BETWEEN REALISM AND PRAGMATISM: LEGAL BASIS AND REQUIREMENTS FOR RECOGNITION OF STATES BY THE EUROPEAN UNION[1]

Por

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Revista General de Derecho Europeo 51 (2020)

ABSTRACT: The question of whether the EU has the power to recognize new States has never been seriously considered. Formally, the Member States have not attributed that function to the EU. However, recent European practice shows an increased EU influence on the recognition of new States. Utilizing both a qualitative research method concerning EU practice towards new States since the nineties and a comparative one with traditional theories concerning recognition, this article characterizes the EU as an active recognition actor and analyses the suitable conditions for carrying out this unilateral act. The article ends with a normative conclusion, which falls in line with the principled pragmatism, as advocated by the European Union Global Strategy.

KEYWORDS: recognition, unilateral acts, conditionality, principled pragmatism.

ENTRE EL REALISMO Y EL PRAGMATISMO: BASE JURÍDICA Y REQUISITOS PARA EL RECONOCIMIENTO DE ESTADOS POR PARTE DE LA UNIÓN EUROPEA

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[1] This research was made thanks to the Polish Academy of Sciences project on *Unrecognized Entities in International Law*, 2016; a first presentation of the topic took place at the *Institute des Hautes Études Internationales, Université de Paris, Panthéon-Assas*, as invited professor in 2017; course "L'Union Européenne et la reconnaissance des États. Pratique et conséquences juridiques et politiques". INTERNATIONAL LAW ASSOCIATION, Sydney Conference (2018), Recognition / Non-recognition in International Law, Fourth (final) Report, at: https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Recognition.pdf (accessed 07 March 2020).

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RESUMEN: El poder de la Unión Europea de reconocer nuevos Estados no ha sido considerado en profundidad, pese a la trascendencia del tema para el desarrollo de la Política Exterior y de Seguridad Común, incluso de las políticas comunes. Aunque la UE nunca ha recibido formalmente dicho poder por parte de sus Estados miembros, la práctica reciente europea muestra su creciente influencia en el reconocimiento de nuevos Estados. Utilizando un método de investigación cualitativo basado en la práctica de la UE respecto a nuevos Estados desde los años noventa, y comparativo con las tradicionales teorías acerca del reconocimiento, este artículo caracteriza a la Unión Europea como un sujeto activo de este acto unilateral y analiza las condiciones para proceder al mismo. El artículo termina con una conclusión normativa, pero siguiendo el pragmatismo basado en principios, tal y como requiere la Estrategia Global de la UE.

PALABRAS CLAVE: reconocimiento, actos unilaterales, condicionalidad, pragmatismo basado en principios.

Fecha de recepción: 12.2.2020

Fecha de aceptación: 8.5.2020

I. INTRODUCTION

The recognition of States is a very controversial issue for international lawyers, a central concern to the modern international system, as recognized by the International Law Association (ILA) in its latest and final report on recognition and non-recognition of State. The most discussed questions include the nature of this unilateral act and the conditions under which a new State can be recognized.

On the first issue, the recognition of States' nature, some consider this unilateral act as a declaratory one; others consider it a constitutive one. Whether it should be considered just a declaration of its existence or whether it reaches the level to be a constitutive element of the State depends on the effects it produces on the new State. There are also debates on the political or legal nature of the recognition. The doctrine tends to accept its declaratory and political nature, even if its consequences are legal. The declaratory nature of recognition is implicit in the Montevideo Convention setting the constitutive elements of the State[2]. It is true that, for some scholars, the criteria settled by this Convention are insufficient, as independence and effectiveness are not taken into account[3]. Criteria of statehood are relevant as the practice of recognition largely depends

[2] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force, 26 December 1934), 165 *League of Nations Treaty Series* 19. Currently, a third approach or a combined view of the declaratory/constitutive theory is followed, working based on J. VERHOEVEN research, *La reconnaissance internationale dans la pratique contemporain - Les relations publiques internationals,* 1975, and Ch. De VISSCHER, *Theory and Reality in Public International Law*, translated from the French by P. E. Corbett, Princeton University Press, 1957, pp.166-227.

[3] On the importance of Independence from another subject of International Law, see J. R. CRAWFORD, " Chance, order, change: The course of International Law", *RCADI*, vol.365, 2013,

on them, apart from another kind of considerations. Hence, the criteria of statehood should not be confused with recognition criteria.

As a political act, recognition is discretionary; there is no legal obligation to recognize a State. However, it is not clear that there exists a legal obligation to not recognizing a State. According to the Guiding Principles applicable to the unilateral declarations of States capable of creating legal obligations, peremptory norms of general international law are the only limitation for discretionary power of States when recognizing new ones[4]. If according to this rule, a unilateral act of recognition is not possible against international peremptory norms, this contradiction would work as an obligation not to recognize, as recognition would be forbidden. Additionally, an obligation of non-recognition arises usually from a UN Security Council resolution asking its members to do so[5].

Despite the various discrepancies, there is an agreement that recognition of States is one of the subjects in which law and politics are more closely interwoven[6].

Apart from several statements within the European Political Cooperation or the CFSP framework, and some resolutions from the European Parliament, European Union Law has paid little attention to the recognition of new States, mainly because of its view of State recognition as an act of States regarding just to other States. The consequences of non-recognition by the EU members, and so by the EU, have also not yet been studied. Scholars never considered seriously the question of whether the EU has the competence to recognize new States. The answer to this question is everything but clear. Formally, the EU did not receive this attribution from its Member States. However, the recent European practice shows an increased EU influence on the recognition of new States.

Apart from the secessions' impact in Europe[7], much has been written on international recognition of the former republics of Yugoslavia[8]. Some articles refer to specific cases

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pp.193-194. On disagreements about the role of effectiveness facing eventual recognition, see ILA Fourth report on recognition and non-recognition, *cit.*, p.9.

[4] ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,* 2006, par. 8. See also, ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, *ICJ Rep* 2006, p. 6. This judgment did not preclude a unilateral declaration by Rwanda being invalid if it conflicted with a norm of *Ius Cogens*.

[5] UNSC, Republic of Cyprus. SC Res. 541 (1983), and SC Res. 550 (1984). On the non-recognition understood as a legal obligation, see, ILA, Fourth report, Commission on Recognition and non-recognition, *cit.,* pp.12-13.

[6] H. Lauterpacht's quotation in Ch. HILLGRUBER, 'The Admission of New States to the International Community', *European Journal of International Law* n.9, 1998, p.491. See also, GRANT, T., *The Recognition of States: Law and Practice in Debate and Evolution*, Westport, Praeger, 1999; and PARFIT, R., "Theorizing Recognition and International Personality", *The Oxford Handbook of the Theory of International Law*, Oxford, 2016, p.591.

[7] COPPIETERS, B., "Secessionist Conflicts in Europe", in DON H. HOYLE (ed.), *Secession as an International Phenomenon: From America's Civil War to Contemporary Separatist Movements*, Athens, University of Georgia Press, 2010.

[8] PELLET, A., "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples", *European Journal of International Law*, vol.3, n.1, 1992, pp.178-185;

within the former Yugoslavia[9], or to South Sudan recognition[10], or to the role of European Organizations, in particular the Council of Europe and the EU[11]. There are also publications analysing secession cases[12]. More recently, some scholars concentrate on secession and withdrawal from the EU[13], the European countries' security-based approaches to recognition[14] or on the tension between EU's normative commitments and its geopolitical interests when making decisions on recognizing new States[15].

This research focuses on the legal foundation for an EU recognition, its limitations, and further explains the need for some requirements and conditions, both legal and strategic, for an EU-Member States' recognition of new States.

If the EU had this power, a conceptualization of the EU practice should be required in order to ascertain the possible application of the same principles applied to the recognition of new States by other States to the EU, namely, if the eventual recognition by the EU can be said to be a free, political and declaratory act.

RICH, R., "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", *European Journal of International Law*, vol.36, n.4, 1993; TÜRK, D., "Recognition of States: A Comment", *European Journal of International Law,* vol.66, n.4, 1993; WELLER, M., "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", *American Journal of International Law,* vol.86, pp.569-607, 1992. On the specific topic of recognition between the entities recognized as States, see S. HILLE, "Mutual Recognition of Croatia and Serbia (+Montenegro)", *European Journal of International Law*, vol.6, 1995, p.598.

[9] PELLET, A., *cit.;* KLABBERS, J., KOSKENNIEMI, M., RIBBELINK, O., ZIMMERMANN, A., *State practice regarding State succession and issues of recognition: the pilot project of the Council of Europe / Pratique des États concernant la succession d'États et les questions de reconnaissance: le projet pilot du Conseil de l'Europe,* Kluwer Law International, 1999; SAHOVIC, M., "Le droit des peuples à l'autodétermination et la dissolution de la Fédération de Yougoslavie", *Mélanges en l'honneur de Nicolas Valticos. Droit et justice*, Éditions A. Pedone, Paris, 1999, pp.189-196, CAPLAN, R., *The Recognition of New States in Yugoslavia*, Cambridge University Press, 2007 (1st edition 2005).

[10] HUBAUT, L., "L'UE face à l'indépendance du Soudan du Sud, Dossier, Tchad, Soudan", RCA, nº 49, 31 janvier 2017, Bruxelles2Pro, https://club.bruxelles2.eu/2017/01/lue-face-a-lindependance-du-soudan-du-sud/ (accessed 09 March 2020)

[11] BUYSE, A., LAWSON, R., "State Recognition: Admission (im)possible", *Leiden Journal of International Law*, vol.20, n.4, 2007, pp.785-795.

[12] BENEDEK, W., "Implications of the Independence of Kosovo for International Law", Buffard, Crawford, Pellet, Wittich (eds.), *International Law between Universalism and Fragmentation*, Fest. in honor of Gerhard Hafner, Brill, Leiden, 2008, pp.391-412; BORGEN, Ch. J., "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", *American Society of International Law Insight*, vol.12, n.29 February 2008; BOULTON, G, VISOKA, G., "Recognizing Kosovo's Independence: Remedial Secession or Earned Sovereignty ? ", *South East European Studies at Oxford*, Occasional Paper 11/10 (2010); DUGARD, J., "The Secession of States and their Recognition in the wake of Kosovo", *RCADI*, vol.357, 2011, pp.2-222; MANGAS, A., "Kosovo y Unión Europea: una secesión planificada", *Revista Española de Derecho International*, vol.LXIII-I, 2011, pp.101-123; KER-LINDSAY, J., *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States*, Oxford University Press, 2012.

[13] CLOSA, C., "Secession from a State and EU membership: the view from the Union", *European Constitutional Law Review*, vol.12, Issue 2, 2016, pp.240-264. *Idem* (ed.), *Secession from a Member State and Withdrawal from the European Union. Troubled Membership*, Cambridge, 2017.

[14] ALMQVIST, J., "EU and the Recognition of New States", *EUborders Working Paper* 12, 2017.

[15] NEWMAN, E., VISOKA, G. "The European Union's practice of state recognition: Between norms and interests", *Review of International Studies*, vol.44, n.4, 2018, pp.760-786.

It shows that it is possible to affirm a certain EU recognition power. This power is not exclusive, but partial, functional, shared with and depending on Member States' unanimity.

The Declarations under the European Political Cooperation in December 1991 [16] opened a promising path to European Union external action concerning new States. However, the recognition of Kosovo and the European institutions' action deployed concerning this former Yugoslav region -not republic- did not follow the 1991 criteria. Currently, the European Union continues approaching prospective new countries in a way that raises their expectations of recognition while conditioning their behaviour, at least, rhetorically.

The second issue of concern is whether the EU recognition is, or should be, conditioned or whether it is just a political act based on effectiveness. The 1991 EPC Statements, setting the criteria for the recognition of the new republics issued from the Soviet Union and Yugoslavia are, with no doubt, the first step on the normative path. From there, the EU and Member States' practice experienced an interesting evolution. The most prominent examples are part of our empirical research: Montenegro, Kosovo, and South Sudan.

In order to fulfil the aforementioned aims, this paper will analyse the reasoning under each case of recognition of new States, since the Balkan wars in the nineties. It will compare the action developed by Member States to that from the EU and find out different consequences that will arise depending on whether EU recognition is based mainly on legitimacy or on effectiveness criteria.

Utilizing a qualitative research method concerning the EU practice towards new States since the nineties and a comparative one with the traditional theories concerning recognition, this article characterizes the EU as an active recognition actor and analyses the conditions for this unilateral act.

The article states that the recognition of States carried out by the EU is a political-discretionary act, with legal consequences; but, once agreed within the European institutions and under political considerations to recognize a State, the EU decision-making process has to fulfil several requirements.

Far from doctrinal epistemic debates, the article ends with a normative conclusion but following the *principled pragmatism*, as advocated by the European Union Global

[16] Declarations on the Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union, 16-17 December 1991, 31 *International Law Materials*, 1485-1487 (1992). View J. CHARPENTIER, "Les Déclarations des Douze sur la reconnaissance des nouveaux États", 96 *Révue Générale de Droit International Public,* 1992, p.343-345 and *Revista Española de Derecho Internacional,* 1992-1, p.119.

Strategy. In this way, the article lays out policy recommendations to member States and EU institutions.

Moreover, the conclusion suggests a new step in the area of EU international legal personality: the possibility of EU recognition of new States, an explanation of which is based in the EU division of powers and the attribution principle. Finally, this will allow confrontation of both a normative and a pragmatic approach to recognition of States by the EU, and provide a precedent to customary law, if third countries follow the European path when recognizing new States.

II. CAN THE EUROPEAN UNION RECOGNIZE NEW STATES?

A legally rigorous response to this question demands a clarification of whether the EU can perform unilateral acts and whether recognition is among the EU's competences. To answer these questions, it is necessary to analyse whether International Law allows International Organizations to act unilaterally, and thus the EU, to do so. Then, it must be determined whether the Member States referred this competence to the Union, in particular the power for unilateral acts of recognition of new States, explicitly or implicitly.

1. The European Union and unilateral acts

In order to support the EU capacity for carrying out unilateral declarations, we must look to two primary foundations. Our first foundation is the general theory on international unilateral acts; the second is the European Court of Justice jurisprudence.

The Guiding Principles applicable to the unilateral declarations, drawn up by the International Law Commission (ILC)[17], refer only to States as actors owning the capacity to undertake legal obligations through unilateral acts. Can an International Organization be the author of a unilateral declaration? The affirmative answer was clear for the ILC when, in 1971, decided to take the subject up separately "owing to the importance of such acts in international life" and the differences with unilateral acts of States, especially with regard to the means of their formulation"[18].

The difference between unilateral acts of States and unilateral acts of International Organizations is that decisions from international bodies can produce legal effects insofar as their sovereign Member States have endowed that body with legal competence to do

[17] 2006 ILC, *Guiding principles*…, *cit*. See principles 2 and 3, according to which, the legal effects of such declarations, depend on their content, and of all the factual circumstances in which they were made, and of the reactions to which they gave rise;

[18] If different from the States, the statement of the ICJ is applicable, according to which, "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights". (International Court of Justice). The unilateral acts from International Organizations are possible.

so, while unilateral acts from States are sovereign acts, ruled by the domestic Constitution. International Law just set their effects for their authors[19]. Keeping in mind these differences, resolutions or decisions from the International Organizations' representative bodies are their unilateral acts.

Having said this, the role of International Organizations concerning the recognition of new States is undeniable and generally accepted. Even if they do not recognize the new or contested States themselves, they usually operate as legitimating bodies for new States, as well as a lobby supporting recognition or non-recognition (if their creation violates the International Law rules[20]). The United Nations is the paradigmatic case as it played a relevant role in both senses -legitimating and supporting recognition-, even if it is generally recognized that the admission of a State as a member of the Organization does not imply its recognition by the rest of members. At the regional level, for the new States in Europe, the EU plays a role similar to the one of the UN at a global level, even if EU membership amount recognition by the EU Member States.

But apart from this clear role, there is no doubt that the EU can adopt autonomous acts, as the main corpus of secondary EU Law is, which are compulsory for Member States. There is no explicit legal basis in the EU constitutive treaties on unilateral acts binding the EU towards third countries at the international level[21]. Notwithstanding the above, this power is implicit in its international legal personality (Article 47 TEU) and in the treaty-making power conferred to the EU, the general procedure of which is provided by Article 218 TFEU. If the EU has the power to engage internationally through agreements, it can do the same through unilateral declarations (recognition, promise, and renunciation). Nevertheless, the EU decision-making process for the conclusion of international agreements cannot be automatically applied to unilateral acts, as well as the States' unilateral acts do not necessarily follow the conventional procedure. These legal gaps can lead to new inter-institutional disputes.

This problem arose in the Council Declaration of 16 December 2011, which recognized Venezuela's limited rights to access the French Guiana waters for fishing,

[19] 1998 ILC, paragraphs 30-38. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, *I.C.J. Reports* 1949, p. 178. *Yearbook of the ILC*, 1971, vol. II (Part Two), p. 61, para. 282.

[20] BUYSE, A., LAWSON, R., "State Recognition: Admission (im)possible", *cit.*, p.786. They underline the current collectivization of State recognition thanks to the role of International Organizations. European Organizations normativised the recognition in order to prepare future admission of the recognized countries

[21] GOSALBO BONO, R., "Insuficiencias jurídicas e institucionales de la acción exterior de la Unión Europea"*, Revista de Derecho Comunitario Europeo*, n.50, 2015, pp.231-320. This article, that I follow in this aspect, analyses in detail the legal basis for unilateral acts of the EU.

after applying for EU authorization[22]. As a unilateral act, according to International Law, the declaration produced legal effects, independent of any acceptance by Venezuela. The European Commission and the European Parliament considered Articles 43 and 218.6.a TFEU as the legal basis for the declaration, thus requiring the European Parliament's approval. However, the Council based the decision on Articles 43.3 and 218.6.b TFEU, just consulting the Parliament. The Court considered the EU declaration, not a unilateral act properly speaking, but a part of a bilateral agreement with Venezuela that became binding with the consent of this country, implicit in the acceptance to fulfil the EU Law requirements[23]. In this way, it brings the whole discussion back to the exact modality of the conventional procedure within the article 218 TFEU, even though the participating institutions and States before the Court considered the declaration a unilateral act.

Nonetheless, in order to conclude the existence of the EU unilateral act, it is worth highlighting Advocate General Sharpston's reasoning, which is considered more relevant, if possible, because there is no record of unilateral acts adopted as such by the European Union. She recognized the possibility of the EU unilateral acts based on International and EU Law. International Law accepts unilateral declarations of subjects other than States; therefore, International Organizations, as secondary subjects, might engage internationally through unilateral acts if their constitutive treaties recognize the power to do so[24]. The European treaties confirm the EU's international personality (Article 47 TUE), and its exclusive competence to decide measures for the conservation of maritime resources (article 3.1.d). Moreover, the Union is part of the Convention for the Law of the Sea (UNCLOS) and instituted EU rules on the fishing policy.

However, the legal and institutional gap on the procedure for unilateral decision-making is not an obstacle for them, as long as the constitutive Treaties authorized it[25]; in other words, the determinative issue is whether the EU has the competences conferred

[22] 2012/19/EU: Council Decision of 16 December 2011 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana, *OJ L 6*, 10.1.2012, p. 8-9.

[23] Judgment 26 November 2014, C-103, 165/12 Parliament and Commission/Council; GOSALBO BONO*, cit.,* disagrees on this interpretation by the Court.

[24] The ILC Special Rapporteur, in his First report on Unilateral Acts of States, also accepted that unilateral acts of an international organization may have legal force, and that '… the rules which regulate [it] appear to be contained in the basic texts of the organization and the instruments derived from those texts and, where applicable, in international law'; see, First report on Unilateral Acts of States by Victor Rodríguez-Cedeño, Special Rapporteur (A/CN.4/486), paragraphs 34-35.

[25] Opinion of Advocate General Sharpston, 15 May 2014 to the cumulative cases C-103/12 y C-165/12, European Parliament and European Commission c. Council, Legal status of a Declaration made by the European Union and addressed to a third country, *ECLI:EU:C:2014:334*, paragraphs 66-125.

by the Member States for the adoption of a decision on the area covered by the unilateral act. The Advocate General Sharpston reinforced her point of view with the ERTA jurisprudence, according to which, the lack of a generally applicable provision in the Treaty delineating how to negotiate and conclude an international agreement was not an obstacle to confirming that the EU had the competence to do so[26]. She proposes the application of the conventional procedure to EU unilateral acts by analogy[27]. The Court refused her proposal and applied the conventional procedure when describing the nature of the appealed declaration as conventional, and not unilateral. In my opinion, it would be better to recognize the declaration as an EU unilateral act, paving the way for future unilateral acts and clarifying the procedure to follow henceforth. The legal bases for the EU unilateral acts are there: EU international legal personality and the competence to assume obligations under International Law, and, eventually, the implied power contained in the article 352 TFEU. The recognition by the Court of the Council declaration as a unilateral act would avoid uncertainty and eventual problems of legitimacy.

Using the same technique than at the ERTA judgment, the Court accepts the EU competence for approving unilateral acts, even if there is no legislative procedure in the Treaties for this and, in the concrete case of the declaration in favour of Venezuela, the Court refuses to considerate it as a unilateral act.

So, as a matter of principle, the EU can issue unilateral acts. The Court said nothing about the consequences of these unilateral acts, but, as international engagements, these acts should bind Member States. In the case of acts of recognition, this conclusion is even more evident as they require the unanimity of Member States.

2. A functional EU competence

To address the potential EU competence for the recognition of States, it is necessary to remind some basic considerations about the EU competences and the division of powers with its Member States. One of the International Law requirements for unilateral acts is that they came from a competent authority[28]; a second requirement is that they respect the International Law peremptory norms.

Concerning the first, the primary issue is whether the EU can be the competent authority for recognizing new States.

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[26] *Commission* v *Council*, 22/70, EU:C:1971:32 (European Agreement on Road Transport or '*ERTA*').

[27] Conclusions, *cit.*, paragraphs 112-125. A different option provided by the Advocate General is the application of article 352.1 TFEU (Conclusions, paragraph 110).

[28] ILC, *cit.*, guideline 1 ask the unilateral acts were public, clearly expressing the will to engage internationally, in goodwill and from an authority that has the power to engage internationally the State (or the International Organization, in our case). *Doc. A/CN.4/L.703.*

There is no explicit provision in either the EU Treaty or the Treaty of Functioning of the EU that could form the legal basis for EU competence in the field of State recognition. From articles 3.5 and 21.1-2 TEU, we can draw the conclusion that, in the international arena, the EU functions preserving peace and following the principles of States sovereign equality, respect for their territorial integrity and their national unity, and self-determination, as interpreted by the Declaration on Principles of International Law, approved by the General Assembly by its resolution 2625 (XXV)[29].

Otherwise, articles 4 and 5 TEU enshrine the principle of attribution of competences by Member States to the Union. It would seem that, according to this principle, the recognition of States would not be among the powers conferred by Member States to the EU. It would be an essential part of their national sovereignty. However, following the distinction between *competences* and *powers*[30] and ERTA jurisprudence[31], it seems evident that unilateral recognition acts-making power, as treaty-making power, is a power the EU enjoys within the sphere of its competences; a tool to implement EU competences, exclusive or shared.

An additional theoretical question would be if the EU can produce recognition unilateral acts with mandatory value. To answer this question, one must first deeply study the powers attributed by the Member States in this field by other ways than the constitutional treaties; mainly through the implicit powers theory and the EU practice.

Before the Single European Act, the question was never raised. The conclusion of trade agreements took place with States with which the Member States already had such kind of agreements before the creation of the European Community, or, alternatively, by countries already recognized by them. They all agreed on the conventional relationship; the recognition of the partner should be deduced by the recognition made by all the Member States and, consequently, by the Community itself.

The situation concerning the EU powers for recognition was clear at the beginning of the 1980's "…dans l'état actuel de l'intégration européenne, les normes internationales en matière de reconnaissance restent complétement applicables et lesdites reconnaissances appartiennent à la compétence exclusive de chaque Etat membre", said the Council before the European Parliament[32].

[29] UN General Assembly Resolution 2625 (1970) of 24 October 1970 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", *A/RES/25/2625*.

[30] CONSTANTINESCO, V., *Compétences et pouvoirs dans les Communautés Européennes: contribution à l'étude de la nature juridique des Communautés*, Paris, LGDJ, 1974.

[31] *Commission* v *Council*, 22/70, *cit*.

[32] Declaration of 16 and 17 November 1983, the European Parliament, the Commission and the Foreign Ministers of the Member States, following the UNSC Resolution 541 (1983), in the framework of the European Political Cooperation; *JOCE* C 251/80, p.12. S. TALMON, "The Question before the European Court of Justice", *European Journal of International Law*, Vol.12,

Nevertheless, the Member States agreed on a common position for the non-recognition of the Turkish Republic on North Cyprus, following in this way successive UN condemnations[33].

Before the TEU entered into force, the EU was confronted with a situation requiring a firm stance: the collapse of Yugoslavia and of the Soviet Union[34]. The Foreign Affairs Ministers issued a statement under the European Political Cooperation (EPC) concerning the Guidelines for the recognition of the States from the former Soviet Union and the former Yugoslavia[35]; the Guidelines aimed to facilitate the recognition by Member States based on the same criteria, thus suggesting the allowance of collective recognition.

Legally, the Declarations were EPC common positions and, thereby, they constituted recommendations to the Member States. Thereby, the EC exerted an orientation power over the Member States when they exercised their international competences. In turn, States have also conditioned the EU forcing it to accept hasty recognitions.

The text of the Declarations confirms the above interpretation; it provides, "the commitment to these principles opens the way to recognition by the Community and its Member States and the establishment of diplomatic relations".

The qualification of this so-called collective recognition can probably be better characterized as an *agreed* recognition, as the recognition power is not transferred to the EU. The Union, or more precisely the Member States coordinated under the EPC, gave the guidelines and a further unilateral act from each of them should follow these guidelines.

Nonetheless, after the 1991 EPC Declarations, the differences with the previous EC position in the 1980s were clear. At that moment, it was stated that recognition was an exclusive competence of the Member States, and there was nothing more at the European level than voluntary coordination. However, in the 1991 Declarations, the consultation rested on certain conditions that the new States had to meet for the recognition by the EU countries. If they fulfilled the conditions, Member States had the ability to recognize the State but did not oblige them to do so.

No.4, 2001, pp.727-750. NAVARRO BATISTA, N., "La práctica comunitaria sobre el reconocimiento de Estados: nuevas tendencias", *Revista de Instituciones Europeas*, n.22, 1995, p.479.

[33] The history of the fight for the Turkish Republic of the North of Cyprus, in KER-LINDSAY, J., *EU accession and UN Peacemaking in Cyprus*, Palgrave, Basingstoke, 2005; See too, DIEZ, T., TOCCI, N. (eds.), *Cyprus: A Conflict at the Crossroads*, Manchester, Manchester University Press, 2009.

[34] On Lord Carrington' Peace Conference, starting on September the 7th, M. Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", *The American Journal of International Law,* vol. 86, n. 3, 1992, pp. 569-607.

[35] Declaration on Yugoslavia and the former Soviet Union, and on the Guidelines on the recognition of new States, *cit.*

This “collective recognition”, or, in other words, recognition by the twelve Member States, was more relevant politically than single unilateral recognitions. It was more relevant for the EU because it was a common position in a topic traditionally under the discretionary power of States. It continues to be a Member State’s competence but, following common guidelines, allowed them to speak with a single voice on an international issue directly touching the security and instability of the European continent. On the other hand, collective recognition was also of great importance for the new States because, in fulfilling the criteria set in the Guidelines, they could reach simultaneously the recognition of the twelve. This was even more important for new States wanting to become members of the EC in the future.

In this way, the EPC was the tool for facilitating an intergovernmental agreement at the European level to deal in common with the emergence of new States. Moreover, the Badinter Commission advice did not legally bind Member States who entirely preserved their competence to recognize.

The European Community Guidelines for recognition of States were a legal and political precedent on the issue, but their use in practice confirmed the States’ discretionary power at the time of recognition. The desire to end communism outweighed rational thoughts about the immediate future for these republics, even at a time when Western countries trusted democracy could spread among European territory and beyond. The implementation of the Guidelines was guided by political considerations and was almost completely ignored in the exceptional case of Kosovo's recognition, more than a decade later.

Despite all the deficiencies, the EU was engaged in a process of collective recognition, perhaps the only possible option for the Union at that time. There were criticisms against ILC Special Reporter for the unilateral acts of States when qualifying the 1991 EC Declarations as an example of collective recognition[36]. However, these criticisms failed to account for the real essence of those declarations in that, by themselves, they do not constitute, in any way, recognition by the EU; they just were the basis for the collective recognition by the Member States, following the aforementioned guidelines.

The evolution of the European integration process had consequences on foreign policy competences. Despite what has been said thus far, when the European Union replaced the European Community, after the Treaty of Lisbon, it assumed foreign policy responsibilities and widely enlarged its external powers. As a result, there had been an increasing number of occasions in which the EU had to speak on the emergence of new

[36] BONDIA, D., *Régimen jurídico de los actos unilaterales de los Estados*, Bosch ed., Barcelona, 2004, p.100.

States. The CFSP, according to article 24.1 TEU, "…shall cover all areas of foreign policy…". Shall we consider State recognition as an area of foreign policy? Or simply as a sovereignty feature?[37]. Can we say the EU can recognize new States according to the Treaty? The EU had set a precedent when the 1991 Guidelines and the Declaration on Yugoslavia were approved. As previously stated, it clearly provided that "the commitment to these principles opens the way to the recognition by the Community and its Member States" implicitly accepting the EC capacity to recognize new countries. This statement should be understood as the recognition of joint competence, so long as Member States agree unanimously to recognize a new State. This serves as a requirement for the EC to exercise some external powers it had towards this country.

Further cases show that after the Treaty of Maastricht and the first steps for the CFSP, the Guidelines were applied inconsistently.

After the entry into force of the Treaty of Lisbon, a new situation necessitated the EU's attention. It was in South Sudan where, following two long civil wars, the 2005 Naivasha peace agreement recognized a large autonomy to South Sudan and opened the door to a self-determination referendum. Not only did the EU support the peace process following the African Union and United Nations request, but it also showed its own view of being in favour of the independence of the South. On 9 July 2011, South Sudan declared its independence. On the eve of this declaration, Sudan and Germany recognized South Sudan. Once again, an EU Member State took the initiative for recognition before the due time and anticipating the rest of the European Union Member States.

In a statement on 9 July 2011, the EU and its Member States welcomed the Republic of South Sudan as a newly independent State. In this way, the statement tacitly amounted to a formal act of recognition, even if it did not include this specific term. This demonstrates that the EU can, in turn, issue a functional recognition, so long as the EU acts within the constraints of its own competences.

The EU's practice has evolved from the times of the European Community and the clear refusal that it could recognize new States, as a sovereign power of its Member States, to the collective recognition made jointly by the EU and the Member States in the case of South Sudan. Does it mean the competence for recognizing was referred to the EU? There is no clear expression on that in the TEU; it would be then impossible to speak about recognition of States, *stricto sensu*, by the EU. Can we then conclude this competence is an implied one? This explanation is not correct considering that CFSP

[37] According to the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto (*Yearbook of the International Law Commission*, vol. II, Part Two (2006)), every State can make unilateral acts with self-compulsory effects. Under the condition to have the power to act in certain fields, International Organizations have this way of international engagement, too.

does not involve a transfer of competences to the Union. Member States continue to be the masters of this power. However, the EU has exclusive and shared competences to act with third countries. These relationships would be hardly possible without recognition. Accordingly, Member States unanimously decide to recognize together with the EU, accepting so the functional power of this one for recognizing new States. In this way, the EU can recognize, jointly with all its Member States; even it can boost a common position of them.

Moreover, in certain circumstances, Member States have some political interest to act with EU involvement. This can serve as a way to make their recognition declaration more valuable or, for some of them, elude a national recognition susceptible to generating domestic controversy.

In the case of South Sudan, it was the first time there was a joint declaration about the recognition, not only by all Member States but also together with the EU.

This kind of recognition engages Member States in coordinating their positions within the Organization. This was in no way possible in cases like Kosovo, as there was no common position within the EU (Article 34 TEU). The same problem arises concerning decisions to open Member States' diplomatic missions or EU Delegations in the absence of unanimity for the recognition of a State (Article 35 TEU).

The EU Member States acting collectively for recognition purposes has political and legal consequences, which are not always clearly differentiable. Without EU recognition, it would be impossible to keep EU-third country conventional relations. Much less, could an unrecognized entity aspire to the candidate status. It would be impossible for an entity, unrecognized by the EU to participate in R+D programs, to receive financial support for development or EBI financial aid. However, the lack of collective recognition does not imply an obstacle for bilateral relations between the new State and Member States that recognize it, if any.

Even if an entity had been recognized by one or several Member States, the above advantageous conditions are reserved for the States recognized by all Member States or by the Union itself. A caveat to this exists: if the Member States opposed to the recognition, do not also oppose the advantageous treatment.

As a legal consequence, recognition confirms the new State as a subject of International Law, fulfilling the conditions to develop its activity within the international society. As long as the number of recognitions grows, this activity will be larger in scope.

To summarize, during the eighties, recognition was an exclusive prerogative of the Member States. They could voluntarily coordinate their position, set conditions for the recognition of new States, or simply decide not to recognize them. In the nineties, there was EU engagement in such a process. The Soviet Union's and Yugoslavian

disintegrations created perfect conditions for a European "management" of the new States' recognition, or, in alternative terms, collective recognition. Member States had given political guidance for recognition; although political, it had a corresponding legal meaning. However, its implementation in the Yugoslav Republics broke the will of EU action. At that moment, Member States put aside the already defined principles and conditions, following their national interests according to their historic "domestic evils". This drift led to the, in my opinion, pernicious recognition of Kosovo, in 2008, after the unilateral declaration of independence.

After the entry into force of the Lisbon Treaty, the issue was marked by this controversial recognition, even after the peaceful, but perhaps not meaningful, recognition of Montenegro, in 2006, where the EU Council declared the EU and Member States willingness to have relationship with the new republic. The last step was the recognition of South Sudan, where the Member States and the EU implicitly recognize the new country in a joint statement.

Given these considerations surrounding the EU's capability to recognize States, as well as the phenomenon of collective recognition initiated by it, and the recent recognition of South Sudan together with its Member States, we can conclude that recognition is not a substantive competence field but a functional power of the EU and, as such, only works for the areas where the EU can act internally and at the international arena, including foreign policy.

The next step will explore the implementation of the EU principles concerning the recognition of States; in other words, because the EU has this functional power, under which conditions it can be implemented.

III. REQUIREMENTS FOR EU RECOGNITION

The question to elucidate here is whether the EU enjoys the same freedom as the sovereign States when recognizing new ones. As a unilateral act with legal consequences, the only limit for States, according to International Law, are peremptory norms. Nevertheless, as the content of this normative category is not clearly delimited and its interpretation largely depends on each State, EU members decide when a new State origins from an external intervention in domestic affairs, aggression, a violation of the self-determination principle, or against the basic rules on human rights. The "European recognition" should, of course, respect International peremptory norms, but not only.

While, for the States, recognition is a sovereign competence, for the EU, it is a political act that requires following some conditions for three reasons. First, in order to substantiate the EU's partial or shared competence to recognize new countries; second,

because, when recognizing, the EU raises expectations, even, where applicable, of membership; therefore it is better to know from the very beginning the conditions to do so. Third, to fulfil the CFSP aims, according to the Treaties. This conditionality must pursue peace and security within the region in question and for the EU, too. Therefore, an assessment of the medium/long term consequences of the recognition for the EU should be done case by case. Coherently, the same criteria applicable to new States would be applicable in cases of eventual secession within the EU.

Following the European Community Guidelines approved in 1991, this section analyses the role these criteria can play and supports the need for the EU to keep a degree of conditionality when recognizing new States. It does not mean to apply always exactly the same conditions. At least, two different groups of countries could be subject to a different level of conditionality; the European countries, eventually potential EU membership candidates; and the rest. For the first group, the EU should be more demanding. Its aim should be the protection of European values and democratic standards. For the rest, the respect of International Law or other specific conditions, case by case, can suffice if recognition is in the EU interest.

First, I will develop only the first reason to condition the EU acts of recognition. The recognition is not an exclusive EU competence and the Member States are the depositaries of the original power to recognize States. Therefore, the first condition for the EU recognition, as a decision within the framework of the Common Foreign and Security Policy, is the unanimous will of the Member States.

1. The unanimity of the EU Member States

The Common Foreign and Security Policy is an intergovernmental policy, that does not imply any conferral of sovereign powers to the EU, and then, the decision-making rule continues to be the unanimity.

As the EU and its Member States share international representation and action, depending on their respective competences, the recognition by the EU has to be decided by unanimity. In this vein, as an intergovernmental EPC decision, Member States unanimously approved in 1991 the Guidelines for the recognition of the former Soviet Union and Yugoslavian Republics. It was necessary to act together in the face of dismemberment processes of uncertain results. However, one Member State -Germany- anticipated its recognition of Slovenia and Croatia, pushing the rest to recognition even without a previous assessment of the conditions settled by the Guidelines. Twenty years later, again Germany recognized South Sudan, on the eve of the independence declaration, acting before the rest of Member States and the EU itself. Nevertheless, there is an EU Declaration on the recognition of this new African country by the Union

and its Member States, unanimously agreed. This kind of mixed recognition allows both to act on behalf of their respective competences for external relations and foreign policy.

The Kosovo case is different. As five Member States do not recognize Kosovo, the EU as such cannot do it; this circumstance refrains some EU actions concerning Kosovo, however, it did not obstruct the development of a CSDP rule of law mission from which Spain had to withdraw once it became clear that it was not a peacekeeping mission like the NATO´s KFOR was[38].

Going still further, the EU celebrated a stabilisation and association agreement with Kosovo[39] following a legal juggling to conclude it avoiding the mixed way (the EU jointly with its Member States), traditional for association agreements. The conclusion of this agreement implies the recognition by the EU of a certain Kosovar legal personality, even incomplete, that can only produce effects within the limits of the EU functional competences[40]. I agree with Gosalbo Bono in that the nature of a not-mixed agreement prevents the Member States not recognizing Kosovo from having a bilateral relation with it. Even, I can agree on his interpretation of article 216.2 TFEU, and accept that the obligations derived from the agreement to be applied by the EU States are obligations towards the Union and not towards Kosovo. However, as the highest form of commercial and political agreements offered by the EU to third countries, an association agreement involves political dialogue; this can hardly be developed without the involvement of the twenty-seven Member States. In particular, the agreement includes the promotion of Kosovo's participation in the international democratic community, the advancement of Kosovo's European perspective, increasing convergence with the EU's common foreign and security policy. Without a consensus within the EU, the implementation of these measures is difficult. Even, trade commitments, like the gradually establishing of a bilateral free trade area, cannot be imagined without a unanimous recognition of the partner[41]. These legal twists are the consequence of an inopportune recognition of Kosovo by a majority of Member States, in 2008, when there were no reasons for secession, except the dubiously acceptable will to become an ethnically pure country[42].

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[38] Spanish Ministry of Defence, Missions, Kosovo, KFOR, http://www.defensa.gob.es/misiones/en_exterior/historico/listado/kosovo.html.

[39] Entry into force on April 1st, 2016, https://eeas.europa.eu/delegations/kosovo/1387/kosovo-and-eu_en.

[40] GOSALBO BONO, R., *cit*., p. 262.

[41] Council Decision, 22 October 2012, on negotiation mandate added a clarification according to which, the agreement is a recognition of Kosovo *auctoritas* to conclude it, but cannot be interpreted as recognition of Kosovo as independent State by Member States.

[42] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *I.C.J. Reports* 2010, p.403. The exclusive legal approach prevented the EU to think about future real problems consequence of the recognition. The uniqueness of the Kosovo case is a rhetorical tool, as Law cannot apply to only one situation. See

The consequences of an EU *de facto* recognition, when there is no unanimity among Member States, include growing legal and practical problems for the EU; from the way it concludes agreements to the management of a membership request by this *de facto* recognized entity; not to cite the applicability of the estoppel doctrine, that could eventually make the actions of States not-recognizing Kosovo an implicit recognition of it.

Under the lack of uniform recognition, it would have been more coherent for the EU to avert the negotiation of such an agreement. This would not have prevented necessarily actions of cooperation with Kosovo[43].

2. Normative or pragmatic approaches

Properly speaking, apart from unanimity, one main question is if the EU has to submit the recognition of States to some conditions. Unanimity, by itself, cannot legitimize acts against International Law, as the premature recognitions are. Of course, the assessment of the moment when an entity gathers the three elements to be a State is subjective; but the use of this form of recognition produces a loss of EU credibility and entails facing a similar behaviour in the future (e.g. recognition of South Ossetia). Effectiveness is a guarantee for the sustainability of the new State.

2.1. *The role of the effectiveness of the new State, self-determination and remedial secession*

The effectiveness of the new State should be the first condition for its recognition by the EU. Effectiveness is the most widespread criterion followed by States to recognize a new one. As a political act, recognition can ignore other conditions, but not the effectiveness or actual existence of the State. Recognition of an entelechy becomes political-fiction but, moreover, its legal effects can only be described as an aberration.

Because of its objectivity, the effectiveness constitutes a factor of stability and an antidote against the arbitrariness of the decentralized international society where the power of self-appreciation of the States is the rule, said De Visscher[44].

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some legal criticisms in J. ALMQVIST, "The Politics of Recognition, Kosovo and International Law" RI Elcano, WP 14/2009 - 16/3/2009

[43] HARZL, B., *The Law and Politics of engaging* de facto *States: Injecting New Ideas for an Enhanced EU Role*, Center for Transatlantic Relations, The Johns Hopkins University, Washington DC, 2018.

[44] VISSCHER, CH. DE, *Les effectivités du droit international public*, Pedone, Paris, 1967, p.41. According to Sicilianos, the principles of sovereignty and non-ntervention in domestic issues of other States were founded on the effectiveness of the power; SICILIANOS, L. A., *L'ONU et la démocratisation de l'État: systèmes régionaux et ordre juridique universel*, Pedone, Paris, 2000, p.13. HILLGRUBER considers that art.4.1 UN Charter contains this requirement when asking for the ability and willingness to carry out international obligations as a criterion for admission of new members, *cit.*, p.499.

Thus, by recognizing the principle of *de facto* effectiveness, international law is not acknowledging the alleged normative force of factual situations, but rather guaranteeing that its claim to validity is enforced. Effectiveness is an essential principle followed by States when considering the recognition of an entity pretending to be a State[45].

Surprisingly, the 1991 Guidelines and European practice ignored effectiveness, and more of the Republics from the former Yugoslavia were recognized without a clear presence of the constitutive elements of State. Clearly, it was the case for Bosnia and Kosovo, but also Croatia.

The Arbitral Commission, in its opinion n.1, emphasized that the existence or disappearance of a State is a question of fact (an implicit reference to effectiveness); however, such a reference is not included in the opinion concerning the requests for recognition from the republics formerly part of the Yugoslav Federation. Here, there was no verification of the effectiveness of the new entities; nevertheless, the opinions from Member States were favourable to the recognition (only Slovenia was clearly effective). Therefore, we can describe the recognitions received by the former Yugoslav republics as premature. Consequently, we can question the lawfulness of these unilateral acts regarding their opposition with the principle of non-interference in the internal affairs of States; a principle enshrined in the UN Charter, and confirmed in UNGA Resolution 2625 (XXV) where the intervention directly or indirectly in the internal affairs of the State is prohibited. The Badinter Commission circumvented the prematurity of recognitions' legal obstacle by the verification of the country's disintegration process. Member States used the recognition to reinforce the aim of the independence of Croatia and Bosnia. As a result, the legitimation derived from the principle of sovereignty was given to self-proclaimed independent but not effective entities that were unprepared for it, and whose governing groups' internal legitimacy was questionable. This, naturally, had consequences on the nature of the recognition, favouring the constitutive concept.

I agree with Koskenniemi in that the use of recognition as a means of pressure has been a tragic mistake because it forced the international community to deal with the Balkan conflict as aggression between States, providing Croatia and Bosnia with the right to legitimate defence and to the invocation of the territorial integrity, which prevented a compromise.

European States hid politically and morally behind the principle of self-determination of peoples[46], also included in the same AG resolution. Thereby, they applied for the first time the self-determination principle out of the colonial context, limited by the *uti*

[45] TÜRK, D., *cit.*, pp.66-71. ALQMVIST, J., *cit.*, n.16.
[46] ROLDÁN BARBERO, J., *Democracia y Derecho Internacional*, Civitas, Madrid: 1992, p.164. NAVARRO BATISTA, N., *cit*., p.501.

possidetis doctrine, except agreement [47] ; right that, according to the Badinter Commission, belonged to the six Yugoslavian republics, recognized by the 1974 Constitution, but not to the two autonomous provinces -Kosovo and Voivodina[48]. The EC role and its Member States' premature recognition would have favoured the configuration in Yugoslavia of a new political structure.

In this regard, the EC common position on the recognition of the new States referred to self-determination, invoking the liberal theory of secession, according to which, the secession will be allowed if the population expressed democratically in this sense[49]. The populations concerned could express through the referenda or the proclamations of independence.

The explanation wielded by the States to recognize most of the Republics arising from the disintegration of Yugoslavia, the remedial secession as a way of self-determination[50], has the pretension to be legal or at least legitimate. The remedial secession is presented as a new concept in International Law, but it is difficult to accept it, as the main characteristic of law is its general application. However, remedial secession is not applied in similar cases. Conversely, the invocation of remedial secession and recognition or the existence of previous aggression by the Yugoslavian armed forces conceals a pragmatic approach when the decision to recognize is due to political reasons, and equals premature recognition to satisfy some Member States will or interests. Moreover, if the moral argument was the protection of citizens, there are other legal instruments to cope with aggression or international crimes; the most evident is the International Criminal Law. States could invoke humanitarian intervention asking for an immediate Security Council resolution. Paradoxically, some State recognizing prematurely the former Yugoslavian Republics, refuse the jurisdiction of the International Criminal Court and acts usually ignoring the UN Security Council.

For these reasons, it seems more coherent for the EU not recognising new States if these are not yet effective States; premature recognition should be proscribed, not only as interference in domestic affairs of an existent country but, basically, because the

[47] KOSKENNIEMI, M., "National Self-Determination Today: Problems of Legal Theory and Practice", 43 *International & Comparative Law Quarterly,* vol.43, n.249, 1994, p.267.

[48] PELLET, A., *The Opinions of the Badinter Arbitration Committee: cit.,* pp. 178-185. See J. KER-LINDSAY, *The Foreign Policy of Counter-Secession: Preventing the Recognition of Contested States,* Oxford University Press, 2012, p.33.

[49] BERAN, H., "A Liberal Theory of Secession", *Political Studies* vol.32, n.21,1984.

[50] In this context see Opinion no. 4, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions, Arising from the Dissolution of Yugoslavia*, 33 *International Legal Materials* 1488 (1992).

recognition is a political unilateral act, but not a wishful thinking act. The recognition of Slovenia, Croatia, and Bosnia- Herzegovina[51] suffered from this evil.

Additionally, the EU Member States, under the umbrella of self-determination and remedial secession, did not follow their own criteria for recognizing the republics arising from the dismemberment of Yugoslavia.

The incoherence of the EU following the remedial secession was revealed years after the Balkan wars. According to the 1995 Dayton Agreements[52], the EU had to pronounce itself on the rights recognized to the Srpska Republic. Before the establishment of the parallel special relations between the Federal Republic of Yugoslavia and the Srpska Republic of Bosnia-Herzegovina, the EU emphasized that full transparency, as well as the respect for sovereignty, territorial integrity and political independence of the State of Bosnia-Herzegovina, should base all aspects of these special relations[53]. At that moment, it was the EU and not the Member States who pronounced on the topic and, implicitly, refused the recognition of an eventual independent Srpska Republic.

The EU Member States recognition of Bosnia-Herzegovina as a new State was based on the right of self-determination; however, they refused to use the same right with the Serbian Republic, this time in the name of the respect of sovereignty and territorial integrity. This contradictory approach had consequences at the time of the first EU accession contacts with Bosnia-Herzegovina. The Srpska Republic President let see his lack of interest in the process, reminding the final decision would require the support or the Srpska Republic. At the same time, this Republic would like to reinforce its autonomy by the integration in the EU.

The inconsistent EU position was, once again revealed when Montenegro decided to split up from Serbia in 2006. The Montenegro Republic, a small region with less than 700.000 inhabitants, remained together with Serbia after the disintegration of the Yugoslav Republic. The separation was a peaceful independence process allowing Montenegro, eventually, to join the EU. For that reason, the Union was asked to play an

[51] Bosnia-Herzegovina is probably the best example of ineffectiveness as a sovereign State. Its structure, based on two separate communities, the Bosniak-Croat Federation and the Bosnian-Serb Republic, with a rotating Presidency every eight months, led to a constitutional crisis in 2018 and a permanent international oversight, according to Dayton agreements. The unfeasibility of this State proves the mistake of not looking for different solutions instead of recognizing countries that cannot develop autonomously as such.

[52] The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) (adopted 14 December 1995, entered into force 14 December 1995) available at https://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf (accessed 23 March 2020).

[53] *Déclaration de la Présidence au nom de l'Union Européenne sur l'établissement de relations parallèles spéciales entre la République Féderale de Yugoslavie et la Republika Srpska de Bosnie-Herzegovine*, 5 March 2001, 6747/01 (Presse 88), available at: http://europa.eu/rapid/press-release_PESC-01-48_fr.pdf (accessed 07 March 2020).

arbitral role between Serbians and Montenegrins, and decide under which conditions the independence on Montenegro could be recognized. Because of the previous failure to intervene in the Balkan crisis, the EU was trying to be more efficient in preventing conflicts in the region[54], conscious that the new States have a certain place in the EU in the future, even if the standing point of view was to keep a joined State[55].

The liberal theory of secession worked for the recognition of Kosovo in 2008, nine years after the war was over; therefore, it was inadmissible to argue there was aggression on the territory. The only reason for this recognition was the will of the population, based on the Assembly of Kosovo's decision, with no referendum[56], and having as the only aim a mono-cultural Albano-Kosovar society, even if the main narrative for the previously recognised Yugoslav republics was the suitability of multicultural societies. The lack of effectiveness was evident in a territory with no structures for a national government and in need of State-building support from the EU.

Probably the recognition of South Sudan was technically premature in the sense that the country was not effective, even if it was an agreed secession with Sudan, after years of fratricidal civil war ending in 2005 with a peace agreement. The celebration of a referendum for independence had given, in the opinion of the EU, a democratic legitimacy to the new State to which it demands respect for pluralism and diversity with a view to an inclusive society[57]. These conditions favour a collective recognition, this time by the EU and the Member States, together.

However, as the context in South Sudan was different than in the Balkans, and it was recognized by the "mother country" -Sudan-, it will be analysed later.

The previous cases let conclude that premature recognition, boosting self-determination of secessionist entities produces a poor EU image as an interventionist power, the unsustainability of these recognized entities and, probably, more conflicts, as no condition plays to avoid them. Self-determination principle and remedial secession cannot fulfil the lack of effectiveness of the entity to recognize as a State.

2.2. *Democracy, rule of law, respect of International Law as additional conditions*

[54] DRAGASEVIV, M., *The Newest Old State in Europe. Montenegro regains Independence*, Zentrum für Europäische Integrationsforschung/ Center for European Integration Studies, Rheinische Friedrich-Wilhelms-Universität Bonn, Discussion Paper C174 (2007).

[55] The result of the EU pressures was the signature by Montenegrin President of the Belgrade Agreement, in March 2002, creating the State Union of Serbia and Montenegro; a kind of confederal structure with a new Constitutional Charter.

[56] A referendum was held in 1991 in Kosovo, boycotted by the Serbs living in the region, representing 10% of the population. 99% of voters voted in favour of independence.

[57] The result of the referendum in January 2011 showed support for independence from more than 98% of the Southern population; see "South Sudan referendum: 99% vote for Independence", *BBC News.* 30 January 2011.

Conditionality for recognizing new States is not new in international practice. As a political act, in order to recognize, a State can submit its discretionary power to some conditions to fulfil by the new State. These conditions conceptualize an international practice of non-recognition. The Stimson Doctrine in refusing recognition to States issued as the result of acts of aggression or intervention of a third power was a first step in the path to set rules on non-recognition. The recognition of Brazil and Mexico, for instance, was submitted to the previous abolition of slavery, according to British Foreign Secretary George Canning. The *uti possidetis* principle was another condition accepted by the South American States to be recognized[58]. All these precedents show a teleological background: humanitarian considerations, respect of International Law, or avoiding further territorial disputes. If these conditions did not become legal rules it is because its discretionary application depends on the political interests of States able to recognize.

In Europe, at the end of the 1940s, there was a significant gap to the principle of recognition as a political discretionary act. The Council of Europe Statute made democratic legitimacy a condition to join the Organization. The Greek case highlighted the implementation of this principle, "within the European public order"[59].

The European Community followed this path of conditionality for recognizing former Yugoslav and Soviet republics having in mind the stability and peace in both regions and Europe as a whole. Moreover, in the case of the former Yugoslavia, it wanted to keep the country united, at least at the very beginning of the conflict, and then reach a peaceful and negotiated outcome to the conflict, according to the Security Council resolution 724[60]. Hence the Guidelines for the recognition of new States concerning Yugoslavia were more demanding than the ones concerning the former Soviet Union Republics[61]. They started with a subjective element: the will to be recognized as independent States; and a conditionality clause by which the new States accept the commitments contained in the guidelines. Other conditions can be applied to any State, whatever it was its geostrategic relevance for the EU; the respect of the UN Charter, or the inviolability of the borders

[58] DUGARD, J., *Recognition and the United Nations*, Cambridge, Grotius Publications Ltd., 1987, pp.52 and 25-26.

[59] *Aff. Grecque*, Danemark/Norvège/Suède/Pays-Bas c. Grèce, requêtes n.3321/67, 3322/67m 3323/67 y 3324/67. Democratic legitimacy was further confirmed in other judgments from the European Court of Human Rights, such as *Autriche c. Italie* (requête n.788/60), Commission Européenne des Droits de l'Homme, 11.1.1969; or *aff. Loïzidou c. Turquie*, exceptions préliminaires, arrêt 23.3.1995, sér.A, vol.310, par.75.

[60] NAVARRO BATISTA, N., *cit.,* p.479; Danilo TÜRK considers these conditions excessive as they delayed recognition, par example, in the case of Slovenia, "Recognition of States: A Comment", *cit.*, pp.68-69.

[61] An Arbitral Commission -the Badinter Commission-, was created for verifying the degree of application of the conditions for the recognition and the necessary guarantees, in the case of Yugoslavia. However, the agreement of the Republics belonging to the USSR to put an end to this on December 31st, 1991, allowed EU Member States to presume the fulfillment of the EPC Declaration's conditions. On the conditions for the former USSR Republics, see NAVARRO BATISTA, N., *cit*., p.486

which can only change through peaceful means, are included in this category. Targeting European countries, the Guidelines included the respect for democracy and human rights, but also the Helsinki Final Act and the Paris Charter, including the right of peoples to self-determination. The respect of minorities and ethnic groups is an EU condition for the recognition of the former Soviet Union and Yugoslav republics that can apply to further cases. It was relevant to former Yugoslavian Republics, given the permanent tensions working among different ethnic and religious groups[62]. The same can be said about the requirement to respect the disarmament and non-proliferation engagements, as well as the security and regional stabilization measures, in cases of countries issued after an armed conflict. As the two groups of new countries in 1991 faced problems concerning the succession of States, a good condition for recognition was the commitment to solve them by agreement.

The assessment of the effectiveness of the Guidelines for the recognition of the new States from the former Soviet Union and Yugoslavia is not positive. Despite the rigor of the Arbitral Commission's assessment concerning former Yugoslav Republics, the Member States recognized them without waiting for guarantees on the protection of minorities, e.g., urged by Germany. However, in the case of Macedonia, satisfying the conditions and having the positive opinion of the Arbitral Commission, they waited to recognize it by the pressures from Greece. Six European States recognized first, showing the political differences among them.

I agree again with Koskenniemi in the sense that the non-recognition of these entities by the most relevant EC member States, before they reached a peaceful transition and guaranteed human and minority rights, would have opened the door to a new, realistic and politically sensitive recognition doctrine[63].

Unfortunately, the EU States did not follow the normative approach wanted by the 1991 EPC Declarations, nor for the Balkan countries, and neither for further recognitions. Member States and doctrine [64] consider that the former Soviet Union and former Yugoslavia are not precedents for the issue of new States and the conditions would not be necessarily the same; each case is autonomous from the previous ones. However, I support the idea that some of those requirements, and perhaps others, would be suitable for further cases, adding effectiveness as a realist condition for the recognition of States. The 1991 Guidelines are the clearest example of a positive conditionality for States' recognition.

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[62] MUJANOVIC, J., *Hunger and Fury: The Crisis of Democracy in the Balkans*, Oxford University Press, 2018.

[63] KOSKENNIEMI, M., *cit.*, p. 268. HILLGRUBER, C., *cit.*, p.497.
[64] TÜRK, D., *cit.*, p.78.

Why it is suitable for the EU to follow some normative criteria? I can give five reasons; some of them already cited. The first is the normative character of the EU as an international actor and the need for coherent external action.

The second is that the fulfilment of these conditions is the only way to reach full Member States support.

The third reason is the expectations raised by EU recognition, either of becoming a member or of maintaining a close relationship with the EU. In order not to frustrate these expectations and be coherent with the EU interests, the conditionality lays the groundwork for future relationships. Furthermore, accepting unconditionally secessions abroad could be a wrong message for eventual secessions at home.

Moreover, it is the best path for reaching a sustainable situation in the future and prevent conflicts. Only democratic multi-ethnic countries, economically sustainable, avoid the "Balkanization"[65].

Finally, submitting recognition to conditions is the way for a normative influence on recognition by other countries given the weight of the EU as an economic leader; it also backs up its strategic autonomy.

As previously said, the respect of some conditions in order to reach the EU recognition would tend to fulfil the CFSP aims. Consequently, it must pursue peace and security within the region in question and for the EU, too. To prove truthful of this premise there is nothing better than assessing the consequences of the recognition of new States, by the EU and its members.

Without a doubt, the most relevant case of political use of the recognition and the most flagrant case of ignorance on the part of the EU of its own guidelines for recognition is Kosovo. However, I will concentrate, first in Montenegro then in South Sudan as examples of secession apparently uncontroversial, supported by the mother State.

No remedial secession applied to the first, part of the Serbia-Montenegro Republic; so, liberal self-determination theory applied. Even fearing a destabilization of the country, undermining the democratic progress in Serbia or the proclamation of independence of Kosovo, the EU decided that a referendum will be required and at least 55% of the votes should be positive to declare independence. The error of this position, according to Dragaseviv, is that the EU broke the rules of representative democracy, and even the right of the people to decide for themselves, creating the rule of 55%[66]. The positive answer reached 55.53% of the votes, and the EU member States recognized

[65] NAUMOVSKI, V., "Europeanization of the Balkans or Balkanization of Europe", *Georgetown Journal of International Affairs*, Volume 20, Fall *2019*, pp. 120-125.

[66] DRAGASEVIV, M. *cit.* Although there is not a single rule acceptable in democratic theory, European constitutional practice shows vast cases of qualified majority provisions in all constitutional arrangements.

Montenegro[67]. The EU Council recognized Montenegrin independence on 12 June 2006. Literally, the official statement said "the European Union and its Member States have decided that they will develop further their relations with the Republic of Montenegro as a sovereign, independent State, taking full account of the referendum result and the subsequent acts by the Montenegrin Parliament". The will to develop relations with a new State implies a tacit recognition, which may be followed by formal or also tacit recognition by the Member States. Today, Montenegro is a candidate country for membership of the EU, as well as Serbia.

The consequences of this EU approach are clear concerning future EU enlargements. When recognizing, the EU raises expectations for membership among European countries. It seems inconsistent to add new small States, issued from a disintegration process, to an integration project. Secession processes are against the CFSP aims. Moreover, it would be hardly manageable for the Union. And, what is more serious, it would be difficult for the EU to use the Canadian way in face of attempts to secede of several European regions; these can work on the Montenegro precedent and the EU support to secession with a so exiguous majority in a referendum.

With South, the involvement of several member States, mainly the United Kingdom, complicity with the US foreign policy and the indifference of the large majority of European countries defined the EU approach. The peace agreement with Sudan was the rule defining the conditions for an eventual secession, after six years with a large autonomy. The EU's involvement with its enforcement and its engagement with the population's rights were in line with EU values. However, its role promoted the independence of this part of the country without caring about the conditions for recognizing, and on the future consequences for the country's stability.

Following the African Union request, it launched a civilian-military mission to support the peace force for Sudan/Darfur, AMIS II[68]. The EUFOR Chad/CAR, deployed at the border with Sudan, operated from January 2008 to March 2009. Thereby, the European Union showed its support to the peace process and the United Nations peace force

[67] Press Release, Press, session 2737 Council General Affairs and External Relations, Luxembourg, 12 June 2006, 9947/06, https://ec.europa.eu/commission/presscorner/detail/en/PRES_06_162 (accessed 10 March 2020). The decision adds that Member States will take the subsequent measures implementing it nationally in accordance with international law and practice.

[68] Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, [2005] *OJ* L 188. It came to an end on 31 December 2007 when AMIS handed over to the African Union / United Nations hybrid operation in Darfur (UNAMID). Then, the EU approved the Council Decision of 22 October 2007 implementing Joint Action 2005/557/CFSP on the European Union civilian-military supporting action to the African Union missions in the Darfur region of Sudan and Somalia. (2007/690/CFSP), *OJ* L 282.

deployed in Sudan. Before independence, the EU provided financial support to the referendum and the country's development[69]. Even the EU planned to open a Delegation in Juba, before the independence. This early statement on diplomatic relations was an implicit recognition by the EU, autonomously, of South Sudan. In the statement of 9 July 2011, recognizing the Republic of South Sudan as a newly independent State, there was no reference to the 1991 Guidelines, which can mean an implicit rejection as general principles of the conditions set forth in them.

The celebration of an independence referendum has given, in the opinion of the EU, a democratic legitimacy to the new State to which it demands respect for pluralism and diversity with a view to an inclusive society[70]. The inadequacy of this reasoning is evident in the events following independence. Various border disputes with Sudan and Kenya emerged concerning the Federal States of Blue Nile, South Kordofan, Abiyé, and Ilemi triangle, respectively. A war with Sudan and civil war, followed. Then, the EU contributed with security assistance for Juba airport[71]. Accusations of human rights' violations, genocide, and attacks on UN forces led to the UNSC resolution 2206 (2015) imposing an individual sanctions regime. The sanctions against military chiefs were endorsed by the EU[72].

The support of the peace process was reasonable if the stability of the region is an EU security concern. However, to cope with it, supporting secession, automatically recognizing the new country and concluding an establishment agreement to start formal diplomatic relations, without any condition, was unnecessary, and probably premature and counterproductive. There was not a proven and detailed evaluation of alternative ways to cope with security concerns. What is more serious, the EU knew the risks inherent to its involvement in the region, including the border disputes, as shown in the Council, on 20 June 2011. By the time of the independence declaration, Sudan and South Sudan should have agreed on the borders delimitation, the Abyei region status, the

[69] Council approved in July 2010, 85 million euros. In May 2011 the Council added 200 million euros, under the 9th EDF. It also sent an electoral observation mission.

[70] A few days later the declaration of independence, South Sudan officially became the 193rd UN, the 54th member of the AU; in April, member of the International Monetary Fund and the World Bank.

[71] According to the UNSC resolution 1996, setting the UN Mission at South Sudan, Council of the EU, 23 January 2012 agreed on the concept of the mission (Council of the European Union, Council Conclusions on Sudan and South Sudan, 3142th Council meeting); mission EUAVSEC South Sudan, approved by the Council on 18 June 2012. In January 2014, the EUAVSEC mission closes. To face the civil war, the UN SC decided a MINUSS temporal reinforcement, on 24 December 2013, until 14.000 blue helmets. Several days later, the IGAD appointed a mediation team.

[72] Council Implementing Decision (CFSP) 2015/1118 of 9 July 2015 implementing Decision 2015/740/CFSP concerning restrictive measures in view of the situation in South Sudan, *OJ* L 182, 10 July 2015.

status of the population from one State living in the territory of the other and the final distribution of oil revenues.

The actual meaning of the South Sudan recognition by the EU and its member States is questionable as it showed to be a wrong political decision. The EU would have done better by conditioning the recognition to the firm engagement to respect International Law, especially the norms concerning the protection of the minorities, and Humanitarian Law. Acting in that way would have forced the parties to solve their disputes, and the EU would have served as an example for the other UN States, so improving its normative impact and its constructive contribution to lasting peace.

Analysing the consequences of the recognition by the EU and its member States, the main findings can be summarized as follows: Premature recognition acts, boosting self-determination and not neutrality towards secessionist entities, produce a poor EU image as an interventionist power. Moreover, the newly recognized States are unsustainable if they are not effective. Besides, the risk of conflicts is bigger if the new countries do not condition their acts to the respect of basic human rights, minority rights, and others. The cases of Kosovo, Bosnia- Herzegovina or South Sudan are clear in this sense.

2.3. *Is there any place for pragmatism?*

Conditioning the recognition of new States can be interpreted as an idealistic and normative EU approach to the issue. Pragmatism, indeed, has a role to play, mainly concerning the EU relationship with non-recognized entities and the freedom not to recognize.

The conditionality of European recognition faces the skepticism of some Member States who already put obstacles in the way of accepting it in the 1991 declarations. They considered that it would complicate the political act of recognition; a unilateral act that, they understood, should not be subject to the respect of certain principles. As a political act, recognition should not impose new conditions. Therefore, the aforementioned declarations were not legally binding; they would allow a normative orientation and be simultaneously pragmatic.

Indeed, for the reasons cited above, the European Union should act internationally following both, the principles inspiring its external action (title V TEU), but also in a pragmatic way to satisfy its interests. Consequently, it would be unreasonable asking the European Union just an idealistic and utopian foreign policy, that no other international actor is following.

I suggest a variable conditionality applying the basic International Law rules to everyone and stricter conditions for eventual candidates to EU membership. In this second group, the European standards on human rights and protection of minorities

should apply[73]. Therefore, the EU would apply a tailored conditionality combining both, values and interests, according to different contexts and particular preferences, and favouring the eventual integration of some European countries.

Moreover, we can also appreciate the need to combine principles and interests, or *principled pragmatism*, in the EU policy of non-recognition. A pragmatic approach can suggest the EU not to recognize an entity, even fulfilling the whole requirements as a State, for political reasons. The refusal to recognize is not subject to any condition since International Law welcomes this sovereign freedom of the States. In this vein, if in the former Yugoslavia and South Sudan the EU showed the interest of its Member States for quick recognition, Palestine and Western Sahara are examples of the opposite, even if a normative action by the European Union would contribute to peace and justice and, thereby, to stability and European security.

There is no European recognition for these two entities as there is no unanimity among member States to recognize them[74] and, because of political and economic reasons, partnerships and alliances seem not convenient. These two pragmatic reasons prevail over the fact that both national subjects are qualified for recognition, even if their statehood elements are quickly deteriorating by the effect of the neighbouring countries, Israel and Morocco, respectively.

Finally, and concerning the entities not recognized because their creation did not follow the International Law rules, the EU can follow both, normative and pragmatic approaches. This could be the case for the South Caucasus republics not recognized by a majority of countries, or for Crimea, after its referendum for independence and further incorporation to Russian Federation[75]. It would not be according to EU values recognizing such entities; moreover, it is not an EU interest to do that and set a dangerous precedent. Harzl proposes an approach of engagement without recognition[76].

As well as not recognizing entities issued against International Law, not recognizing secessions, as a principle seems a good point of departure as within the EU these movements can also take place.

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[73] The European Convention on HR, the European Convention on the Rights of the Minorities,

[74] Nine EU members formally recognize Palestine (Bulgaria, Cyprus, Czech Republic, Hungary, Malta, Poland, Romania, Slovakia, and Sweden), twenty-five in total, adding the ones that use non-diplomatic means. No one single EU member recognized Western Sahara, and only the Swedish Parliament approved a resolution favorable to it.

[75] COPPIETERS, B., "Four positions on the Recognition of States in and after the Soviet Union, with Special Reference to Abkhazia", *Europe-Asia Studies*, vol.70, n.6, 2018, pp.991-1014. "Secessionist Conflicts in Europe", in Don H. Hoyle (ed.), Secession as an International Phenomenon: From America's Civil War to Contemporary Separatist Movements, Athens, University of Georgia Press, 2010.

[76] HARZL, B., *cit.*, pp.48-69.

IV. CONCLUSIÓN

This contribution presents an analysis of the challenges the European Union faces when recognizing new States, therefore, accepting the EU as an active actor of recognition, having a functional power to recognise, together with its Member States. Its secondary and limited international legal personality raises concerns about the delimitation of competences for this unilateral act. If EU legal personality allows it to conclude agreement, to international representation or participation in peaceful settlement of disputes mechanisms, nothing prevents it to act through unilateral acts of recognition. The scope of such recognition should be delimited by EU competences in external relations and foreign policy powers.

Following Gosalbo Bono, the Union needs an adequate legal framework which would enable it to act effectively as a subject of international law whenever it adopts international unilateral acts, whether it be by recognizing third countries, or others[77].

There is a majoritarian agreement according to which recognition of emerging States is a political decision within a legal context. In consequence, it seems that political, rather than legal reasons are the most important determinants when deciding whether to recognize them; independently of the fulfilment of the statehood criteria[78].

Being this so, the question would be if conditionality for the EU recognizing aspiring States would be an inconvenient or unnecessary limitation for its performance as an international actor, compared with the discretionary power of States in this field. My answer is negative as the Union is not a State with a single government but a supranational Organization, working lead by the Member States will when developing its foreign policy. This reason is enough to understand the need to follow the explained conditions that can reach the agreement of Member States.

This article clarifies the requirements for the EU to recognize new States, working on the empirical basis of its previous practice and its consequences, and claiming for a teleological approach that allows achieving the objectives of sustainable regional stability and the security of the EU. As there are contradictions between the declaratory and the practical EU and Member States recognition policy, I propose an approach that combines both, the respect of the EU values and a pragmatic way of recognizing.

A recognition due exclusively to political reasons, with no attention to the real situation of the entity to recognize, its future development as a State and its will to keep the peace, can only cause endured conflicts threatening the EU security. It was only political reasons that played a role when recognizing Kosovo. It was a premature recognition by the States

[77] GOSALBO BONO, *cit.,* p.232.
[78] ILA, Fourth (final) report of the Commission on Recognition and Non-Recognition, *cit.*, p.14.

who organized the military operation in 1999, and that sought to legitimize the intervention rather than confirm the existence of an effective subject of International Law according to the achievements of the interim administration of the province in terms of nation-building or ensuring the rights of the population (Russia State Duma 2009, UN).

But, on the other hand, a compulsory recognition of those States fulfilling the statehood features and some normative conditions would place the EU in a disadvantageous position regarding sovereign States who, from an International Law point of view, can decide freely whether to recognize or not. Under these circumstances, a positive conditionality, taking into account the effectiveness of the new State, the unanimous agreement of the Member States and other conditions tailored applied, can balance the pragmatic and the normative trends. Political recognition of a non-effective entity produces a legal fiction and restricts relationships of the new entity with the rest of the world.

One of the findings I reach is that the main obstacle to the EU conditionality for recognizing is the Member States' behaviour. It happened when some of them boosted the recognition of new States based exclusively on national interests, ignoring their past political engagements within the framework of the EPC, EU competences in external relations and eventual disagreements among the rest of the Member States.

As the EU pretends to be a normative actor, the effectiveness of the new State should be taken into account together with the assessment of its legality; its creation according to peremptory norms of International Law, the application of the self-determination principle or the remedial secession. The last element, or perhaps the first, would be the EU's political will or interest to recognize.

Finally, conditionality will avoid the beginning or the continuity of conflicts, like the Balkan wars, the war between Sudan and South Sudan, or the further civil war in this new country. An incremental conditionality if the new State is an EU neighbour, a potential candidate to membership, will avoid expectations if EU values are not strictly met.