also the view of the US government was that Kosovo constituted a *sui generis* case. From the perspective of the recognizing states, it meant that their recognition acts did not countervail basic principles of state sovereignty and territorial integrity endorsed in the UN Charter and reaffirmed relevant Security Council resolutions.²⁹ This position went hand-in-hand with the argument that Kosovo reflected a "grey zone" in international law. For example, Sweden stressed the difficulty of reaching a decision. It had considered the relevance of the fact that Kosovo had been under international supervision for nearly a decade and had not been a sovereign part of Serbia during that time. Indeed, several recognizing states, such as Germany, Hungary, and Sweden, affirmed "continued international presence," including the European-led EULEX mission, as a condition for their recognition acts.

The case of Kosovo shares some similarities with Palestine in that the latter too is struggling to achieve effective statehood against the will of the parent state. Even so, by now, 136 UN member states and two non-members have recognized Palestine as a

²⁸ International Crisis Group, Kosovo and Serbia after the ICJ Opinion, *Europe Report* No. 206, 26 August 2010.

²⁹ EU Council Conclusions on Kosovo, 2851st External Relations Council Meeting, Brussels, 18 February 2008. The *sui generis* argument was also present in the conclusions of the Ahtisaari Plan of 2007 and Kosovo's Declaration of Independence.

state in spite of Israel's persistent refusal, traditionally supported by the US, to succumb to their demands. Notably, in 2012, the UN General Assembly passed a resolution changing Palestine's status to "observer state" with 138 voting in favour, nine against, and 41 members abstaining. However, as in the case of Kosovo, Palestine's aspirations to gain UN membership are blocked by permanent members of the Security Council, that side with the parent state in what, in their view, is still an unsettled conflict. In line with the US, the majority of EU states withhold recognition of Palestine, insisting on the need for a peaceful negotiated settlement with Israel about its status. On 17 December 2014, the European Parliament approved a resolution stating that it supports "in principle recognition of Palestinian statehood and the two-state solution, and believes these should go hand in hand with the development of peace talks, which should be advanced." It also called on the High Representative of the EU on Foreign Affairs and Security Policy and the Vice President of the European Commission to facilitate a common EU position in this regard. However, the recognition of Palestine has also come to divide the EU. The unilateral decision of Sweden to proceed to recognition on 30 October 2014 was taken in the context of a series of motions in the House of Commons of the UK on 13 October 2014, the Irish Senate on 22 October 2014, the French National Assembly on 2 December 2014, and the Portuguese Assembly on 12 December 2014. However, Sweden is not the only EU state that has recognized Palestine. Eight other states did so already in 1988 when still not EU members,³⁰ which accentuates the diversity of positions. The adoption of Security Council resolution 2234 on 23 December 2016, which condemned the Israeli settlements in the territory occupied since 1967, seemed to imply a change in US policy towards the Israel-Palestine conflict, a development that most likely would generate more recognition acts within the EU. However, the new US Administration with Trump in power has stated that it is against any change. Meanwhile, Israeli policies reveal continued discord with Palestine over its status as state, thereby decreasing the likelihood of conflict settlement and effective statehood in the near future.

The EU and its members do not necessarily consider that peace and security are always best served through the formation of new states or a change of territorial borders. As recent cases evince, a commitment to pragmatic reasoning does not imply that this regional organization, or a majority of its members, has become more prone to support the aspirations of secessionist movements instead of reaffirming territorial integrity and state sovereignty in conflicts over these matters. Importantly, the EU adopted a common stance on non-recognition towards recent demands for self-determination by Abkhazia and South Ossetia that Russia actively supports and if successful would benefit

³⁰ Bulgaria, Czech Republic, Cyprus, Hungary, Malta, Poland, Romania, and Slovakia.

Russian strategic interests. So far, the two entities that seek to separate themselves from Georgia have been recognised by a handful of UN states, including Russia, Nicaragua, Venezuela, and Nauru. At first Vanuatu and Tuvalu gave the two entities initial support but thereafter withdrew their recognition acts. The understanding that peace and security requires respect for territorial integrity governed the European reaction to Crimea's declaration of independence in 2014 following the Russia's unilateral annexation of this part of Ukraine. Indeed, the EU repeatedly manifests its support for the territorial integrity of the parent states, Georgia and Ukraine, in these cases. This has led Azerbaijan to accuse the EU of double standards since the OSCE basic principles for a peaceful settlement of the Nagorno-Karabakh conflict, adopted in Madrid on 29 November 2007, foresees some kind of referendum on the future status of Karabakh, which at least theoretically would allow it to secede from Azerbaijan.³¹

5. Outstanding issues: the rule of law and human rights concerns

The fact that European recognition and non-recognition policies are motivated by pragmatic considerations renders them vulnerable to several criticisms. Since strategic interests are allowed to predominate decision-making in this area, the chosen approach risks giving rise to inconsistencies and arbitrariness in decisions as to when recognition is warranted and must be withheld, and will also give rise to disagreements within the EU on specific cases. This outcome is problematic to sustain due to the European commitment to promote the rule of law in international relations. As it is now, there is no guarantee that different contemporary secessionist demands that share a desire for political independence will be treated alike in the sense that the same rules and principles are applied consistently in all cases. While EU practice manifests an effort to insist on some rules, such as those regarding the peaceful settlement of disputes and negotiated agreement between the affected parties, deviance has occurred.

³¹ According to Basic principle 1: "The final legal status of NK will be determined through a plebiscite allowing the free and genuine expression of the will² of the population of NK. The modalities and timing of this plebiscite will be agreed by the parties through future negotiations as described in (9). The population of NK is understood as the population of all ethnicities living in NK in 1988, in the same ethnic proportions as before the outbreak of the conflict. The formulation of the question or questions to be asked in the plebiscite should not be limited, and could cover the full range of status options." Thomas de Waal, *Crimea, Russia and Options for Engagement with Abkhazia and South Ossetia*, *Op-ed. Carnegie Europe* (26 November 2015), available at: <http://carnegieeurope.eu/2015/11/26/crimea-russia-and-options-for-engagement-in-abkhazia-and-south-ossetia-pub-62122> (last visited on 1 August 2017).

The rule on peaceful negotiations was endorsed in the EC Guidelines, which at the time of their adoption reflected a general demand for agreement between the affected parties, including in the case of the Baltic republics. Notwithstanding the fact that the restoration of their sovereign rights were undisputed on both moral and legal grounds, their claims provoked a discussion on whether they were entitled to secede from the Soviet Union by virtue of a unilateral act or if they had to negotiate a settlement with the occupying state prior to declaring independence. The Mitterand-Kohl statement on 26 April 1990 opted for the latter, urging the Baltic republics to arrive at an agreement with the federal authorities. According to Cassese, the statement manifests how concerns about “the territorial integrity of the Soviet Union restrained, or at least slowed down, not only the furtherance of, but also international support for, the quest for self-determination,” even in the case of the Baltic republics.³² Nevertheless, other cases, such as Kosovo, which has been recognised by a majority of EU states without insisting on negotiated agreement with Serbia risks undermining the universal validity of this rule. These inconsistencies or occurrence of exceptions may feed new demands, such as those of South Ossetia and Abkhazia or Crimea, and be invoked by non-recognized peoples within the EU.

Whereas a commitment to the rule of law does not demand equal treatment of all cases, it requires that valid reasons be given for treating apparently similar cases differently. From this perspective, unless the reasons for unequal treatment are understandable and acceptable from the standpoint of affected populations, pragmatism in this realm of international affairs will lead to results that seem arbitrary and haphazard or even unfair and, as such, as inconsistent with respect for international rule of law values. The quest for consistency, transparency, and acceptability of responses to secessionist movements becomes all the more important when considering the possible need to tackle and react to current demands for more political independence arising within the EU.

A second and related problem with the pragmatic approach in its current formulation is its unclear stance on the role and value of referendums. The question has become all the more vital since current secessionist movements, including within the EU, stress the importance of organizing referendums. The stance is motivated by a conviction that the degree of popular support for a secessionist demand is critical to the achievement of political independence and, ultimately, recognition as a new state. The idea of popular referendums in state-formation processes was introduced in the decolonization process and was then reaffirmed at the beginning of the nineties. The Badinter Commission came to address the question in the case of Bosnia-Herzegovina in which it opined

³² Antonio Cassese, *The Right to Self-Determination of Peoples*, supra fn 1, p. 262 and 264.

that holding an internationally monitored referendum involving the whole population of this republic was an indispensable element for recognizing it as a new state. Its pronouncement on this issue has been interpreted as giving referendums “the status of a basic requirement for the *legitimation of secession*.”³³ The rule, however, has not been applied consistently. It was not a necessary condition in the case of Kosovo while it was applied again to South Sudan. More recently, the EU has refused to accept the referendum that was organized in Crimea in 2014, declaring it invalid in defence of the territorial integrity of Ukraine.

While a pragmatic view will emphasize the prevalence of different strategic interests at stake in each case to explain the varied divergent stances on the value of referendums, a sound recognition policy must be connected more clearly to normative considerations to communicate the role and limits of a popular vote in these contexts. The Code of Good Practice on Referendums adopted by the Council for Democratic Elections and the Venice Commission in 2007 serves to clarify these questions.³⁴ According to this code, for a referendum to be valid, the submitted text must not be contrary to international and national law. By this measure, the Crimean referendum should be rejected since the Russian annexation of this part of Ukraine amounts to a violation of the international legal prohibition against the threat or use of force against the territorial integrity and political independence of any state (art. 2.4 of the UN Charter).³⁵ The Code also takes national law into account. It will only consider “referendums within federated or regional entities” to be valid if in conformity with the law of the central state.

A third line of criticisms that can be made against the current approach is its ambiguous relation to human rights. Even if respect for human rights ranks high in the EU, including in its external actions, and was endorsed as a condition for recognition of new states in the EC Guidelines, more recent EU recognition policies do not insist on similar conditions to the same degree. More generally, in spite of new cases of self-determination, there is still no comprehensive account of how both recognition and non-recognition policies may affect human rights in negative ways.

³³ Antonio Cassese, *The Right to Self-determination of Peoples*, *supra* fn 1, p. 272. Also see Jure Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice*, Hart Publishing, 2013.

³⁴ Code of Good Practice on Referendums, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), pars. 33-35.

³⁵ EU External Action Service, *The EU non-recognition policy for Crimea and Sevastopol: Fact Sheet* (17 March 2017) available at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/22959/The%20EU%20non-recognition%20policy%20for%20Crimea%20and%20Sevastopol:%20Fact%20Sheet

The situation of contested statehood is especially unfortunate in this regard insofar as it tends to be associated with political isolation and economic hardship. A new state whose status is controversial will hamper the ability of its government from obtaining access to and participating in multilateral and regional schemes of economic and political cooperation. The partial or total exclusion of new states from these schemes adds to the difficulties involved in the furtherance of the socioeconomic conditions deemed essential to ensure respect for human rights in practice, not only civil and political rights, but economic and social. Any recognition policy must consider these difficulties that can only be overcome through international financial and other kinds of assistance. Likewise, any non-recognition policy must take the question of how the population will fare as a result of a defence of the *status quo* and the territorial integrity of existing states seriously. One example is when a minority group that wishes to secede suffers from serious and systematic human rights violations committed by the central government.

The fact that Kosovo's final status became such a divisive question, also within the UN Security Council, makes it impossible for Kosovo to join several key international organizations in the near future. At a practical level, a key challenge is that Serbia, which is supported by Russia, has vowed never to recognise Kosovo as a state. By now, Kosovo is member of the World Bank, the IMF, the European Bank for Reconstruction and Development, and the Council of Europe Development Bank. However, it is not part of the UN, the Organization for Security and Cooperation in Europe or the Council of Europe. Kosovo, with its 1.2 million citizens, is still struggling to develop an effective foreign policy and to create the basic conditions for protecting human rights. At present, it suffers from record-high levels of unemployment, political corruption, criminal networks, and persistent challenges to institution-building and law enforcement.³⁶ As part of its partial recognition policy, the EU has decided to provide financial and other assistance through association. On 1 April 2016, the EU-Kosovo Stabilization and Association Agreement entered into force. This is the first contractual relationship between the EU and Kosovo that establishes a comprehensive framework for closer political dialogue and economic relations. For the 2014-2020 period, Kosovo has been allocated 645.5 million euros to strengthen areas such as education and employment, the rule of law and human rights, competitiveness, democracy, cooperation, etc. The case demonstrates that recognition policies generating situations of contested statehood must be coupled with a commitment to international assistance that serves the protection of human rights as a matter of principle.

³⁶ Antonio Cassese, *The Right to Self-determination of Peoples*, *supra* fn 1, p. 272. Also see Jure Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice*, Hart Publishing, 2013.

Furthermore, the commitment to assistance may be present in other cases in which the majority of EU states maintain a non-recognition policy, which manifest the relevance of human rights. Notably, the EU is the Palestinian people's most important partner, and committed to assist in the "building of the institutions of a future, democratic, independent and viable Palestinian State living side-by-side with Israel in peace and security." While it is the most significant financial donor supporting the Palestinian Authority and refugees it insists on a negotiated peace process.³⁷

However, even when the status of a new state is not contested, it seems vital that recognition acts are complemented with a consideration of how human rights will be protected in the new state. The situation in South Sudan is a case in point. Especially relevant is the acknowledgment in the EU recognition statement that its act was combined with "ambitious plans to build the foundations of the world's newest state."³⁸ According to the European Commission, the EU "rallied behind the country's state- and nation-building efforts through significant diplomatic, political, humanitarian, and developmental support." In this way, it indicated not only that South Sudan, at the time of declaring independence, was still not a state, empirically speaking, but also that it will demand considerable assistance, including in the field of human rights.³⁹ In this case, recognition was seen as instrumental to settle a conflict and signalled a bold promise on the part of the EU that it would assist the new state in attaining effective statehood.

6. Concluding reflections

The adoption of pragmatic attitudes to the recognition of new states at the end of the Cold War was a logical reaction to the legal and moral uncertainties involved in responding to multiple demands for self-determination at a time of radical historical change in international society. However, since then, the same attitudes have continued to shape European decisions on matters of recognition, with varying degree of attention paid to international law depending on political considerations and strategic interests in each case. This fact feeds the claim about the prevalence of a possible tension between

³⁷ See relevant country information, available at: https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/palestine_en

³⁸ See relevant country information available at the following website of the European Commission: http://ec.europa.eu/europeaid/countries/south-sudan_en.

³⁹ The EU development plans were hampered in 2013 when South Sudan returned to a state of war and widespread violence. The new peace agreement signed in August 2015 and its implementation allow development cooperation to resume.

pragmatic attitudes to secessionism and the basic principles of international law, including those related to territorial integrity, the equal sovereignty of states, as well as respect for human rights and the rule of law.

The pragmatic approach is attractive precisely because it is not governed by moral and legal imperatives, allowing states to resort to recognition acts as practical solutions to changing political realities, including war and violence, such as in the case of South Sudan. Nevertheless, insofar as third states tend to disagree on feasible solutions, it will not treat all self-determination demands in the same way, and will permit their policies to be governed by political necessities or convenience instead of principles. From this standpoint, the present approach may generate apparent inconsistencies that seem contradictory to the requirements flowing from a commitment to the promotion of rule of law principles in international relations. Indeed, given its emphasis on peace and security, recognition acts are expected to be ad hoc, politically controversial, and even counterproductive to the furtherance of these principles. A second concern is related to respect for human rights. As has been argued, both recognition and non-recognition policies may have adverse effects on protecting the human rights of populations depending on the case. From a human rights standpoint, situations of contested statehood are especially unfortunate in this regard, although any policy in this realm needs to be attentive to the question of how human rights are to be protected in a new state, including the need for financial and other kinds of assistance.

In the light of these considerations, the pragmatic approach is not an ideal solution to demands for self-determination that do not care sufficiently about the requirements of rule of law and human rights. As new independence movements emerge, including within the EU, it becomes all the more essential to make progress on the question when as regards the question as to when recognition is owed and on what basis. If the approach is to be regarded as sound by the most affected populations within or outside the EU, it must be more firmly connected to normative considerations. Instead of steering away from matters of principle, whenever it seems sensible for the sake of peace and security, EU states should engage more fully and consistently with the outstanding normative questions that any response to the aspirations of these movements provoke, including their impact on the rule of law and human rights as well as the value and limits to the rules related to peaceful negotiations and popular referendums.

References

- Abraham, Kavi Joseph and Yehonatan Abramson. 2015. "A Pragmatist Vocation in International Relations: The (global) public and its problems." *European Journal of International Relations* 23: 26-48.
- Albert, Mathias and Tanja Kopp-Malek. 2002. "The Pragmatism of Global and European Governance: Emerging Forms of the Political 'Beyond Westphalia'." *Millennium: Journal of International Studies* 31(3): 453-471.
- Almqvist, Jessica. 2013. "The Politics of Recognition: The Question about the Final Status of Kosovo." In *Statehood, Self-determination and Minorities: Reconciling Tradition and Modernity in International Law*, edited by Duncan French, 165-186. Cambridge: Cambridge University Press.
- Caplan, Richard. 2005. *Europe and the Recognition of New States in Yugoslavia*. Cambridge: Cambridge University Press.
- Cassese, Antonio. 1995. *Self-determination of Peoples. A Legal Reappraisal*. Cambridge: Cambridge University Press.
- Crawford, James. 2006. *The Creation of States in International Law, 2nd ed.*. Oxford: Oxford University Press.
- De Waal, Thomas. 2015. "Crimea, Russia and Options for Engagement with Abkhazia and South Ossetia", *Carnegie* (26 November). <http://carnegieeurope.eu/publications/?fa=62122> (last visited 17 September 2017).
- Eckstein, Harry. 1966. *Division and Cohesion in Democracy. A Study of Norway*. Princeton NJ: Princeton University Press.
- Franck, Thomas. 1993. "Postmodern Tribalism and the Right to Secession." In *Peoples and Minorities in International Law*, edited by Catherine Brölmann, René Lefebvre and Marjoleine Zieck, 3-28. Dordrecht: Martinus Nijhoff Publishers.
- Higgins, Rosalyn. 1993. "Postmodern Tribalism and the Right to Secession. Comments." In *Peoples and Minorities in International Law*, Catherine Brölmann, René Lefebvre and Marjoleine Zieck, 29-35. Dordrecht: Martinus Nijhoff Publishers.
- Hillgruber, Christian. 1998. "The Admission of New States to the International Community." *European Journal of International Law* 9: 491-509.
- International Crisis Group, Kosovo and Serbia after the ICJ Opinion. 2010. *Europe Report* 206, 26 August.

International Law Association. 2012. First Conference Report on Recognition/Non-recognition in Contemporary International Law. Sofia.

Kohen, M. G. and Katherine Del Mar. 2011. "The Kosovo Advisory Opinion and UN-SCR 1244 (1999): A Declaration of 'Independence from International Law'?" *Leiden Journal of International Law* 24: 109-126.

Kymlicka, Will. 2005. *Multicultural Citizenship*. Oxford: Oxford University Press.

Milanovic, Marco and Sir Michael Wood, eds. 2015. *The Law and Politics of the Kosovo Advisory Opinion*. Oxford: Oxford University Press.

Przeworski, Adam et al. 1995. *Sustainable Democracy*. Cambridge: Cambridge University Press.

Remiro Brotóns, Antonio. 2007. *Derecho Internacional*. Valencia: Editorial Tirant Lo Blanch.

Rich, Roland. 1993. "Recognition of States: The Collapse of Yugoslavia and the Soviet Union." *European Journal of International Law* 4: 33-66.

Taylor, Charles. 1995. "The Politics of Recognition." In his *Philosophical Arguments*, 225-256. Boston MA: Harvard University Press.

Türk, Danilo. 1993. "Recognition of States: A Comment." *European Journal of International Law* 4: 66-91.

Rawls, John. 1993. *Political Liberalism*. New York: Columbia University Press.

Waldron, Jeremy. 1992. "Minority Cultures and the Cosmopolitan Alternative." *University of Michigan Journal of Law Reform* 25: 339-369.

Warbrick, Colin. 2008. "Kosovo and the Declaration of Independence." *International & Comparative Law Quarterly*: 675-690.

Vidmar, Jure. 2013. *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice*. Oxford: Hart Publishing.



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