

Political Realities of Recognition of States Contrary to the Bindings of International Law

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Introduction

“There are only very few branches of international law which are of greater, or more persistent, interest and significance for the law of nations than the question of Recognition of States. . . . Yet there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven” writes [Lauterpacht](#) as the first sentence of his book on recognition of States in international law. This quote alone shows how the topic of recognition has many layers that affect the actions taken toward granting and withholding recognition. The issue of recognition of States has long been a topic of controversy among scholars of international law.¹ The topics of controversy do not only include the definition of recognition of States or what entity can be accepted as a State to begin with but also the theories surrounding the effects of recognition. Moreover, one of the most discussed topics regarding recognition of States is whether it is a matter of politics or international law. With the drastic increase of States on the international scene, especially in Europe after the dissolution of the Soviet Union and Yugoslavia, the questions of what entity can be recognized as a State and the impacts of recognition on Statehood have gained importance.

This Essay will aim to show that recognition of States is indeed a matter of politics; however, the effects of recognition will bear legal bindings, making a new-born State a subject of international law. This Essay contains five parts, the first being this introductory chapter. The second part will define what recognition of States means. This section will also examine the Constitutive Theory and Declaratory Theory of recognition of States. The third part of the Essay will examine the traditional criteria laid down by the [Convention on the Rights and Duties of States](#). This section will also analyze the European Community’s [Declaration on Yugoslavia and on the Guidelines on the Recognition of New States](#) and its new conditions to recognize new States in Yugoslavia. With these examples, part three will conduct an overview of how States have mostly followed a politically charged method rather than one of legal responsibility. This can be best exemplified with the new States emerging after the dissolution of Yugoslavia, thus the Essay will

1. See, e.g., [Hans Kelsen, Recognition in International Law: Theoretical Observations](#), 35 AJIL 605-17 (1941); [Philip Marshall Brown, The Legal Effects of Recognition](#), 44 AJIL 617-640 (1950); or [Christian Hillgruber, The Admission of New States to the International Community](#), 9 EJIL 491- 509 (1998) and so on.

mostly focus on the cases of Macedonia, Bosnia-Herzegovina, and Croatia. The fourth part will focus on the legal side of the question of recognition of States and how this issue may develop in the context of international law. The fifth part of the Essay will look at a case study on Kosovo and why Kosovo's recognition by some States can be accepted as politically decided rather than following international law. The Essay will ultimately conclude that recognition of States is indeed a political matter in essence that has legal implications for both the recognizing State and the recognized State.

I. Recognition of States and Theories of Recognition

In a general sense in international law, [“recognition involves the acceptance by a State of any fact or situation occurring in its relation with other States.”](#) The concept of recognition in international law applies to many issues, such as recognition of States, recognition of governments, and recognition of belligerent status. However, in this Essay, the main theme will be the recognition of States and how the process of recognition is politicized. In the literature of political science and international law, [the recognition of States historically has not gained much attention](#). However, especially with the dissolution of Yugoslavia and the Soviet Union, the literature has begun to flourish with scholars focusing on the criteria for recognizing States, the decision mechanisms involved in the processes of recognition, and even the criteria for Statehood.

[Recognition of a new entity as a State is a free act](#) in which one or more States recognize the existence of a society that is politically organized, exists on a defined territory, is independent of any other State, and has the potential to observe and fulfill the requirements of international law. Hence, States, through recognition, show their intention to consider the new-born State an actor in the international community. Nevertheless, it should be noted that this definition derives from [Article I of the Montevideo Convention](#). [There have been different definitions of recognition of States](#) according to the differences in defining what a State is and what criteria should be fulfilled to achieve recognition.

The questions of when an entity can be accepted and recognized as a State and what immediate effects this recognition entails have long been some of the most controversial issues in the literature of recognition of States. The constitutive theory of recognition perceives recognition as the creator of the State as a subject of international law. [An entity wishing to be the member of the family of nations has to be recognized by other States to enjoy its international personality](#). That means that [a community that has not been recognized possesses no rights or obligations that a recognized State may have](#) within the limits of international law. Hence, [it is the decisions taken by other States that constitute the existence of a new State](#); it is the actions, in this case recognitions, of the existing States that decide whether an entity is a State or not. Although [Jellinek](#) claims every State is *ipso facto* a part of the general community of States, it nevertheless is recognition that makes this community a part of the juridical community of States. Also, since an entity

that is not a subject of international law cannot constitute its own legal personality, it must be concluded that constitutive unilateral recognition by an existing State creates this legal personality for the entity, thus recognition is a constitutive act that has creating and attributing powers. [Crawford](#) explains that before recognition, an entity is “a matter of fact, not of law” to which [Oppenheim](#) adds that international law does not recognize the legal existence of an entity unless it is recognized by other States.

The constitutive theory has a number of drawbacks in practice. Firstly, the question of which States’ recognition, if any, must be obtained is ambiguous. Secondly, [constitutive theory falls short](#) on finding a solution for a situation where several countries recognize an entity as a State while other States do not. Furthermore, [considering there is not a supranational body for recognition of States](#), there is the question of whether States recognize an entity based on their national interests and policies or if they have to recognize any entity that fulfills the traditional criteria. [Lauterpacht](#) answers that recognition is “an act of unfettered political will divorced from binding considerations of legal principle.”

[Recognition of Bosnia-Herzegovina](#) by the States of the European Community [EC] and the United States, for example, [was a topic of controversy](#) both for [the government of Yugoslavia and supporters of the traditional criteria of Statehood since Bosnia-Herzegovina’s recognized government did not have effective control over most of its national territory.](#)² Moreover, the peoples of Bosnia-Herzegovina did not [demonstrate “the will to constitute the republic a sovereign and independent State”](#) through a referendum. Nevertheless, [Bosnia-Herzegovina was still recognized because of an international agenda](#) that aims to avert the sort of violence that had been going on in the region. This action of the EC States and the United States may well be said to have created the State of Bosnia-Herzegovina even though Bosnia- Herzegovina did not meet the traditional criteria of Statehood and the peoples’ will had not been taken then. Yet again, recognition was not used as a confirmation of the criteria of State being fulfilled, but [it was used as a substitute for the criteria that were missing](#). Thus and so, the recognition created the State.

On the other hand, [recent cases in international law](#) have demonstrated that the declaratory theory of recognition is more commonly accepted than the constitutive theory. [The declaratory theory of recognition perceives recognition as a means of acknowledging or declaring the existence of the State.](#) Unlike the constitutive theory, [the declaratory theory claims that an entity can be accepted as a State as soon as it fulfills the criteria of Statehood](#), its existence as a subject of international law and recognition only declares this fact. If a State is a fact, this makes recognition [“a formal political action](#)

2. See Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. 595- 96 (July 11). Judge Kreca in his dissent states that [“legally the recognition of Bosnia and Herzegovina within its administrative boundaries represented the recognition of a non-existent State.”](#)

[rather than legal relevance.](#)” This is because States make the decisions to grant and withhold the recognition and every State may not use the same criteria while assessing the Statehood of an entity. National interests and politics also play an important role in acknowledging or declaring the Statehood of an entity. [Lauterpacht](#), one of the best-known advocates of the constitutive theory, admits that politicization of the process of recognition is the reason for the popularity of declaratory theory among scholars. [Crawford](#) states that according to declaratory theory, recognition is merely “a political act that is not a necessary component of Statehood.”

[In the case of the Federal Republic of Yugoslavia](#) (FRY), for example, the Socialist Federal Republic of Yugoslavia’s (SFRY) dissolution was clear, thus new States could be born. [Both the ICJ and the Badinter Commission](#) stated the fact that FRY became a State as soon as FRY adopted a new constitution on April 27, 1992. However, neither the EC States nor the other republics of Yugoslavia declared FRY’s recognition as a State. [This demonstrates that States that are not recognized may also exist](#) but cannot be the subject of international law.

[Visscher and some other writers later](#), however, state that these two competing theories are not sufficient in explaining the relation between recognition, politics, and international law [saying](#)

Recognition is said to be neither declaratory nor constitutive. It simply is a political act which has significant legal effects in the international and domestic legal orders. This approach is premised on the idea that the dichotomy between [the] declaratory and constitutive [approaches] is insufficient to explain the complexity of the impact of recognition on the functioning of legal orders. Yet, such an approach is not exclusive of the idea that recognition occasionally has some declaratory and constitutive effects (the latter being generally reserved to effects of recognition under domestic law).

If an entity fulfills the criteria of Statehood, can it be still considered a State, regardless of the recognition granted by the other States? The answer to this question is where the two theories differ. While constitutive theory perceives recognition as the creator of a State, declaratory theory solely declares or acknowledges the fact that an entity exists as a State. However, similar to the approach under constitutive theory, an entity becomes a subject of international law and possesses all the rights of a State under international law only with the recognition of Statehood according to declaratory theory. Moreover, neither of the theories advocate that recognition is a matter of legal duty for the community that grants it. In other words, both theories perceive recognition as a political act.

II. The Criteria of Statehood and its Relationship With the Law and Practice of Recognition

One of the key parts of the discussion on the State recognition is that international law does not hold a universal law on what entity can be accepted as a State and what features of the entity are necessary to fulfill the criteria to be regarded as a State and be a subject of international law. [Even though](#)

[there have been different implications and attempts for the exact definition of the criteria of Statehood, they have not been confirmed by all the States](#), thus making the process of State recognition more politically charged.

A significant legal formulation of the criteria of Statehood that has been used by many countries to assess an entity for Statehood is the criteria put forward in [Article I of the Montevideo Convention](#). [Article I](#) states that an entity should have the following features to be recognized as a State under international law:

- Permanent population
- Defined territory
- [Effective and Independent] Government
- Capacity to enter into relationships with other State

Permanent population as a criterion of Statehood signifies the importance of a physical community of people. According to the [Montevideo Convention](#), there are no limitations on the exact number of people residing in an entity. However, taking the State of Vatican City as a case study in this matter, [Lauterpacht explains](#) that when the issue of natural process of renewal and growth of the population is concerned, Vatican City is controversial because the population mostly exists because of vocational reasons. Hence, [it is more challenging to express whether Vatican City is a State or not as its population criteria is not fulfilled the same way as other States](#).

Defined territory, together with the criterion for permanent population, is also associated with the physical existence of a community. [It is imperative for an entity to have a defined territory to be able to set up an effective government and the political community must be in control of the defined area](#). Similar to the criterion for permanent population, the territory of an entity can be any size with no limitations on the area. [The State of Vatican City, for instance, has an area that is less than 0.50 km²](#). Hence, [Lauterpacht](#) points out that “the element of Statehood is reduced to a vanishing point in this case.” Disputes against the parent State or other States regarding frontiers may also result in postponed recognition or non-recognition of an entity as a State. The British government, for example, [postponed the recognition of Finland](#) when the frontiers were not drawn according to the decisions taken by the Peace Conference. A similar issue occurred [when Lithuania did not manage to solve the Vilna dispute](#) concerning her frontiers even though Estonia and Latvia were granted recognition by the Allied Powers.

The next criterion is having an independent and effective government. [Crawford](#) stresses the importance of fulfilling this criterion saying that independence from other States is the “decisive criterion of Statehood.” [The government must be independent from all the other States, including the parent State](#). If a State has gained its independence from the parent State but is still legally or actually a satellite of another State (for example, the Manchurian government under Japanese influence), [it would still not meet the criterion of having an independent government](#). Another requirement is that the government [must have an effective authority to provide internal stability of the State](#). Unlike the example of Bosnia-Herzegovina mentioned

in Part II of this essay where an entity was granted with recognition without having an effective government, [Cuba's claim to recognition was denied by the United States by President Grant in his Annual Message of December 7, 1875](#) for the lack of an effective and stable government controlling the entity. He stated that [for an entity to be a State, it must have](#)

Some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing the corresponding international duties resulting from its acquisition of the rights of sovereignty.

Capacity to enter into relations with other States, according to [Roth](#) is the most criticized of the four elements of the Montevideo formula.” The reason for that, [Vidmar expresses](#), is that the criterion of capacity to enter into relations with other States is itself “a corollary of a sovereign and independent government” thus this makes the criterion a consequence rather than a requirement to fulfill. For the supporters of Constitutive theory of recognition, a State can not be a subject of international law unless it is recognized, however, if capacity to enter into relations with other States is expected from an entity before recognition (as a criterion to fulfill), this creates the question of how an entity can enter into relations with other States on the State-State level if it is yet to be recognized.

These criteria alone, however, have not been the only consideration of States granting recognition. The history of recognition is full of examples where other States bend and change these criteria and sometimes recognize entities that do not even fulfill the traditional criteria, as shown on Bosnia Herzegovina example. Even the scholars of international law have contradicting ideas concerning the recognition of an entity upon fulfillment of traditional criteria. While [Brown argues](#) that even though the criteria is reasonable and comprehensive, these conditions do not guarantee the recognition of a State, [Lauterpacht contends](#) that “existing States are under the legal duty to grant recognition” if an entity meets the traditional criteria. In the case of Israel, for example, the British Foreign Office announced that since Israel had not yet met the criteria of an independent State, Great Britain could not grant recognition to Israel. The same day, though, [United States and Soviet Union had already announced their recognition of the State of Israel and its Provisional Government](#). This difference in State practice demonstrates the irregularity and political discretions in the process of State recognition. However, it is important to remember that [Lauterpacht expresses](#) that the recognition is not a decision taken in the line of a legal duty, but “in pursuance of the exigencies of national interest.”

Apart from the criteria laid out in Montevideo Convention, States, in certain situations, have also asked for special [“conditions on entities seeking recognition.”](#) One of the most significant examples of these conditions was put forward by the European Community with [Declaration on Yugoslavia and on Guidelines on the Recognition of New States](#). [Rich argues](#) that because traditional criteria did not provide “sufficient choice of diplomatic tools,” for

the EC to work on the issues and recognition alone would not influence the situation. As a result, they set new conditions. The Guidelines included conditions regarding human rights, respect for the rights of ethnic groups and minorities, respect for the borders with other States, conditions on disarmament, etc. EC guidelines changed the way recognition had worked with addition of the issue of conditionality. Setting up conditions for entities wishing to become a State is [unacceptable by Lauterpacht](#) since this means that recognizing States dictate how the new State should be organized internally. Moreover, a State may be created without respecting the minority rights or frontiers with other States. [EC guidelines did not only set new standards for Statehood and the criteria/conditions of recognition, they also disregarded traditional criteria in many examples during the dissolution of Yugoslavia. Rich lists the following deviations:](#)

Croatia: Although the entity did not have an effective control over one third of its territory, it gained widespread recognition by EC States.

Bosnia and Herzegovina: The entity was recognized by the States of EC and United States as well as being admitted to the United Nations without having an effective government control over its territory, including its capital city.

Macedonia: The entity was denied of recognition even though it fulfilled all the traditional criteria as well as conditions of EC guidelines. The reason for withholding recognition was that a State among EC did not approve of the name of the entity.

[It must not be forgotten that the criteria of Statehood may not be equal to the criteria/conditions of recognition.](#) So in the case of Macedonia, [there was no doubt that it was a State](#), however it [was not granted recognition until the resolution of name dispute. It is in the discretion of the State to decide that different criteria such as self-determination, democracy, minority rights and constitutional legitimacy or non-violation of international law](#) should be added to traditional criteria or not since these conditions reflect different policies of States. For instance, [the EC considered these conditions as factors for recognition whereas the US used them as determining factors of entering into diplomatic relations.](#) This clearly shows that though the conditions and normal standards of international practice have partially been considered, the political realities of each case also play an important role in the process of recognition. [Rich](#) points out that the question of recognition of States became unpredictable and political as a consequence of the EC Guidelines. As the examples above demonstrates, recognition became a topic of name disputes³ which has never been listed as a condition or criteria of recognition, or governments with no or partial control over their territories which contradicts with traditional criteria of Statehood. Warbrick, focusing on British practice on recognition of States, admits that recognition with special conditions were new to the government, these conditions for recognition is [“an act of policy” and in the case of Yugoslavia, the policy was to provide stability and fairness](#)

3. See, e.g., Foreign Affairs Committee (FAC), First Report, Central and Eastern Problems of the Post-Communist Era, 1 H.C. 11, 181 (1992) for a discussion on what British approach on deciding a name for another State.

[in the area](#). In a sense, [recognition was used as a tool of political pressure](#) during the process of recognition. Moreover, [these conditions were not applied consistently in other cases](#), thus making the process of recognition more of [“an instrument of foreign policy rather than a formal declaration of an ascertainable fact.”](#)

III. Recognition as a Legal Duty

So far in this Essay, the process of recognition has been exemplified mainly with political discretion of the recognizing States. [However, there have been many scholars focusing on the legal aspect of recognition, as well. The arguments](#) stress the fact that if a community of people fulfill the requirements of being a subject of international law as a State, then, in their relationships with other States, international law is applicable to this community and that makes the act of recognition a legal act. [Kelsen explains](#) that the legal act of recognition simply establishes the fact that the recognized State legally exists as a State with rights and obligations provided by international law which makes the recognition a constitutive act. Thus, [it is only with recognition an entity can legally interact with other States on a State-State level](#).

It is also important to assess the question of whether there is an obligation to recognize or not. International law does not obligate any State to recognize an entity by its laws. [State practice has also shown that existing States do not have any obligations to recognize](#). Granting as well as refusing of recognition of an entity fulfilling Statehood conditions are not violations of international law, and they are at political discretions of existing States. However, [Kelsen warns](#), it is violation of international law to recognize an entity as a State if it does not meet the conditions of Statehood laid down by the law. Furthermore, it must also be noted that [if an entity fulfills the criteria of Statehood, other States are ‘legally at risk’ if they choose to ignore the fact that the entity exists as a State under international law](#).

IV. Recognition of Kosovo as a State and its Implications to the Literature of Recognition

Kosovo first declared its independence in 1991 during the dissolution of Yugoslavia, but the only State that granted recognition then was Albania. The European Community’s Arbitration Commission, however, [withheld its recognition due to the nonfulfillment of the criterion of having an effective government controlling its territory](#). On the other hand, [since the declaration of independence on 17 February 2008, following unilateral secession without the approval of the parent State Serbia, 118 States have granted recognition to Kosovo](#) despite the fact that the declaration [was announced as incompatible in accordance with UN Security Council Resolution 1244 \(1999\) by International Court of Justice \(ICJ\)](#). The court expressed in a number of Security Council resolutions that it [“condemns particular declarations of independence” as well as it calls Member States for “not recognizing” the entities that initiated such declarations](#). Nevertheless, [several States](#)

[recognized Kosovo regardless of the fact that ICJ had not made a reference to the legal status of Kosovo](#), making the situation even more unclear.

To understand whether Kosovo fulfills traditional criteria of Statehood, one must evaluate the entity in accordance with the criteria. [The population of Kosovo is approximately 1.9 million as of 2018 estimates and is made up of 90% Albanians and 10% Serbs, Bosniaks, and other minority groups](#). Even though Montevideo Convention does not mention a certain number, Kosovo has a permanent population residing in the territory of Kosovo. Concerning the criterion of defined territory, since the declaration of independence in 1991, Kosovo has accepted its territory as an independent territory even though Serbia's approval was not taken during this unilateral declaration of secession. Hence, it is challenging to accept the existence of a defined territory even when the entity has a map of itself drawing its borders with its neighboring States. Capacity to enter into diplomatic relations with other States is another criterion that Kosovo meets, as [it hosts 52 diplomatic missions including embassies of other States and international organizations and it has 28 embassies in other States](#). Lastly, Kosovo does not fulfill the criterion of having an independent and effective government as [its government has been supervised by international organizations such as the United Nations and NATO](#). This can not be accepted as an independent government (even though it is still independent of Serbian government) as its judicial, electoral, and governmental decision mechanisms are mostly under the administration of international organizations.

With all these conditions in mind, one must ask why Kosovo was not recognized in 1991 in a very similar situation but more than hundred States have recognized it since 2008. [Caspersen](#) mentions the change from "standards before status" to "standards then status" specifically in case of Kosovo. The idea that standards meaning the conditions of Statehood must be completed so that recognition could be granted did not seem to apply for many States such as [Australia, Italy, Japan, the UK, and the US](#) since they recognized Kosovo without an independent government and despite the ongoing dispute over territorial claims. Does the recognition in this case make Kosovo a State or does it just declare its existence? If recognition is declaratory in nature, how, in this case, did only Albania recognize Kosovo in 1991 and 117 more States recognized it today? [Caspersen points out](#) the political interests of the 'great powers' in the case of Kosovo and how their strategic needs played an important role in the decision to recognize Kosovo. Thus, great powers and their political interests could even constitute a State, showing one of the few examples of State creations in the 21st century. [Vidmar adds](#) to this discussion that whereas collective recognition can still constitute a State, unless there is universal recognition, this State remains as a State for some and just an entity for others. It is, again, in the political discretions of States to grant recognition.

Conclusion

Recognition of States is a matter of politics that has legal consequences

for both the recognizing and the recognized States. The theories surrounding the concept of recognition of States focus on either its constitutive (the creator of the legal existence of the State) or declaratory (merely acknowledging the existence of a State as long as it meets the requirement of Statehood) features of recognition. Declaratory theory is more widely accepted among scholars even though, especially after the dissolution of Yugoslavia, States have been created with the effect of recognition whether the traditional criteria had yet been met or not. However, the supporters of both theories agree that the recognition is a matter of politics but have different opinions concerning the legal consequences it creates.

An important assessment towards recognition of an entity as a State is if the traditional criteria (defined territory, permanent population, independent and effective government, and capacity to enter into relations with other States) have been fulfilled. Although some States have considered these criteria as legal conditions for recognition (as seen in British non-recognition of Israel at first), State practice throughout the history has shown that these conditions are prone to changes and they can be bent and altered (as seen in the examples of Bosnia-Herzegovina and Kosovo). Furthermore, some States have suggested new conditions for entities to meet if they wish to be recognized. EC Guidelines have transformed traditional criteria to more case-base conditions under the consideration of political realities of each case. Examples have shown that while an entity with no effective government and not having taken the will of its people towards independence may be granted with recognition as well as membership to the United Nations, another entity that had fulfilled both traditional criteria and EC conditions may not be recognized because of a name dispute. In a more recent example, Kosovo, having failed to meet the criterion of having an independent and effective government in 1992, had a government that was in most parts supervised and controlled by organizations like the UN and NATO, hence its government was not of an independent nature. Yet again, though recognized by only Albania in 1992, since 2008, Kosovo has been recognized by 118 States despite the resolutions concerning the nature of its secession and declaration of independence.

The history of recognition of States has more examples as to how State practice is politically charged and it is the national interests, foreign policies and political strategies that shape the decision of granting and withholding recognition. Moreover, the scholars agree on the fact that there is no obligation to recognize a State. For the reasons, I consider recognition of States as a matter of politics rather than legal acts.