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RECOGNITION OF STATES IN INTERNATIONAL LAW AND PRACTICE

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რეზიუმე

აღიარება ახალი ერთეულების სახელმწიფოებრიობის დამადასტურებელი მნიშვნელოვანი სამართლებრივი აქტია. აღიარების პრინციპი მნიშვნელოვანი გახდა მას შემდეგ რაც პოლიტიკურმა ლიბერალიზმმა შეარყია დინასტიური მმართველობა. აღიარების კრიტერიუმები ახალი სახელმწიფოების აღიარების საერთაშორისო პრაქტიკას დაეფუძნა, თუმცა აღიარებისას მაღიარებელი სახელმწიფოები მაინც საკუთარი კრიტერიუმებით ხელმძღვანელობენ. ამჟამად არ არსებობს არცერთი საერთაშორისო სამართლებრივი აქტი, რომელშიც ჩამოთვლილია აღიარების უნივერსალური კრიტერიუმები, მიუხედავად მცდელობებისა, რომ აღნიშნული კრიტერიუმები და პრინციპი საერთაშორისო სამართალში კოდიფიცირებულიყო. ახალი სახელმწიფოს აღიარება მაღიარებელი სახელმწიფოს უფლებაა და არ არსებობს არანაირი საერთაშორისო მექანიზმი, რომელიც დაავალდებულებს ერთ სახელმწიფოს აღიაროს მეორე სახელმწიფო.

ამასთან, არ არსებობს არანაირი საერთაშორისო სტრუქტურა, რომელიც დაადასტურებდა ან უარყოფდა ახალი ერთეულების პრეტენზიებს სახელმწიფოებრიობაზე. შედეგად, თითოეული სახელმწიფო აღიარების გადაწყვეტილებას მხოლოდ საკუთარი შეფასებებისა და პოლიტიკური ნების საფუძველზე ღებულობს. აქედან გამომდინარე, აღიარების, არაღიარებისა და აღიარების უკან გაწვევის გადაწყვეტილება წმინდა პოლიტიკური აქტია, რომელშიც გადამწყვეტ როლს ეროვნული ინტერესი თამაშობს.

საკვანძო სიტყვები: აღიარება, საერთაშორისო სამართალი, სახელმწიფოებრიობა, თეორია, საერთაშორისო პრატიკა, არაღიარება, აღიარების უკან გაწვევა

Abstract

Recognition is an important act for validation of new entities' claims to statehood. It started to feature as an important principle when political liberalism challenged the dynastic rights. Development of recognition criteria reflected the prevalent state practice of recognition of new states. When recognising new states, the recognising states guide themselves with their own criteria for recognition. Despite attempts

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to codify criteria as well as the institution of recognition in international law, there is no single international law act which lists the universal criteria for recognition. Recognition to the new entity is still extended at discretion of a recognising state and there is no provision in international law that could force the state to recognise the new one.
Along with lack of codification of recognition criteria, there is a lack of any international authority tasked with determining whether an entity claiming to be a state in fact is a state. It is for each state to make such determination based on its own assessment and its own political will whether the new entity should be admitted to the community of nations. De-recognition, non-recognition and recognition thus becomes a political act, and perceptions of national self-interests play a determining role.

Keywords: Recognition, International law, Statehood, Theory, State Practice, Non-Recognition, De-recognition

Introduction

The issue of recognition of new states turned into a bone of contention between the world powers in 2008, when firstly the western nations recognised Kosovo after its unilateral declaration of independence and then in August 2008, Russian Federation officially recognised Abkhazia and South Ossetia as independent states. These acts of recognition eroded one of the fundamental principles of international law - territorial integrity and brought systemic change to the Westphalian order, given the fact that four out of five permanent members of the UN Security Council challenged the principle (US, UK and France with recognition of Kosovo and Russia with recognition of Abkhazia and SO). The present article aims at exploring how recognition is regulated in international law if at all and what is the pattern of state practice of recognition. According to international practice, recognition may be extended to a state, to a government and to a belligerent party.[1] For the purposes of the present article I will concentrate only on recognition of states.

In order to provide an analysis of the research topic I will briefly explore the history of development of norm of recognition in international law and its relevance and significance to international relations. Further, I review the existing sources of international law and provide examples of application of this norm from the international practice.

Recognition is an institution of state practice that can resolve uncertainties as to status and allow for new situations to be regulated.[2] It confirms the will of recognising state to establish relations with the new state and it is a legal acknowledgement that the new entity fulfils the conditions for becoming an international subject.[3] Recognition is an instrument for validation of claims to statehood on the part of new entities by existing states.[4] At the same time, recognition is an important factor in diplomacy and newly formed states are striving for recognition to secure their place on the international arena. Recognition deals with creation of new subjects of international law, representation of existing subjects at the international arena and establishment of legal relations between the subjects of international law. Object of state recognition is legal relations between the benefactor and beneficiary of recognition.

Evolution of Recognition

It is extremely difficult to ascertain concrete date of origin of institutions, but it could be stated that the notion of recognition started to develop when the Westphalian congress in 1648 extended first ever collective recognition to Switzerland and Netherlands. It introduced the rule, according to which accession to the family of nations was granted only through approval of the family of nations.[5] Nevertheless, recognition, like self-determination, did not become important until at least late 18th century, when political liberalism started to challenge authority of the monarch. Dynastic legitimacy and full monarchical authority began to erode in the second half of the eighteenth century under the growing popularity of political liberalism. The liberal views had it that the government was to be based on the will of those sub-

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[1] Lauterpacht, Hersch, Recognition in International Law, pp.4-5
[2] Crawford, James: The Creation of States in International Law; p.26
[3] Cassese, Antonio, International Law, p.74
[4] Dugard and Raic in Kohen, Marcelo G, ed. Secession – in International Law Perspectives, P. 94
[5] Fabry, Miculas: Recognising States p.22

ject to it and not on the will of monarchs.[6] The American independence and French revolution also contributed to the advance of political liberalism and the US independence was justified exactly from liberal viewpoints. Despite this, all nations but France extended recognition to the US only after it was clear that the parent state Great Britain let the US into independence in 1782. There was a common understanding among states that recognition of a new state can only happen when the parent state renounces its sovereignty over that territory.

After the US and French revolutions, dynastic legitimacy suffered its blow in Latin America with the emergence of 12 independent states from the period of 1810-1830. Once the Spanish Crown lost effective control over its territories in Latin America, someone had to be responsible for interaction with these entities. Although, Britain and the United States did not recognise the entities right away, they dealt with de-facto governments and endorsed the application of *uti possidetis juris*, which was designed to protect from external force the sovereignty and territorial integrity of entities that attained de-facto independence. The principle meant that the de-facto states agreed to the external boundaries that they inherited from colonial entities. The main factors leading to recognition was a success of freedom movements, which managed to effectively secede from the Spanish Crown. The tendency of recognising was further developed in Europe when political entities such as Belgium, Greece, Serbia-Montenegro were granted independence and gained recognition from the great powers. According to positivist theory, which was a prevailing theory of the time, the obligation to obey the international law derived from the consent of individual state.[7] If a new state subject to international law came into existence, new legal obligations would be created for existing states. Late 19th century positivist stance towards statehood and recognition is best described in Oppenheim's International Law which is acknowledged as the most influential work of the time reflecting views propagated by different jurists. Here are the main principles:

1) "As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not imply membership of the family of nations. Those states which are members are either original members because the law of nations grew up gradually between them through custom and treaties, or they are members as having been recognised by the body of members already in existence as they were born".[8]

2) "New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in force at the time of their admittance."[9] States not so accepted were not bound by international law, nor were the "civilized nations" bound in their behaviour towards them.

3) "Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international conduct of States, and not of their citizens".[10]

4) "International law does not say that a state is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. A State is and becomes an International Person through

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[6] Locke, John, Second Treatise of Civil Government
[7] Crawford, James: The Creation of States in International Law; p.15
[8] Oppenheim, L. International Law, Vol. 1 para. 71, http://www.gutenberg.org/files/41046/41046-h/41046-h.htm#Page_16
[9] ibid. para 12
[10] ibid. para 13

recognition only and exclusively. It is a rule of International Law that no new State has a right towards other States to be recognised by them, and that no State has the duty to recognise a new State."[11]
5) It did not matter how an entity became a state. Unrecognised states were not part of the law-governed system and neither the recognised states were treating them as such. Their birth and mechanisms of acquisition of a territory were completely irrelevant to international law. "The formation of a new state is... a matter of fact not a law. It is through recognition, which is a matter of law, that such new states become a member of the family of nations and subject to international law. As soon as recognition is given, the new state's territory is recognised as the territory of a subject of international law, and it matters not how this territory is acquired before the recognition".[12]
The quotes from Oppenheim clearly reflect the constitutive theory to recognition. This theory was later challenged by declaratory approach, which maintains that recognition is a mere declaration of the fact that the state exists. The difference between these two theories constituted the great debate on recognition as a doctrine.

Theories of Recognition

Constitutive and declaratory theories of recognition are termed as classical theories. Recognition is described as either "constitutive" or "declaratory" of statehood. The constitutive school argues that a recognition of a new entity as a state creates a state. It makes recognition part of statehood and implies discretion of the existing state to bring new states into being. The central implication of this is that whether or not an entity has become a state depends on the actions of existing states. Recognition by others makes an entity a state, non-recognition leaves the entity in non-state status. For a "constitutivist", existence of all attributes of statehood and how the state was formed bears no importance in the absence of recognition. The constitutive proposition follows directly that recognition resides at the complete discretion of the existing state.
The decision to recognise is subject exclusively to the sovereign will of the existing state and is made unilaterally without reference to the actions of other members of international community or objective condition of the entity receiving recognition. Extending or withholding recognition is a political act and more often an act of bargain. Some historic quotes below clearly prove this notion. The Head of Eastern Department of UK Foreign Office, Bernard Burrows said:

> "We can repeat to the Americans that our attitude on recognition (of Israel) will depend on the success of the plan on which we are working, and we could perhaps add that we have always considered our recognition as a valuable card which must be played to the best political advantage".[13]

US Ambassador to the UN Warren Austin in response to criticism by Syrian representative at UN SC in 1948 when the US recognised Israeli government stated:

> "I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States in the exercise of that high political act of recognition..... Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal

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[11] ibid. para 71
[12] ibid. para.209
[13] Pattison, Keith: The delayed British Recognition of Israel, In: The Middle East journal Vol. 37, No.3, 1983, P. 412-413

> of justice or of any other kind, anywhere, that can pass upon the legality or the validity of that act by my country".[14]

One of the reasons given by the US in 1920 for refusing to recognise Georgia and Azerbaijan was "the reaction on the minds of Russians, hitherto friendly to the allied and associated governments, of such recognition."[15] In a similar vein, US Secretary of State Dulles on a question why the US and Great Britain have not recognised German Democratic Republic said that

> "it would be politically disadvantageous and harmful to our interests to do it. So the guide in these things isn't something doctrinaire, that you have to give recognition of a diplomatic character to a regime which is hostile to you and where it involves great disadvantages to do it ... But on the other hand we do not accept the blind policy of pretending that it doesn't exist. It does exist. We know it exists."[16]

All of the above quotes show that basically it is not important whether a state fulfils statehood criteria or not, political interests and political bargaining play far more important role.

Historic roots of constitutive theories are traced back to the Vienna Congress. Accession of any new state to the family of states depended on great powers. Constitutivist interpretation of recognition could be compared to an entrance ticket for a new state to enter the exclusive club of states.

Recognition, under this model is not a principled and mandatory response to certain developments within a foreign community. It is a deliberate measure taken unilaterally and at the discretion of the individual state. Recognition in this sense has a heavy political agenda behind it, which may have little or no relation to the act of recognition or even to the benefactor of recognition.

Recognition is solely a matter between the state recognising and the entity being recognised. If recognition is bilateral and discretionary, then there are no legal restraints to censure a state extending recognition. The reaction of third states is also irrelevant, since it concerns conduct over which the state has discretionary power. The constitutive doctrine provides no apparent means to regulate state conduct and no apparent code of conduct either.[17]

Constitutive theory of recognition is challenged by the declaratory theory. The declaratory school asserts that an entity becomes a state upon meeting the statehood criteria and recognition simply declares the fact that it has done so. "In general, a nation's existence should be determined without reference to whether or not other states have officially recognized it."[18] Declaratory theory emerged as a reaction to the constitutive theory of recognition which failed to address the questions of recognition as early as in 19th century. Some scholars consider the Monroe Doctrine as the source of declaratory theory. Monroe doctrine of de-facto recognition did strike on the principles of legitimism which served as a basis of constitutive theory. Grant writes that recognition to the "declaratist", is a response triggered by certain facts and conditioned by law. When the statehood criteria are attained by a community, existing states should recognise that community as a state. Declaratory theory sees recognition as a legal duty, whereas the "constitutivists" argue that states have no such duty. Thus, the declaratory doctrine is a more complex one, since the recognising state needs to determine whether the claimant entity has attained the statehood criteria.

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[14] Lockwood, John, Recognition of Israel, In: The American Journal of International Law, P. 621
[15] Lauterpacht, Hersch, Recognition in International Law, p.35
[16] Ahmed Sheikh, The United States and Taiwan After Derecognition: Consequences and Legal Remedies, Wash. & Lee L. Rev. 323 (1980), available at: http://scholarlycommons.law.wlu.edu/wlulr/vol37/iss2/2
[17] Grant, Thomas D., Recognition of States, p.3
[18] Chen, Ti-chiang, The international law of Recognition, p. 13

Soviet scholar Tunkin writes that even though the recognition does not create a legal personality of the state, its legal implications are obvious, since it creates "solid legal basis for relations between the two states."[19] "Declaratists" also acknowledge that the more states recognise the new entity, the stronger is its position in international law. Recognition brings about certain juridical consequences. These consequences are mostly dependent on the forms of recognition and most frequently culminate in establishment of full diplomatic relations.

The Badinter Arbitration Commission tasked by the European Community in 1991 to provide legal advice on compliance with the EC guidelines for the recognition of states following the dissolution of Yugoslavia, found that "the existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory."[20]

Both views have their weaknesses however and have been criticised therefore. "Constitutivists" are criticized for neglecting the rights of new states and simultaneously providing immunity to non-recognised entities for violation of international law (excluding Geneva conventions), by not letting them to become subject of international law. Equality of states under constitutive model is distorted and new states are subordinated to supremacy of existing ones. Most importantly its main shortcoming however is "that constitutive act of creative of statehood is an act of unfettered political will divorced from binding considerations of legal principle".[21]

The declarative theory is criticized for non-compatibility of the theory with juridical importance of recognition. "Declaratists" are further criticized for neglecting the political ingredient of the act of recognition and claiming that it is a legal duty. The declaratory model does not put an emphasis on recognition, but as historic examples of Turkish Republic of Northern Cyprus, Biafra and Rhodesia and more recently Abkhazia, Karabakh, and Kosovo show, the entities do need recognition to become fully-fledged members of international community.

It is sometimes suggested that the great debate over the character of recognition has done nothing but confused the issues. It is mistaken to categorise recognition as either declaratory or constitutive in accordance with a general theory. As Thomas Grant writes neither doctrines addresses where recognition falls along the spectrum between law and politics.[22] Grant is echoed by Starke who says that "the truth lies between these two theories. One and the other theory could be applied to different cases."[23] As the state practice shows, different states may also apply different approaches to the same case.

The recognition in fact is a two-step process: 1) declaration of recognising states of the fact that a new entity is created with sustainable government and 2) establishment of official relations with the new state. The first of these acts is declaratory and the second – constitutive.

The interim conclusion to constructivist vs. declaratory debate is that recognition only does not make an entity a state. Entity can become a state irrespective of recognition, albeit its international legal personality could be limited. On the other hand, the declaratory approach implies that there should be workable statehood criteria established in international law, attainment of which qualifies entity as a

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[19] Тункин Г, Основы современного международного права, p.22

[20] Opinions of the Arbitration Committee, Opinion 1, Article, 1, available at: http://ejil.oxfordjournals.org/content/3/1/178.full.pdf+html

[21] Lauterpacht, Hersch, Recognition in International Law, p.41

[22] Grant, Thomas D., Recognition of States, p.1

[23] Фельдман Д., Современные теории международно-правового признания, P.29

state and thereafter its recognition is a mere declaration of fact by the recognising state. Therefore, now we will turn to the criteria of statehood.

Criteria of Statehood

As Crawford writes, if the effect of positivist doctrine in international law was to place the emphasis in matters of statehood on the question of recognition, the effect of modern doctrine and practice has been to turn the attention to issues of statehood and status independent of recognition.[24] However, for a quite long period of time, there have been no recognised criteria for statehood. Here, we have to distinguish between the criteria of effective statehood and international law conditions that should be met for creation of a state.

Attempts to declare rules about recognition within the framework of international codification had been rejected by the League of Nations Committee of Experts as well as during the International Law Commission's work on the draft of Declaration on the Rights and Duties of States.[25] The topic of recognition of states and governments has remained on the International Law Commission's work programme since 1949, for the Vienna Convention on the Law of Treaties in 1956 and 1966 and for proposed Articles on Succession of States in Respect of Treaties in 1974, but during last discussion it was agreed to set it aside for the time being due to "many political problems, which did not lend themselves to regulation by law."[26]

The best known formulation of the basic criteria for statehood was offered by the United States and other Pan-American nations after endorsing the Montevideo convention in 1933. Article I of the Montevideo Convention on the Rights and Duties of States, reads: "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 other states."[27] Although, the Montevideo convention was limited in its geographical scope, the criteria have been endorsed by wider international society thereafter.

According to the Foreign Relations Law of the United States, the state exists when 1) its leadership is in effective control of the state's defined territory; 2) the bulk of its inhabitants possess sufficient political stability and provide allegiance to whatever national symbols there might be; 3) the leadership possesses sufficient administrative capability to carry out certain well recognized internal government functions and its international obligations under international law and the United Nations Charter; and 4) there is no massive and systematic interference in its affairs by a foreign power.[28]

Though international organisations or conferences have not produced any new instrument to replace and supplement the Montevideo Convention as a definition for statehood, many scholars are calling for revision arguing that additional criteria are necessary. Crawford puts forward other important criterion, which Montevideo does not mention but implies, - independence. According to him, independence is the central criterion for statehood. It is important to distinguish independence as an initial criterion for statehood and as a condition for continuing existence. "A new state attempting to secede will have to prove substantial independence both formal and real from a parent state before it could be regarded

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[24] Crawford, James: The Creation of States in International Law; p.37
[25] ibid. p.38
[26] ibid. p.40
[27] Montevideo Convention of the rights and duties of states, 1933 available at: http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897
[28] Restatement (2nd) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 4, 100,101 (1965)

as definitely created".[29] However, it is very hard to measure the extent of independence. It is also not clear why independence from a parent state should be a criterion and not from the other state.
Some new criteria however are blurring the distinction between criteria for statehood and criteria for recognition. These are for example respect of fundamental standards such as ban on wars and aggression, respect of human rights, rights of minorities and respect for existing frontiers that have become more important in international law.[30] It has been suggested that respect of these principles also form criteria for effective statehood and hence recognition. Therefore, we will turn to recognition criteria next.

Criteria for Recognition

As I have mentioned above, the international law does not provide for concrete norms which regulate the creation of new states – subjects of international law. Lauterpacht wrote that recognition of a political entity as a State means to declare that it satisfies the conditions of statehood under international law.[31] His criterion of recognition consists of independent government exercising effective authority within a defined area.[32] Basically, Lauterpacht's vision coincides with Montevideo criteria of statehood. Charpentier challenges Lauterpacht arguing that these are not criteria for recognition, but rather criteria for legal personality of state. "International legal personality of a state depends on factual existence of a state (and not its recognition). The general criterion for legal personality is compatibility of this personality of a new state with international law practice due to lack of norms regulating creation of a new state".[33] In 1936 the Institut de Droit International – French organisation devoted to study development of international law and composed of renown international lawyers - in its resolution on recognition of new states and new governments defined the following: "The recognition of a new state is the free act by which one or several states take note of the existence of a human society, politically organised on a fixed territory, independent of any other existing state, capable of observing the prescription of international law and thus indicating their intention to consider it a member of the international community".[34]
Even this short overview shows that the fundamental problem in recognition is absence of well-defined requirements of statehood and recognition. Lorimer expressed concern that "Each state is to say, not only whether or not a given community fulfils the requirements of international existence, but is, moreover, left to determine what these requirements are."[35] Since Montevideo, more criteria have been added in the practice, leaving unclear whether these are criteria for statehood or for recognition. This, of course makes recognition subject of political manipulation.
An important clarification for criteria of recognition came from the European Community. Following the break-up of the USSR and velvet revolutions in the Eastern Europe, on December 16, 1991 the foreign ministers of the EC countries adopted a "Declaration on the Guidelines on the Recognition of New

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[29] Crawford, James: The Creation of States in International Law; p.62
[30] Cassese, Antonio, International Law, p. 75
[31] Lauterpacht, Hersch, Recognition in International Law, p.6
[32] ibid. 26
[33] Фельдман Д., Современные теории международно-правового признания", P.119
[34] Institut De Droit International, La reconnaissance des nouveaux Etats et des nouveaux gouvernements, 1936, available at: http://www.idi-iil.org/idiF/resolutionsF/1936_brux_01_fr.pdf
[35] Grant, Thomas D., Recognition of States, p.83

States in eastern Europe and the Soviet Union". The declaration stated that the following criteria should be satisfied in order to recognise the emerging states:

"The Community and its Member States affirm their readiness to recognise those new states which, following the historic changes in the region, have constituted themselves on a democratic basis". Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights; Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE; Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement; Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States."[36]

It is worth concentrating at some of the important provisions of the guidelines, such as democracy, minority rights and security and regional stability.

Like self-determination, democracy began to matter as a criterion in the recognition in the 20th century and gained widespread recognition itself towards the late 20th century. In deciding whether to recognise the Yugoslav and Soviet republics the European Community and the United States demanded that the emerging states undertake democratic reform. However, Yugoslav and Soviet cases were different. Former Soviet republics were recognised after the official dissolution of USSR and recognising states did not bother about statehood criteria at all. In the Yugoslav case EC declared that the governments of Slovenia, Croatia, Bosnia and Macedonia had to demonstrate adherence to democratic principles before recognition could be extended.[37] Commitment to these guidelines did not turn into practice, however, as Germany and Austria recognised Croatia and Slovenia unilaterally, with big question marks over Croatian democratic governance. Bosnia also received recognition in summer 1992 with its tripartite institutions not functioning democratically.

Truly, democracy is not as evident criterion for recognition and it is very difficult to de-couple democracy criterion from politics. As the practice in Yugoslav cases showed, the democratic criterion is applied more negatively than positively, meaning it is applied to halt the recognition of new entity until better times.

State practice had connected minority rights to state recognition even until the 1990's. The new states were required to guarantee minority rights in the 19th century and after the WW I. The break-up of Yugoslavia and the USSR served again as a catalyst because the emergence of new independent states with large ethnic minorities, whose rights were not enshrined in the respective constitutions and ongoing ethnic tensions, posed a threat to security of these new states and the continental Europe as well. The EC Guidelines of Recognition explicitly stated that "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of CSCE" were required. Slovenia and Croatia quickly amended their constitutions, adding guarantees of minority rights to the text.

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[36] EC Declaration on Yugoslavia, 16 December 1991, http://www.dipublico.com.ar/english/declaration-on-yugoslavia-extraordinary-epc-ministerial-meeting-brussels-16-december-1991/

[37] Ibid.

Insistence by the EC that minority rights receive formal guarantees preferably through amendment of the constitutions in the new states extended the formal criterion for recognition to minority rights' protection. However, it should be noted that it can not be regarded as a universal criterion, since outside the EU and US many other countries recognised the new states without insisting on guarantee of minority rights.

Security and stability has been named as another criterion for recognition. This criterion coincides with the UN membership condition. Presently, as international law prohibits war as a means of solving problems in relations between the states, and international aggression is condemned, the existing states closely examine international intentions of a new entity. Commitment to peace is as important criterion for recognition as political independence[38] and one of the aims of the international community is to hinder emergence of a new state prone to aggression.

Modalities and Forms of Recognition and Non-Recognition

There are several modalities of recognition of a new state as well as non-recognition. It could occur either unilaterally or collectively. Unilateral recognition occurs when an existing state, international legal personality recognizes that another entity claiming to be a State meets the requirement of statehood and is therefore regarded as a state with the rights and duties attached to the statehood.

Collective recognition occurs, when a group of States, such as the European Union or the United Nations recognises the statehood of a claimant entity directly, by an act of recognition, or indirectly, by the admission of the State to the international organisation.

I have discussed the purpose and consequences of unilateral recognition already, therefore I will focus on collective recognition here. In recent past the European Community has collectively recognised states emerging from the former USSR as well as ex-Yugoslavia. Germany recognised Croatia and Slovenia three weeks before the collective recognition from the EC but did not enter into diplomatic relations before collective EC recognition.[39] Here, states exercised their individual right of recognition collectively in a manner which does not depart substantially from traditional recognition practice. Second example of collective recognition is admission of an entity to the UN. Today, apart from Israel whose statehood is still denied by some states, all members of the UN are accepted as states. Former colonial territories achieved statehood en masse by admission to the UN. They would have otherwise not received widespread recognition through traditional unilateral recognition only. Thus, it is reasonable to conclude that many states have achieved statehood by becoming members of the UN and that this procedure for recognition co-exists alongside the traditional method of unilateral recognition.

Apart from collective recognition, there exists a notion of collective non-recognition dating back to non-recognition of puppet state of Manchukuo in 1932. The then US Secretary of State Henry Stimson declared that the US would not recognise Manchukuo, because it was created in violation of the Pact of Paris 1928 renouncing war. This was followed by a declaration by the League of Nations calling upon its members not to recognise Manchukuo.[40] The doctrine of non-recognition is founded on the legal principle that if certain peremptory norms are violated, the legal act itself is null and void. This applies also

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[38] Фельдман Д., Современные теории международно-правового признания, p.128

[39] Haftendorn, Helga, Coming of Age, p.375

[40] Dugard and Raic in: Kohen, Marcelo G, ed. "Secession – in International Law Perspectives", P. 100

to the creation of states. States are under a duty not to recognise such acts under customary international law. In accordance with this doctrine, the UN has directed States not to recognise entities created on the basis of aggression (Northern Cyprus), systematic racial discrimination and denial of human rights (Bantustan states), and self-determination rights (Southern Rhodesia) or illegal change of status (Crimea). Non-recognition could be a tool for the states not to recognise entity, which is not considered to be really independent of the state that had been instrumental in its establishment. In such cases non-recognition reinforces the legal position and helps to prevent consolidation of unlawful situations. Its value in this respect is significant, although non-recognition is not as such either a method of enforcement or a sanction. It is a precondition for other enforcement action and a method of asserting the values protected by the relevant rules.

Unilateral non-recognition is also a phenomenon that is widely spread in international relations. PRC, North Korea and GDR were not recognised on ideological grounds. The recent recognition of Kosovo on one hand and recognition of Abkhazia and South Ossetia on the other have brought unilateral non-recognition policies to the center stage. For example the United States and the member states of the EU declared that they will not recognise the independence of Abkhazia and South Ossetia. On the other hand, Russia, China, 5 EU member states and among others Georgia conduct non-recognition policy towards Kosovo. We can still attribute non-recognition of Abkhazia and South Ossetia by the European Union to collective non-recognition, whereas other cases and Kosovo non-recognition is clearly a unilateral policy of non-recognition chosen by the solid amount of states.

State practice provides for the principle of de-recognition that is withdrawal of recognition. Although, de-recognition is not widely spread and concerns mostly the case of Taiwan. Taiwan was de-recognised by most of the international community in 1971 and replaced by People's Republic of China at the United Nations. However, until recently some states have switched recognition from China to Taiwan and back for political and financial reasons.[41] Abkhazia and South Ossetia were also derecognised by Vanuatu and Tuvalu.

Dependence between the forms of recognition and intensity of relations has also been a matter of discussions of the legal scholars. The international law distinguished two forms of recognition 1) De-Jure; 2) De-Facto. The discussions mainly concentrated over the form of de-facto recognition. Some scholars argued that de-facto recognition could be revoked, some said that de-facto recognition could not be revoked, but fully-fledged relations could not be established and the others denied any juridical difference between de-jure and de-facto recognition. The analysis of legal nature of the form of recognition shows that division of recognition into de-jure and de-facto may not be applicable to all types of recognition and specifically to recognition of new states. Act of recognition is a juridical fact for the creation of a state. If a new state emerges on the international arena it has the right for full recognition (de-jure). Nevertheless, the government of the new state may get limited recognition (de-facto).

Thanks to Hallstein Doctrine most of the countries who had trade, economic and cultural relations with the German Democratic Republic recognised its government de-facto, because in case of de-jure recognition they were faced with breaking of diplomatic ties with German Federal Republic.[42] This practice effectively came to an end when both GDR and FRG were admitted to the UN.

Nowadays, features of de-facto recognition can be observed in relations between Russia and Transnistria and Armenia and Karabakh. Russian President Putin's decision to deal directly with authorities of

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[41] States that have switched recognition from PRC To Taiwan were Macedonia, Kiribati, Nauru, Guatemala, Gambia

[42] Haftendorn, Helga, Coming of Age, p.39

Abkhazia and South Ossetia in May 2008 represented also a sort of de-facto recognition. But none of those entities were recognised as states either by Russia or Armenia in the period concerned.

Conclusion

Recognition has been an important factor in validation of claims to statehood for over two centuries. It started to feature as an important principle when political liberalism challenged the dynastic rights. Recognition became a tool for establishing relations with the newly emerging states first in the Americas and then also in Europe. At first recognition was thought to have a constitutive character for the beneficiary state however, the declaratory theory challenged this notion by stating that recognition only confirmed the existence of a factual state. The great debate over these theories of recognition pointed that the "truth lies somewhere in between". Declaratory approach presupposed existence of certain criteria for statehood but until today international community failed to codify criteria for state creation, with Montevideo convention being the only limited source.

Similarly, there are no universal criteria for recognition either. Mostly, development of recognition criteria reflected the prevalent state practice of recognition of new states. When recognising new states the recognising states guide themselves with their own criteria for recognition. Despite attempts to codify criteria as well as the institution of recognition in international law[43], there is no single international law act which lists the universal criteria for recognition. These attempts have failed because there are no clear dividing lines between law and politics in the field of recognition. Recognition to the new entity is still extended at discretion of a recognising state and there is no provision in international law that could force the state to recognise the new one. The truth is that recognition is not governed by any rules whatsoever. All aforementioned criteria are deriving solely from international practice of recognition of new states.

Along with lack of codification of recognition criteria, there is a lack of any international authority tasked with determining whether an entity claiming to be a state in fact is a state. It is for each state to make such determination based on its own assessment and its own political will whether the new entity should be admitted to the community of nations. De-recognition, non-recognition and recognition thus becomes a political act, and perceptions of national self-interests play a determining role.

As a rule new states are rarely successful in achieving recognition by all members of the international community within a short period of time, unless they become the member of the UN right away. Recognition of a new entity largely depends on the consent of the parent state to let the entity into independence. Absence of recognition however does not mean that the new entity is devoid of legal personality in relation to non-recognising states. "General international rules such as those concerning to high seas, or respect for territorial and political sovereignty do apply to the relationships between the new state and all other members of community."[44]

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[43] UN International Law Commission members advised to codify recognition of states at the first session in 1949.

[44] Cassese, Antonio, International Law, p76

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