Non-recognition of states as a specific sanction of public international law

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Abstract

This article analyses two of the most controversial institutions of public international law: the recognition/non-recognition of states and the sanction in public international law, arguing why the non-recognition of states represents one of the specific sanctions of the public international law. The purpose of this article is to bring a novelty value to the current stage of research, by analysing a specific sanction of public international law: the non-recognition of the states created by disregarding international rules, especially the jus cogens ones. Therefore, the research hypothesis of this article is as follows: the non-recognition of states represents a specific legal sanction of public international law which intervenes as a results of the violation of some jus cogens rules in the process of creating the new state that wants its recognition.

Keywords: *non-recognition of states, sanction, public international law, jus cogens.*

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1. Introduction

The difficulty to identify sanctions for violating the rules of public international law has often led in the past to the doctrinal idea that public international law would not be a veritable law in the sense of legal order, but a *"positive international morality"*[2].

In fact, as Lassa Oppenheim also noticed in his article entitled "*The Science of International Law: Its Task and Method"*, the denial of the legal order nature of public international law comes from its comparison with the national law: "*From Hobbes down to Blackstone and Austin it is always the same wrong starting point – municipal law*"[3]

Indeed, the fact that the rules of public international law are not created by a legislative body, as is the case for the national law, the fact that the legal rules are created by the subjects of public international law and are also applied by them, plus the optional character of the international courts and the lack of the "sanction" element in the logical structure of a legal rule, all these lead, at a first sight, to the

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[2] John Austin, *The Province of Jurisprudence Determined*, Cambridge University Press, New York, 2001, p. 112, 160.

[3] Lassa Oppenheim, *The Science of International Law: Its Task and Method*, „American Journal of International Law", No. 2, 1908, p. 330.

conclusion that the international law would deprived of those features of a legal order in the sense given by Hans Kelsen: *"law is an order of constraint*"[4].

However, it should not forget that the legal international rules are voluntarily accepted by the states, which are both the creators of the rules and their recipients, "a situation practically, incompatible with the idea to insert a sanction in the body of legal rule"[5], whereas as Raluca Miga-Beșteliu noticed: *"it is unlikely that states will consensually develop certain rules of conduct, with the intention of violating them"*[6].

Moreover, both in the international doctrine and in the national one, after World War II, it is stated that the existence of sanction in the structure of the legal rule does is no related to the quintessence of a legal order, considering that:

- "*in any legal system, the sanctions do not represent the basis for observing most of the rules, but the conscience of the legal entities that such rules come necessarily from well-defined social commands"*[7],
- *"the absence of the coercive element is not enough to deprive its rules of the law force"*[8],
- "*the sanction is not the essence of the legal rule, as the primary rules do not have to be necessarily accompanied by a sanction to be applied by a judicial body"*[9],
- "*the real foundation of the authority the international law has arises from the similar fact that the states of the international society recognize it as an element that obliges them and, furthermore, as a system that,* ipso facto*, links them as members of that society, regardless of their individual desires"*[10].

All these aspects cannot lead to the incorrect conclusion that there are no sanctions in public international law. In public international law, there are forms of constraint and sanctions, some of them being provided for by the Charter of United Nations in art. 41, art. 42 and art. 51. Apart from these sanctions provided for by the Charter of United Nations, there are also specific sanctions of public international law which are not provided for in international documents, such as: non-recognition of states, non-recognition of governments, nullity of a treaty or of some clauses of an international convention, exclusion from international organizations, economic sanctions a.o.

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[4] Hans Kelsen, *Principles of International Law*, The Lawbook Exchange, Ltd., Clark, New Jersey, 2003, p. 5.

[5] Carmen Moldovan, *Drept internațional public. Principii și instituții fundamentale*, Hamangiu Publishing House, Bucharest, 2017, p. 13.

[6] Raluca Miga-Beșteliu, *Drept internațional public,* Vol. I, 2nd edition, C.H. Beck Publishing House, Bucharest, 2010, p. 4.

[7] *Idem.*

[8] Bianca Selejan-Guțan, Laura-Maria Crăciunean, *Drept internațional public,* 2nd edition, Hamangiu Publishing House, Bucharest, 2014, p. 5.

[9] Valentin Constantin, *Drept internațional*, Universul Juridic Publishing House, Bucharest, 2010, p. 77.

[10] Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement,* „The Modern Law Review", Volume 19, January 1956, No. 1, p. 8.

As most of the scientific researches in the field of international sanctions concern the analysis of the economic sanctions which are, lately, used by more and more Western states against some states that have seriously violated the principles of public international law (for example, economic sanctions against Russian Federation for the illegal annexation of the Crimean Peninsula), the purpose of this article is to bring a novelty value to the current stage of research, by analysing a specific sanction of public international law: the non-recognition of the states created by disregarding international rules, especially the *jus cogens* ones.

Therefore, the research will focus on the analysis of the legal institution of the recognition of the states, having as purpose to identify the situations in which the other states already existing in the international society do not grant the recognition of a new created state. Using the comparative method, we will identify the divergent elements of the two legal-political phenomena: the recognition and non-recognition of states. In other words, our research wants to answer the questions: "*What does the recognition or non-recognition of a state represent and why does this occur?"* and *"What are the situations in which the recognition of a new created state is not granted?"*

Once these situations are identified, using the inductive method, we will test the research hypothesis of this article, namely: the non-recognition of states represents a specific legal sanction of public international law which intervenes as a results of the violation of some *jus cogens* rules in the process of creating the new state wanting its recognition.

2. *Ex factis jus oritur* – principle of international law

"*Ex factis jus oritur*" (Latin for "*the law arises from the facts*") is a principle of international law known as the "*principle of effectiveness*", according to which "*a situation cannot be relied on as against third parties unless it has a sufficient degree of reality*"[11].

To illustrate the application of this principle in the matter of states and the recognition of states, we will discuss the statement of François Mitterrand, president of France: "*In its decisions on the recognition of a state, our country has always relied on the principle of effectiveness, implying the existence of a responsible and independent power, exercised over a population and over a territory*"[12].

Therefore, in the matter of states and the recognition of states, the principle is applied in the sense that an entity cannot be considered to be a state, as a subject of public international law, if this does not correspond to reality, not having at least the four attributes of statehood mentioned in first article of the Montevideo Convention, namely: permanent population, a defined territory, government and the ability to enter into relations with other states.

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[11] Larousse dictionary, electronic version, accessed on the 30th of October 2019 at http://www.larousse.fr/dictionnaires/francais/ effectivit%C3%A9/27904.

[12] *François Mitterrand*, on the statehood of Palestine, Le Monde, 24 November 1988, p. 7 *apud* J. Crawford, *The creation of states in international law*, second edition, Clarendon Press, Oxford, 2006, p. 3.

3. Recognition – an institution of public international law

In the doctrine, recognition is defined as "*an unilateral act, by which a state ascertains the existence of certain facts or acts, which may have consequences on its rights and obligations, or on its political interests, and expressly declares or implicitly acknowledges that these are elements on which its future legal relationships will be based in relation to the new entity or situation*"[13].

It is true that this controversial institution of public international law applies not only to the creation of states internationally, but also to the coming to power of new governments installed by force, as a result of a revolution or coups or in the field of applying an international common law. Moreover, the recognition is part of the category of unilateral manifestations of will of the states that produce effects in the international environment, together with notification, protest and renunciation.

Therefore, it is necessary to review also the definition of the recognition of states: "the unilateral act by which one or more states, explicitly or tacitly, admit that they consider a new entity as a state and that, consequently, they recognize its international legal personality, respectively the ability to obtain rights and to contract international obligations"[14].

As a legal act of the states, the recognition of states is a unilateral legal act in the category of manifestation of the will regarding the opposability of a legal situation, since "*the legal situation constituted as an exteriority to the intervention of a state* (our note: *the creation of a new state) raises the question of its opposition to this of the state concerned, which has the possibility to recognize it or vice versa to protest*".

The emergence of the new states gives a new distribution of the power on the political map of the world, as the ratio of forces changes, which could lead to a change in the course of international politics. The recognition expresses precisely the reaction of the existing states towards these events and defines their favourable attitude toward the new entities issued in the international arena. It is said that the recognition is "an act of sovereignty of the states, generating legal consequences, which determines a certain legal continuity in international relations, being able to intervene in any legal fact, of a nature to modify the international order"[15], as this notion of public international law represents the legal basis of the international law, James Lorimer[16] even considering it as fundamental to the international law.

At present, the international recognition has a particular actuality, given that in many states in Europe and in the Caucasus area the secession of some entities from the existing states is discussed. Therefore, we can agree with the affirmation according to which "*the recognition of international law, being inextricably linked to those moments of international life, such as the emergence of new states, following them and registering them, reflects the process of developing the objective of human*

[13] Raluca Miga-Beșteliu, *op. cit.*, 1997, p. 99.
[14] Raluca Miga-Beșteliu, *op. cit.*, 1997, p. 101.
[15] *Ibid.*
[16] Professor of public law at the University of Edinburgh and founder of the Institute of International Law.

society in accordance with the laws of social development and of the succession of social-economic formations"[17].

Therefore, the recognition of states can also be defined as the free act of the states by which there is noticed the emergence on the international stage of a new subject of international law, through which the existing state expresses its desire to establish normal relations with the new created state.

The legal characteristics of the recognition derived from the definitions given by the doctrine:

1. Recognition is an unilateral legal act of the states, as through this "*the already existent state expresses its will to consider the new entity as a member of the international community*"[18]. A question may be asked whether the recognition remains an unilateral legal act when it takes place through a multilateral international treaty? The answer to this question is that the act of recognition has the same legal nature of an unilateral act, as the manifestation of will of the existing states to participate to this treaty is unilateral.

2. The recognition is a legal act referring to the enforceability of a legal situation towards the already existing state. This legal nature provides the answer to the question *Who recognizes whom?* Does the already existing state recognize the new created state or vice versa? The entire practice of the states confirms and proves that only the existing states take note of the emergence of the new states, while the latter ones do not proceed to the recognition of the already existing states. However, the question may be asked if two states can mutually recognize each other? Of course, the answer is yes, two states can mutually recognize each other, but in such a case the recognition would be made through two unilateral acts.

3. The recognition is a legal act with a discretionary nature, as no international legal rule and no international common law obliges a subject of public international law to recognize a new created entity as a state.

4. The recognition is a free act of the already existing states, as no state can be under any kind of pressure or be forced to adopt a certain position in the field of recognition, each state being entitled to recognize or not a state depending on its own interests. Otherwise, it would mean a violation of the sovereign rights of the states and would represent a violation of the rules of international law.

5. The recognition is a creative act of rights and obligations between the already existing state and the new created state recognized by the first one.

6. The recognition is a declarative, but also a constitutive act, *"in that by this act it is ascertained the existence of a new state that exists as an effect of its creation and not as a result of the recognition act*"[19]. However, this characteristic is a disputed one in doctrine.

7. Recognition is an irrevocable legal act, as long as one of the classic attributes of the statehood has not disappeared.

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[17] Roman Pamfil, *Recunoașterea internațională a statelor*, University of Bucharest, 1966, p. 3.
[18] B. Selejan-Guțan, L.M. Crăciunean, *op. cit*., p. 51.
[19] Victor Todos, *Lecture Notes. Public International Law,* "Bogdan Petriceicu Hașdeu" State University of Cahul, 2010, p. 23.

8. Recognition is a legal act, as well as a political act, "*in most cases when the decision is made to recognize or not a state, this depends on more political factors than legal factors"*[20].

9. Recognition has a non-uniform nature[21]**,** as except the declarations adopted at European Community level regarding the recognition of the states appeared from the dismemberment of former Yugoslavia, "*there is no general set of rules applicable to determine the modalities and criteria for the recognition of states*"[22].

10. Recognition is not a legal act affected by suspensive conditions. It is true that "*the recognition has a pronounced political character and is granted in many cases for purely political reasons*"[23], but we consider that a declaration of non-recognition of a new created in which there are mentioned several conditions depending on which that state will receive the recognition remains a declaration of non-recognition, even if the new created state fulfils, in the meantime, the conditions required by the already existing state. When it is noticed that the conditions are met by the new state, the already existing state has to adopt a new declaration, this time for recognizing the new state, so that the latter one can benefit of its recognition or can benefit of a tacit recognition from the already existing state, both cases excluding the existence of strictly suspensive conditions.

11. Recognition has a predominantly customary nature[24], as it represents a modality of creating public international law, by which legal commitments are made and the sovereign rights of the states are exercised, the long-standing behaviour and practice of the states representing the legal basis for the recognition of states.

12. The recognition in international law is absolute, definitive and irrevocable.[25] In international practice, there are no examples of withdrawal of recognition from the states, as long as the recognition has taken into account the j*us cogens* rules. "*When a state disappears from the international arena or a government is unconstitutionally overthrown, recognition becomes meaningless and obsolete*"[26].

4. Non-recognition – sanction for violating the rules of public international law

In order to be able to analyse the institution of non-recognition, we will have to start from the enunciation of the principle *ex injuria jus non oritur* (Latin for "*law (or right) does not arise from injustice*"), as this principle is the basis of the institution of non-recognition, regardless of the doctrine created and accepted over time.

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[20] Malcom Shaw, *International law*, Cambridge University Press, 8th edition, 2018, p. 326.
[21] B. Selejan-Guțan, L.M. Crăciunean, *op. cit.*, p. 52.
[22] Idem.
[23] Malcom Shaw, *op. cit.*, p. 327.
[24] Arpad Czika, *Doctoral thesis – Summary - Recognition of new states in international law*, Ministry of Internal Affairs, "Alexandru Ioan Cuza" Police Academy, Bucharest, 2013, p. 17.
[25] Roman Pamfil, *op. cit.*, p. 7.
[26] *Ibid.*

If we correlate the two principles set out in this article, it would be clear that the law arises from facts, except the unjust ones, of which the law does not arise. Considering these aspects, we can state that the non-recognition of states is the opposite of recognition, by which "*under certain conditions, a fact situation will not be recognized because of the strong reservations regarding the morality and the legality of the actions adopted to create that fact* situation"[27].

There is no coincidence that the two antagonist principles bring up the problem of the criteria for statehood. If we started from the principle *ex factis jus oritur* in analysing the traditional criteria of statehood: permanent population, territory, effective and exclusive government authority over the territory and the population and the capacity to enter into relation with other states, the principle *ex injuria jus non oritur* raises the question whether there are some additional criteria of statehood, other than the four ones mentioned above.

The answer to this question from the Committee on Recognition and Non-recognition in International Law of the International Law Association, included in the report of Sofia Conference (2012), is that "*special care must be taken not to confuse the criteria of statehood with the criteria for granting recognition (conditions of recognition)*"[28].

James Crawford also provides an answer, considering that there cannot be *a priori* criteria of statehood independent of the principle of effectiveness, as there are still no additional criteria of statehood in public international law.[29]

These additional criteria would refer to: respect for the principle of self-determination, respect for the rule of law, the rights of the persons belonging to minorities and respect for other rules of public international law. However, a state can exist without being democratic, even without respecting the right of the persons belonging to minorities, and the international practice in the field of recognition suggests that there is no obligation to recognize or not recognize a certain state, all these being discretionary acts of the already existing states, considering, depending on their interests, whether to recognize or not recognize the new states that do not fulfil these criteria of recognition states at the beginning of the paragraph.

Therefore, we cannot discuss about additional criteria of statehood, but we can discuss about conditions for granting the recognition, which, depending on their compliance/non-compliance by the new created states and on the legitimate/illegitimate interests of the already existing states, the latter can take the decision to recognize or not recognize the existence of the new created states. And these criteria of recognition analyse especially how the creation of the new state took place and whether the way it was created complies, first of all, with the peremptory norms of public international law. Some states include on the list of conditions for granting recognition also the respect for democratic principles, for the rule of law and for the rights of persons belonging to minorities inside the new created states.

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[27] Malcom Shaw, *op. cit.*, p. 327.

[28] Report of the Committee on Recognition / Non-recognition in International Law, Sofia Conference, 2012, p. 172.

[29] J. Crawford, *op. cit*., p. 97.

Thus, the non-recognition can be seen as a last bastion against the failure to comply with public international law, as Lauterpacht considers: "*non-recognition is the least resistance a community based on principles of law can have against illegality*"[30].

Thus, starting from the premise that recognition is a political act that respects a certain legal framework and that there is no obligation of the already existing states to recognize, the question rises whether there is a legal obligation of the states not to recognize those situations that do not respect the peremptory norms of public international law. The experts of the Committee on Recognition and Non-recognition in International Law of the International Law Association answered to this question at the Committee's session during Washington Conference in March 2014. According to the interim report of this session of the Committee "*most of the opinions expressed consider that there is no legal obligation for non-recognition*"[31].

However, there are also separate opinions, such as those of the Austrian rapporteur[32], who considers that "*there is certainly a legal obligation not to recognize a state as long as it is not a state from the point of view of international law and its recognition would mean an illegal interference in the internal affairs of one of more state(s). Prohibition of recognition results from the consequences of this recognition ... A particular case is the obligation not to recognize the states created by illegal acts...*"[33].

The Greek[34] rapporteur's opinion is much clearer: "*a legal obligation not to recognize exists when the creation of a new entity and the adoption of the declaration of independence are related to the illegal use of force or other violations of general rules of international law, especially of the binding ones or when there has been a conviction through a resolution of the Security Council of the United Nations*"[35].

Regarding the opinion expressed by the US rapporteurs[36], even they refer to the recent practice of the United States of America, which considered that the recognitions of Abkhazia and South Ossetia are violations of Georgia's sovereignty[37],

[30] Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1947, p. 431.

[31] Interim Report of the Committee on Recognition and Non-recognition in International Law of the International Law Association from Washington Conference, 2014, accessed on the 8th of October 2019, available at http://www.ila-hq.org/en/committees/ index.cfm/cid/1032.

[32] Prof. Gerhard Hafner.

[33] G. Hafner, the Austria's report quoted by the Interim Report of the Committee on Recognition and Non-recognition in International Law of the International Law Association from Washington Conference, 2014, accessed on the 8th of October 2019, available at http://www.ila-hq.org/en/committees/index.cfm/cid/1032.

[34] Dr. Aristotle Constantinides.

[35] A. Constantinides, the Greece's report quoted by the Interim Report of the Committee on Recognition and Non-recognition in International Law of the International Law Association from Washington Conference (2014), accessed on the 8th of October 2019, available at http://www.ila-hq.org/en/committees/index.cfm/cid/1032.

[36] Prof. Margaret McGuinness and Prof. Brad Roth.

[37] Russia recognises Georgian rebels, BBC News online, accessible at http://news.bbc.co.uk/2/ hi/in_depth/7582181.stm, accessed on the 8th of October 2019.

they consider that US cannot state that there is a legal obligation of non-recognition[38]. And all these contrary to the doctrinal opinion stated in the document without official character, but with a significant authority in US, entitled "*The Restatement (Third) of the Foreign Relations Law of the United State*", which considers that: "*A state has the obligation not to recognize or not to treat an entity as a state, if it fulfilled the criteria of statehood through the use of force or the use of threats, thus violating the provisions of the UN Charter*"[39].

As it can be seen, there are many answers regarding the existence of an obligation of non-recognition of states, these being granted depending on the national and political interests of the already existing states, thus emphasizing the political character of the recognition/non-recognition. However, as the latest developments in the international environment have shown, referring here to the Kosovo case and the much more recent case of Crimea, "*the states should not forget that their policies do not exist in a legal vacuum, and the decisions to take action contrary to international law or contrary to the rights of the affected state could have costs*"[40].

5. Conclusions

Therefore, we share the opinion expressed also in the Romanian doctrine, according to which "*the state carrying out the recognition has a serious freedom of appreciation, but granting this must nevertheless comply with legal rules and principles.*" [41] Thus, the states must have the obligation not to recognize an international situation that does not comply with the peremptory norms of public international law, the *jus cogens* rules[42]. Thus, considering that the *jus cogens* rules derive from the fundamental principles of public international law, from the regulations on the rights recognized by the entire international community, such as the freedom of space and of seas, but also from the respect for the human rights, the already existing states should not recognize those entities that used illicit acts, such

[38] M. McGuinness, B. Roth, the USA's report quoted by the Interim Report of the Committee on Recognition and Non-recognition in International Law of the International Law Association from Washington Conference (2014), accessed on the 8th of October 2019, available at http://www.ila-hq.org/en/committees/index.cfm/cid/1032.

[39] The Restatement (Third) of the Foreign Relations Law of the United States 202 (2) *apud* Interim Report of the Committee on Recognition and Non-recognition in International Law of the International Law Association from Washington Conference (2014), accessed on the 8th of October 2019, available at http://www.ila-hq.org/en/committees/index.cfm/cid/1032.

[40] E. Milano, *The doctrine(s) of non-recognition: theoretical underpinnings and policy implications in dealing with de facto regimes*, accessed on the 8th of October 2019 at http://www.esil-sedi.eu/sites/default/files/Agora%203%20Milano.pdf.

[41] R. Miga-Beșteliu, *op. cit*., 1997, p. 101.

[42] According to Art. 53 of Vienna Convention of 1969 on the law of treaties, the *jus cogens* rules are defined as follows: *"(...) a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"*.

as violating the principle of non-compulsion[43], violating the peoples' right to self-determination and even pursuing racist policies. At the same time, as it can be seen in practice, most of the acts of non-recognition of states are based on a violation of the principle of territorial integrity of the states in which new territorial entities have emerged.

Synthesizing and concluding, the creation of new states through the violation of *jus cogens* norms is illegal.

Therefore, an already existing state cannot recognize a new created state through the violation of *jus cogens* norms, reason for which the non-recognition of that new created state intervenes, meaning that the non-recognition of states is foreshadowed as a specific sanction of public international law.

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13. Victor Todos, *Lecture Notes. Public International Law,* "Bogdan Petriceicu Hașdeu" State University of Cahul, 2010.

[43] United Nations General Assembly Resolution no. 2625-XXV, The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, according to the Charter of the United Nations: "*no territorial acquisition obtained by threat or use of force will be recognized as legal*".