
The Rocky Road to International Recognition

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Summary

The author argues that the problem of recognition of state sovereignty has been neglected in international law despite its essential significance for international politics. He examines the consequences of new developments and the political practice of recognition after the breakdown of Communism. General considerations are supported by a detailed analysis of the cases of recognition of post-USSR and post-Yugoslav states. The new practice of recognition has provided great momentum in the development of international law which is progressing towards full recognition of the right to self-determination, including a right to secede.

Introduction

According to Falk there is an emerging paradigm shift whereby the basis of international law in sovereign statehood is withering away with the rise of alternative structures competing to regulate international activity¹. Nevertheless, the state is still the principal actor and therefore the law of recognition which determines the existence of a state "must be seen as the foundation stone of the edifice of international law"². Moreover, the act of recognition reinforces the sovereignty of the recognizing states. Yet for Lauterpacht, this area was "one of weakest links in international law"³. Brownlie describes theories about recognition as a "bank of fog on a still day"⁴.

¹ Falk, R., *Revitalising International Law*, (1989) 3.

² Dugard, J., *Recognition and the United Nations*, (1987) 1.

³ Lauterpacht, H., *Recognition in International Law*, (1947) 3.

⁴ Brownlie, I., *Recognition, Theory and Practice*, in: *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, (1983) 627.

International law is the language and structure of international politics. Indeed, the mix between the theoretical law of recognition and *realpolitik* recognition often resembles that of oil and water; the thin layer of theory on the top and often disguises the vast depths of *realpolitik* considerations. The volume of state practice in relation to recognition in the past 12 months has been greater than of the previous four decades, inevitably resulting in considerable development in international law. This has been brought about by significant historical events which have altered the structure of the world community.

The end of world conflicts such as World War 1 and World War 2 and now Cold War, has resulted in the development of new structures in the geopolitics of the world and particularly of Europe which has been the fulcrum of all three conflicts. It is therefore not surprising that the existence of Yugoslavia which was created and recreated after each previous conflict, was again in question. Two of the three elements of glue that held the state together after World War 2, namely the Soviet threat and Tito, were gone. All that was left was the Serb-dominated army (JNA), a cruel remnant of Stalin's legacy and an anachronism in the modern world.

The death of Communism, which had over the years anaesthetised the nationalist sentiments that existed in Yugoslavia and the Soviet Empire, enabled them to find new expression. The international community's response necessarily entailed the question of recognition in which political factors proved not only influential but decisive. Thus imposing further impediments along road to international recognition which consequently changed the law beyond "recognition".

The principle of recognition

Premature recognition gives rise to a delict in international law against an existing state. Art. 2(7) of the UN Charter prohibits intervention in the domestic jurisdiction of any state. For this reason and the self-interested reason of self-preservation, states attach extreme importance to the principles of non-intervention and respect for the territorial integrity of states. Recognition is perhaps the most extreme form of intervention in another state's domestic affairs short of external aggression or direct armed aid to secessionist movements.

In 1933, the Montevideo Convention on The Rights and Duties of States articulated the four then-prevailing criteria for statehood. Namely; a permanent population, a defined territory, a government and the capacity to enter into relations with other states. These provisions ignored the complexity of the highly charged subject of recognition.⁵ Controversy arose over the question whether a polity complying with these criteria becomes a state (the declaratory theory) or whether the additional act of recognition by other states is required to bestow international legal legitimacy (the constitutive theory).⁶ International legal scholars found themselves on different sides of the great divide in the doctrine of recognition with politicians favouring the constitutive school. Although Lauterpacht followed

⁵ Berat, L., *Review Essay-John Dugard's Recognition and the United Nations*, (1989) 24, *Texas International Law Journal*, 501.

⁶ *Ibid.*

the views of the constitutivists, he also insisted that states were legally obliged to recognize any polity that met the requirements of statehood.⁷ An overarching requirement is independence. In the *Customs Regime Case* (1931) the Permanent Court of International Justice established that Independence exists where a state has over it no other authority other than that of international law. This was the reason advanced for the non-recognition of Manchukuo as a Japanese "puppet-state" or of 1941 Croatia Democratic Republic was for a long time not recognized as a sovereign State because it was not considered sufficiently independent vis-à-vis the Soviet Union.

The concepts of *de jure* and *de facto* recognition belong primarily to the recognition of governments.

"The conditions under international law for the recognition of a new regime as the *de facto* government of a state are that the new regime has in fact effective control of most of the state's territory and that this control is likely to continue. The conditions for the recognition of a new regime as *de jure* government of a state are that the new regime should not merely have effective control over most of the state's territory, but it should, in fact, be firmly established".⁸

These concepts "have outlived whatever usefulness they may once have served"⁹ particularly in light of Australia's recent decision to continue to recognize states but to no longer formally recognize governments, thus bringing it into line with the US and most countries of the EC. The rationale for the change was that it allowed quicker and more flexible reactions to international developments and avoided assumptions of approval of recognized regimes. This change in policy therefore provided a way out of the impasse with Fiji following the coups in 1987.

Lorimer's doctrine of relative recognition whereby different entities in international law can have different rights, along with Lauterpacht attempted to develop scientific rules of recognition so that it was not merely a political act.¹⁰ However, recognition policies in relation to governments have also been trained by political considerations.

Inconsistency in British recognition practice is evident in the long period of non-recognition of the effective East German and North Korean governments and the continued recognition of the Pol Pot regime in Kampuchea even when in 1979 it was no longer in effective control of Kampuchea. The new recognition policy did not imply any change in Australia's attitude towards Afghanistan or Kampuchea. Australia had refused to recognize the government of Afghanistan since the Soviet invasion of 1980 and withdrew recognition of the government of Kampuchea in 1981. The US only recognized regimes which were committed to hold free elections and to fulfil all international obligations. Factors influencing US recognition policy

⁷ Lauterpacht, H., *Recognition in International Law*, 1947, 6.

⁸ Secretary of State for Foreign Affairs to the House of Commons on 21 March, 1951 (Hansard, Vol. 485, col 2410: cited in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd & Ors*, 1967; A. C. 853, 906 Per Lord Reid).

⁹ Dugard, J., *Recognition and the United Nations*, 1987, 6.

¹⁰ Lorimer, J., Of International Recognition in General, *International Law*, Vol 1, 101.

included support for anti-monarchical governments, advancing American economic interests, promoting constitutional government, reducing support for Axis powers in World War 2 and curbing the spread of communism. Recognition policy also varied with region with recognition of Central and Latin American revolutionary governments based on more stringent conditions than recognition of European, African or Asian revolutionary regimes. Latin America States have also considered factors such as whether or not a government or whether or not elections will be held, before extending recognition. In 1959 the Minister for External Affairs, Mr. Casey, explaining Australia's non-recognition of the People's Republic of China said that "a regime's capacity to govern is not the sole test for recognition by other governments".¹¹ By 1974, however, the Australia position was that recognition and establishment of diplomatic relations were neutral acts, implying necessarily neither approval or disapproval of the government of country concerned.¹² The minimum criteria for the policy of "universal" recognition of governments was said to be: the exercise of effective control; a reasonable prospect of permanence; the support of the population; and an expressed willingness to fulfil international obligations.¹³ The policy explains the recognition of the Pinochet regime in Chile and the Whitlam government's recognition of the incorporation of the Baltic States into the Soviet Union which was reversed when the Liberals came to power. This policy was not always strictly adhered to as evident by Australia's recognition of the Viet Cong Government in South Vietnam before the final collapse of the Thieu Government in May, 1975. The policy of "recognizing reality" was applied in recognizing the de facto absorption of East Timor into Indonesia and the 1979 de jure recognition of Indonesian sovereignty.¹⁴ Only three years later Australia refused to recognize a military regime in Bolivia on the grounds that it had reversed the democratic process. Australian and British refusal to recognize the Vietnamese-backed regime in Kampuchea in 1980 because it came to power through outside intervention is contradicted by recognition in 1979 of the Lule administration in Uganda whose effective control was made possible by Tanzanian troops.

Therefore recognition has long been a political act. In 1778 when France recognized the US, Britain consequently declared war. However, recent recognition practice, particularly in relation to the USSR and Yugoslavia, has challenged the traditional criteria for statehood which have been the means of recognizing a state. These criteria have previously come under serious question such as when Israel was accepted into the UN whilst fighting still continued. This could be treated as an exceptional case. The US in recognizing Israel justified its action as "a practical step in recognition of realities".¹⁵ However, contemporary state practice has provided a very broad, deliberate and articulated approach to recognition which no longer reflects the traditional law for the creation of States. Again, politics has played a significant role in this development.

¹¹ Charlesworth, H., *The New Australia Recognition Policy in Comparative Perspective*, *Melbourne University Law Review*, 1991, 18.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *UN: Security Council Official Records*, No. 68, 3rd Year, 16.

The USSR: The Baltic States

In the 1920s the Baltic States were generally recognized as independent states and had diplomatic relations with several countries including Australia. However, in 1939 they became victims of the *Molotov pact* between the Nazis and the USSR whereby they came under the Soviet sphere of influence which was formalized after World War 2 when they became republics of the USSR. In 1988/89 they asserted their sovereignty and independence in light of Gorbachev's *Glasnost* policies. However, as recognition is an acceptance of country's independence, they were not considered independent as long as Moscow asserted its authority over them.

However, a distinction was made between *de jure* and *de facto* recognition. Most of the West, with the exception of Australia during the Whitlam era, did not accept the *de jure* authority of the USSR over the Baltic States but did accept its *de facto* control. This was significant for the eventual independence of the Baltic States. When the Soviet coup of August 1991 collapsed, the Baltic States re-asserted their independence which the West was now ready to accept. On 27th August, 1991 the EC did not use the word "recognition" but said that it would enter into diplomatic relations with the Baltic States which could only be done with independent states. Similarly, the US and Australia did not have to recognize the Baltic States by virtue of their *de jure* recognition so it was only a question of entering into diplomatic relations. Recognition by the USSR was distinct as it had previously exercised its authority over them.

For fear of instability by setting a dangerous precedent, the international community distinguished the situation of the Baltic States from the situation of the other republics of the USSR and those of Yugoslavia. The Baltic States had been independent countries and their incorporation into the USSR had not been recognized and therefore they were viewed as having regained their independence when the USSR relinquished its control over them. Therefore the traditional rules of international law and practice were still to be applied to the remaining republics and to Yugoslavia. However, the traditional law did not accommodate those situations.

The Soviet Republics

A decisive factor in US recognition policy was the overarching thrust of President Bush's firm connection with Gorbachev. Yet US could not recognize the Balkan republics and not do the same for the Baltic States as this would have undermined the Soviet President. Gorbachev declared Yugoslavia was a salutary warning for the USSR of a separatist threat stating "I will not be diverted from this path one inch whatever the pressure put upon me".¹⁶ His government suggested it would be in the West's interest to offer financial support for Gorbachev and his policies aimed at holding the country together. Gorbachev was prepared to devolve substantial economic and political powers to the republics for the sake of preserving the union. US recognition policy was based on its determination that Gorbachev's success was essential to US interests and that he must survive his many crises,

¹⁶ *Age*, Melbourne, 7th September, 1991.

including the Baltic States' demand refusal to accept Soviet annexation of Estonia, Latvia and Lithuania the US flinched from recognition of the Baltics. US policy viewed Baltic aspirations as a threat to Gorbachev more than as a legitimate demand for self-determination.

Even when Russia recognized the Ukraine on 3rd December, 1991 the West was still reluctant to act because Gorbachev was still in power and still trying to broker a new Union Treaty with various republics. Therefore the West viewed Russia's act as Yeltzin recognizing the USSR with only Russia's interests in mind. By recognizing the Ukraine the West would have been effectively rejecting Gorbachev. It therefore refused to buy into the Yeltzin/Gorbachev power struggle until it became obvious that the latter no longer wielded power.

On 8th December, 1991 Russia, the Ukraine and Byelorussia concluded an agreement effectively ceasing the existence of the USSR. Gorbachev resigned on the 25th December, 1991. The EC recognized the new republics, including Russia, but did not use the term "recognition" in relation to the latter. The EC noted the interests, rights and obligations of the former USSR, including those under the UN Charter, would continue to be exercised by Russia. They welcomed the Russian government's acceptance of these commitments and responsibilities and in this capacity would continue their dealings with Russia taking account of the modification of its constitutional status.

The US however, did use the term "recognition" in relation to Russia recognizing also the Ukraine, Armenia, Kazakhstan, Byelorussia, and Kirghizia. Bush stated that the US also recognized the independence of Moldova, Turkmenistan, Azerbaijan, Tadjikistan, Georgia and Uzbekistan but would establish relations with them "when we are satisfied that they have made commitments to responsible security policies and democratic principles".¹⁷ This is an important distinction in terms of the way in which international law is developing. The EC was not able to establish that all of its criteria had been met in respect of these republics without further submissions. Australia did not initially recognize Georgia until 29th March, 1992 after EC recognition on 23rd March, 1992, because it did not meet the old criteria of having a government. It was in virtual anarchy with the government forcibly ejected by opposition forces. It was only when a new government was formed by former Soviet Foreign Minister Eduard Shevardnadze that recognition was extended. In this regard the criteria ran parallel to the new criteria.

YUGOSLAVIA

Croatia and Slovenia

Contributing to the momentum of popular sovereignty through Eastern Europe, the Croatian and Slovenian people ousted the communists from power in their respective republics in multi-party elections held in 1990. Overwhelming majorities at subsequent referendums provided a mandate for the Declarations for Independence on 25th June, 1991. Both the Slovenian and Croatian referendums left open the possibility of an alliance of sovereign states with other republics

¹⁷ Age, Melbourne, 27th December, 1991.

in line with the Croat-Slovene proposal for the solution of the state crisis in Yugoslavia of October, 1990. In Slovenia's referendum on 23rd December, 1990, 93.2 % of all registered voters took part. Of those, 95 % voted in favour of Slovenia becoming an independent sovereign state. In Croatia, 83.5 % of all registered voters participated in the referendum on the 19th May, 1991. Of these 93.2 % feverous Croatia becoming a sovereign independent state.¹⁸

Recognition policy towards the former Yugoslav's republics was obscured by hypocrisy. The international community suspected the country was doomed but refused to consider any alternatives and when the choice existed, most states continued to assert they would not recognize Croatian and Slovenian independence. Attempts by such states to keep Yugoslavia together will remain a testimony a muddled policy implemented far too late and with a stubborn determination which defied realities and ultimately hastened Yugoslavia's disintegration.

As the conflict unfolded, many states in unison and parrot-fashion repeated their demand that Yugoslavia must stay together and solve its problems. The US adopted the stick approach by ceasing its small aid program. The EC opted for the carrot by signing a five year 607 million ecu loan agreement. Croatia was admonished by the US which said that only if all parties agree can the federation relationship change. This effectively gave the Communists veto power over all dialogue. Baker argued first in favour of Yugoslav unity and then appealed to all sides to avoid the use of force thus putting the pro-Western governments of Croatia and Slovenia in the same basket as the neo-communists in Belgrade.

The Australian government alone accepted the possibility of the inevitable break-up of Yugoslavia. However, statements by Prime Minister Hawke and Foreign Minister Evans that Croatia and Slovenia would be recognized if they satisfied the requirements of independent statehood expressed the traditional view for what had been the criteria for statehood. No explanation was given as to why they didn't meet these criteria. Primary emphasis was put on the need for "an end to confrontation and a renewal of dialogue" (Senator Evans) and the importance of resolving the crisis "peacefully and in an acceptable and orderly fashion" (P. M. Hawke).¹⁹ Australia therefore adopted the American condition for recognition that independence must be achieved peacefully. This ignored the possible use of the JNA to suppress the independence movements and hence prevent a peaceful settlement, which is what happened. The subsequent aggression resulted in Croatia losing control over one third of its territory thus no longer satisfying the traditional criteria which it possessed at the time of its Declaration of Independence. It any event, under the criteria of Defined Territory it is sufficient that there is enough certainty. Croatia's borders were internationally recognized under the Helsinki Process and 1990 Charter of Paris for a New Europe and could not be altered by act aggression.

The Croatian Declaration of Independence states that the Declaration "begins the process of disassociation from the other republics" of Yugoslavia. The West therefore saw Croatia's independence as inchoate and accordingly did not respond

¹⁸ Cviic, C., Implications of the Crisis in South-Eastern Europe, *Aldephi Papers*, 1992.

¹⁹ Moore, D., Slovenia and Croatia: When Should Australia Recognize?, *IPA Backgrounder*, 3, 1991, 1.

favorably. Although Slovenia's Declaration actually stated that "Slovenia expects legal recognition from other countries" it received the same response. The Declarations were a process of independence because they acknowledged that some issues remained to be resolved such as the status of the JNA in the republics and the division of common property. Rich is critical of Slovenia for doing more than Croatia by actually taking over the border posts by force.²⁰ Yet, he sees Croatia's act of independence as insufficient. He takes the American view saying "Perhaps Croatia should have tried harder with their negotiations and been more patient in the way they went about things".²¹ This view ignores events in Yugoslavia before the Proclamations of Independence. It overlooks the referendums, proposals for confederation and numerous other negotiations which were rebuffed by the communist regime.

The Declaration of Independence were in fact a culmination of a process of independence beginning well before the Declarations. Moreover, they were a necessary action of both republics to protect the interests of their own nations. In 1989 Serbia annexed the autonomous provinces of Vojvodina and Kosovo without referendums and thus automatically obtained three votes in the Yugoslav Presidency of 8 representatives. Serbia brutally suppressed the Albanians which comprise 90 % of the population in Kosovo. These actions could be seen as a threat to constitutional provisions could be seen to have destroyed constitutional validity thus necessitating the republics to protect their citizens through secession.

Milosevic embarked on a campaign backed by the army which aimed at re-centralizing Yugoslavia. After the elections in Croatia an armed rebellion, supported by Serbia, was staged in a series of border districts where Serbs form a majority. This soon developed into a well-orchestrated attempt to destabilize Croatia with some regions declaring themselves part of Serbia, with the increasingly open backing of the JNA.

Ancient differences account for a large part of the present trouble but not all. There have been endless disputes over the distribution of wealth and resources. Slovenia and Croatia being richer and more advanced have complained of having to subsidize the federal budget which includes the Serb occupation of Kosovo. A deep cause of the war was the inability of a closed society to abide an opening to the light democratization. Slovenia began its search for a civil society several years ago—a society independent of the state rather than an independent state. Yugoslav society however, was kept closed by the weight of federal communist dictatorship by the Serbian Communists and army. The Slovenians were faced with a Soviet dilemma. While the centre resisted democratization, it was not possible to enjoy independence within their republic, let alone within the federation. At the same time, Milosevic revived his party by exploiting the nationalist dream of Greater Serbia and by repudiating any demand for democratization as a malignant form of nationalism. It was therefore not just a war between nations but between an old communist regime—centralized in the power of the Army and the Serb Government—and democratic movements. Many Serbians in Slovenia and Croatia, who voluntarily than under the dictatorship of Milosević, supported the idea of independence.

²⁰ Rich, R., *Paper delivered at Melbourne University*, 1st June, 1992.

²¹ *Ibid.*

Serbia's attempts to keep the country together had the contrary effect. Instead of welcoming of even considering the Slovene and Croat proposal for a looser confederal structure with a single market and single currency, Serbia rejecting it out of hand and clung ever more fiercely to the idea of a centralized authoritarian unitary state thereby alienating the other republics beyond recall even before inflicting the final blow by resorting to armed force. Year-long negotiations for a reformulation of relationships in the federation were constantly met with nothing but smug intransigence as there was no incentive for the Communists to negotiate.

Another factor which triggered the independence decision was Serbian economic warfare against Croatia and Slovenia particularly the imposition of duties on their goods and the confiscation of their property on Serbia. Moreover, Serbia perpetrated a financial raid on the Yugoslav National Bank in December, 1990 stealing half the money supply earmarked for the whole of Yugoslavia for 1991. A similar illegal operation was mounted by Montenegro in early 1991 for the same purpose of obtaining fresh funds to pay the large increase in wages and pensions that preceded elections in Serbia and Montenegro which the Communists then won.

The last straw for Croatia and Slovenia was Serbia's decision, with the aid of the votes of Montenegro, Kosovo and Vojvodina (all under Serb control) on the Yugoslav's state presidency to block the election for a year of a Croatian, Stipe Mesić, as its Chairman in line with procedures followed since Tito's death.²² Consequently Croatia and Slovenia had no alternative but to declare their independence. Yet the US was putting more pressure on Croatia than Milošević. Baker actually visited Belgrade and spoke of his country's commitment in keeping Yugoslavia together in spite of the obstacles the Serbs were putting in the way of letting the federal presidency work. Baker's comments simply encouraged Milošević and his generals to become more extreme in their demands. They felt safe in the knowledge that the US would hinder any recognition of Croatian independence by the EC.

Furthermore, the republics continued their negotiations even after their Declarations of Independence. In the Brioni Declaration they agreed to a three month moratorium on their Declarations of Independence in order for peace to be achieved. This did not revoke their Declarations of Independence. Nevertheless, states including Australia continued to withhold recognition because they now believed the Republics would possibly change their minds during the interim period.

The overriding reason the international community was reluctant to recognize Croatia and Slovenia was to avoid a violent break-up of the Soviet Union. Secondly, traditional criteria for recognition did not accommodate the situation. The events in the USSR soon reached the point where the overriding reason no longer existed. The failed Russian coup signalled the end of the Soviet Union as several republics immediately asserted their independence. However, caution still prevailed in the West. The US could not recognize the Baltic States and could not do the latter whilst Gorbachev whom they strongly supported, was still resuscitating the Soviet Union. Moreover, the US was still bound by the Percentages Agreement concluded

²² Cviic, C., Implications of the Crisis in South-Eastern Europe, *Adelphi Papers*, 1991, 86.

at Yalta after World War 2 whereby the superpowers tacitly entered into spheres of interests agreements in which they divided up Yugoslavia 50/50. It was only until it was clear that the Soviet Union could not be revived that the US decided to alter its policy in relation to Yugoslavia.

The Australian government was also reluctant to recognize Croatia and Slovenia because it feared its actions could increase inter-ethnic tension in Australia. Another reason for Australia's non-recognition was that it was simply waiting for good company. In October last year the Prime Minister said: "The government was reluctant to recognize Croatia because of the view that the Europeans should move first".²³ Senator Evans also expressed an unwillingness for Australia to be the first to extend recognition. Moreover, he claimed Slovenia could not be recognized because Australia may be forced to recognize Croatia as well where the position was more ambiguous with minority Serb enclaves. Therefore it did not matter that Slovenia satisfied the criteria for sovereign statehood because political considerations continued to dominate the question of recognition.

International law as conservatively by Evans and Hawke did not accommodate the situation in Yugoslavia thus necessitating substantial changes to the rules in order to enable appropriate international community reaction. Reinforced by subsequent state practice, the EC rewrote the criteria for statehood and thereby the law of recognition in the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (15/12/91). The Declaration expressly took into account the "political realities in each case" and therefore politics again had a significant role in the determination of statehood and recognition. In the Declaration the EC acknowledged that the new states had constituted themselves on a democratic basis and would extend recognition upon certain conditions being met. These involved questions of human rights with guarantees for ethnic minorities; respect for the inviolability of frontiers; acceptance of non-proliferation commitments and a commitment to settling by agreement all questions concerning state succession. The Declaration unequivocally stated that "the Community and its member States will not recognize entities which are the result of aggression".

The EC also adopted a separate Declaration on Yugoslavia which established an actual mechanism for recognition whereby the Republics were required to apply for recognition. Therefore unlike previously where states satisfied the criteria for statehood and then simply awaited recognition, the Yugoslav Republics were required to take a further step and pass a test. Applications for recognition were sent to the Arbitration Commission established by the EC consisting of 5 Presidents of Constitutional Courts from 5 countries of the EC and headed by French judge, Robert Badinter. Upon the Commission's ruling on the Applications, the EC Foreign Ministers met on the 15th January, 1992 to decide which republics would be recognized. By allowing the republics to have international personality on the international stage, they were allowing recognition to have a constitutive effect. Judge Badinter found a lacuna in Croatia's Application in relation to protection of human rights which was immediately to ensure domestic laws would be amended to rectify the shortcomings. Croatia and Slovenia were thus recognized on 15th

²³ *Age*, Melbourne, 14th October, 1991.

January, 1991 even though it could be argued that Croatia did not fulfil the old criteria of possessing a defined territory with one third still controlled by Serb irregular forces backed by the JNA. This was previously a major impediment to recognition. Bosnia and Herzegovina was not recognized at the time because it had not held a referendum so the EC could not ascertain the wishes of the people. Macedonia satisfied all criteria but was not recognized because of its name.²⁴

Political reasons essentially brought about the EC actions which inevitably altered the law. On 15th December, 1991 the EC sought to avert a damaging split over Yugoslavia by postponing for a month a final decision on recognition of Croatia and Slovenia. Germany argued fiercely for immediate recognition and vowed to open diplomatic ties with Croatia unilaterally that week. The EC's decision to extend recognition on 15th January, 1992 on certain conditions pursuant to the Declarations ended a split between Germany and most other countries headed by France and Britain which wanted to delay recognition. The delay also appeased the US which opposed recognition arguing that recognizing the Republic's too quickly would worsen the conflict—a view echoed by outgoing UN Secretary-General Perez de Cuellar. Britain and France expressed the same view but 15th January, 1992 "agrees to go along with the other 10 EC governments to preserve unity".²⁵

Bosnia and Herzegovina

In Bosnia and Herzegovina a referendum on independence was boycotted by the large Serbian minority which comprises almost one third of the population. Nevertheless 63.4 % of the population voted with 99 % voting "Yes". On 7th April, 1992 the US and EC recognized Bosnia and Herzegovina with Australia following suit. This was done in the knowledge that government held no authority over its territory which was being controlled by the Serb-dominated JNA. In this case, recognition was used as virtually the sole element in a constitutive method of creating a state. The US was in the forefront of the recognition and led the push for meaningful sanctions against Milosević and his regime.

The third "Yugoslavia"

On 29th April, 1992 Serbia and Montenegro formed the Federal Republic of Yugoslavia claiming it to be the continuing state of Yugoslavia in a similar sense to that of Russia in relation to the USSR. Although the UN does not explicitly deny Belgrade's claims of inheriting "old" Yugoslavia's seat at the UN, Resolution 757 states that Belgrade's attempt to continue the Yugoslav membership "has not been generally accepted".²⁶ The view which is being formed is that all the former republics of Yugoslavia should be equal successor states. Moreover, if Serbia and Montenegro ignore the cease-fire and sanctions imposed by Resolution 757 because of continued fighting in Bosnia and Herzegovina, the UN would consider expulsion from the UN and possible military intervention.

²⁴ See discussion on Macedonia on next page

²⁵ Age, Melbourne, 16th January, 1992 (Emphasis added)

²⁶ Age, 1st June, 1992.

Macedonia

The treatment of Macedonia prevents there being too much confidence that the lesson of the past tragic 18 months has really been learned. This small former Yugoslav republic land-locked between Greece, Bulgaria, Albania and Serbia, has, like Croatia and Slovenia asserted its independence after a referendum. Moreover Macedonian President, Kiro Gligorov was able to negotiate the withdrawal of the Yugoslav army from his country without a shot being fired. The Macedonian Government was democratically elected and Macedonia has a Constitution that guarantees the rights of ethnic minorities within its borders, which it controls. All the conditions for recognition that the US and EC set as obstacles to delay Croatian recognition last year were met by Macedonia. Yet still the politicians and diplomats of the West find a reason to defer acceptance of Macedonia into the international community. The reason is Greece, where a government with a parliamentary majority of two has found in the very name Macedonia an issue it hopes may allow it to cling to office at the next election.

For Greece, Macedonia is a name to which it claims exclusive rights as some kind of memento of a long-gone glorious past. The Greeks claim the former Yugoslav republic has usurped the name of ancient Greek people to lay territorial claims to the Northern Greek region of Macedonia. The Greek Government demands recognition should be denied until the name of the Republic of Macedonia is changed. Unfortunately, the EC, desperate to have a united approach to foreign policy, has ignored the legal position and in its own self-interest has only take into account realpolitik considerations in order to appease a member state, for the sake of its own preservation. In May 1992 the EC admitted that Macedonia satisfied all the criteria in relation to statehood and met its own criteria for recognition but refused to recognize it until "a name acceptable to all parties concerned"²⁷ is found.

The issue of nomenclature remains the only impediment to the recognition of Macedonia. The EC Declaration on Yugoslavia and Declaration on the Guidelines on Recognition required the republics to commit themselves to adopt constitutional and political guarantees to ensure they have no territorial claims towards a neighboring state. Macedonia actually amended its constitution to stipulate that it has no territorial claims and will not take up hostile propaganda activities in relation to a neighbouring state, particularly a member of the EC. The President of Macedonia even wrote to the EC undertaking never to conduct hostile propaganda. However, hostile propaganda was interpreted to include the use of domination which according to Greece implied territorial claims.

On 15th June 1992 EC Foreign Ministers meeting in Luxembourg again failed to overcome a Greek veto against EC recognition of Macedonia. Greek Foreign Minister, Mr. Mitsotakis, repeated the Greek demand that Macedonia change its name before it can be recognized by the EC. The decision the Foreign Ministers had to make was not whether Macedonia satisfied the International Law of Recognition but whether recognizing Macedonia was worth a possible split in the EC. They decided it was not, especially when Greece threatened not to ratify the Maastricht treaty over the issue. Unfortunately for Macedonia the question of its

²⁷ *Declaration on the former Yugoslav Republic of Macedonia*, 4th May, 1990.

recognition is being determined in the midst of EC turmoil and uncertainty about its future. With the Danish rebuff of the Maastricht treaty in a recent referendum and with further referendums still to be held in other member countries the EC succumbed to Greek threats of calling a referendum to deliberately undermine the treaty if the EC extended recognition.

However, Greece's position has earned it international scorn for its "the-name-means-everything" stand on Macedonia as it has held up international recognition and aid for Macedonia. The Greek Government is engaged in a delaying tactic which could touch off a full-scale multi-national war in the Balkans. It is standing by its position staunchly, arguing that the price of its vital support for sanctions against Serbia, which include stopping the flow of oil and goods from Greece's port in Salonika, is the refusal to accept any sovereign republic with the name Macedonia. The alliance Greece has with Serbia, about which the EC dares not to have any qualms, is devastating the Macedonian economy just as assuredly as Serb tanks and mortars are doing in Bosnia and Herzegovina. Serbia has made ominous threats about sending back the army it withdrew and has blockaded Macedonia to the North. The Greeks have done the same in the South. With trade ground to a virtual halt and denied access to the port of Salonika in Aegean Macedonia, the fledgling Macedonian democracy is under considerable strain. The Greeks have declared they will do everything in their power, even break the UN embargo on Serbia to prevent the creation of an independent republic on their northern border. The Greeks have already boycotted Dutch and Italian goods after their Foreign Ministers said they favored recognition of the republic of Macedonia. This is an issue which holds such symbolic weight for the Greeks that it has overshadowed the Cyprus question.

For the US the reason for making a mockery of its own principles governing recognition is again a political one. This is a presidential election year and the Greek community in the US is both large and influential. Baker makes soothing sounds in private when he meets Macedonian officials but will as nothing in public. The impasse on the recognition of Macedonia will continue until the political problems as opposed to legal questions are resolved.

Effect on International Law

Recognition is thus being used as an instrument of foreign policy. The traditional criteria are not being as vigorously applied and are even overlooked. New conditions have been adopted such as the expression of democratic choice through referendum and guarantees which regard to human rights and non-proliferation. The recognition of Croatia, Slovenia, Bosnia and Herzegovina, Lithuania, Latvia, Estonia, Ukraine and all of the former Soviet Republics has provided great momentum in the development of international law which is progressing towards full recognition of the right to self-determination, including a right to secede.

The doctrine of *Uti Posseditis* has been extended by the ICJ to the non-colonial context of internal borders of federal states.²⁸ The EC Arbitration Commission subsequently used the doctrine in respect of the republican borders of Yugoslavia.

²⁸ Rich, R., *Paper Delivered at Melbourne University*, 1st June, 1992.

Under the doctrine colonial boundaries in Latin America were sacrosanct to avoid bloodshed in border disputes. The doctrine will no doubt be invoked in the impending break-up of the two parts of the Czechoslovakian federation and could also be applied to Canada.

Personal political considerations

As mentioned above, Bush is loathed to alienate his large Greek electorate particularly because this presidential election involves an appealing alternative to traditional politicians in Ross Perot who is posing a considerable threat. However, electoral appeal is not important when the race is not close. Bush showed in his 1988 campaign that he was not unduly concerned about the East European ethnic vote and therefore did not need to budge from his fixation with preserving central authority in disintegrating countries.

Multiculturalism played a significant role in Canada's recognition of the Ukraine. A successful referendum on independence was held on 1st December, 1991 in fulfillment of a condition of Ukraine's earlier Declaration of Independence. Canada, where multiculturalism has a stranglehold on the political process and where 1 million people of a population of 24 million claim Ukrainian origins, extended recognition the next day.

For years US policy makers nurtured Yugoslavia as a wedge in the communist world and developed beneficial personal relationships in the process. Deputy Secretary of State Laurence Eagleburger developed quite a personal relationship with Milosević. He procured American loans for Yugoslavia and promoted Yugoslav exports to the US and enjoyed special privileges when Ambassador to Belgrade. It was therefore not surprising that when the American Croatian Association lobbied the US Administration, it was always Eagleburger who found a reason why Croatia could not be recognized.

David Anderson, also a former US Ambassador to Belgrade (1981-85) and who considers Yugoslavia as "part of me"²⁹ said that "Whether the Serbs were intent on creating a Greater Serbia at Croatian expense is open to question. ... So, I would say, a plague on both houses".³⁰ When Gorbachev and the Soviet Union were still in issue, Bush viewed the war in Croatia as "People (Croatians) using independence as an excuse to settle old scores".³¹

Conclusion

Any writer who attempts to examine the mysteries of State practice on recognition with the intention of providing a coherent explanation of the behavior and expectations of States within a framework of legal principle and theory exposes himself to certain ridicule and vituperation.³² This is because Recognition "has been

²⁹ *Asian Wall Street Journal*

³⁰ *Ibid.*

³¹ *C.N.N., TV Report*, August 1991.

³² Dugard, J., *Recognition and the United Nations*, 1987, 5.

a plaything for the political scientist who have taken delight in posing abstract problems of a theoretical nature".³³ Therefore whilst international lawyers would like to believe that recognition has developed within the parameters of legal principle, recent state practice confirms that notwithstanding its pivotal position in international law, it is a "plaything" for politicians who choose the legal parameters within which they wish to play. Consequently, the road to recognition is made all the more rocky. According to The Late Honourable Philip C. Jessup, "He who travels a rocky road to the end, merits more praise than he who drives his coach-and-four down the Champs Elysées".³⁴ This certainly applies to Croatia more than any other state because of the high price of international justice it had to pay with the worst destruction and human suffering since World War 2.

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³³ Brown, P., *The Legal Effects of Recognition*, *American Journal of International Law*, 1950, 617

³⁴ Jessup, P., *The Price of International Justice*, 1971, 3.

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