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TRENDS IN THE STATES RECOGNITION IN INTERNATIONAL PUBLIC LAW AND THE CASE OF MACEDONIA

The paper analyses the most recent trends in the international public law in relation to the institute of STATES RECOGNITION, which is particularly up-dated with the European experiences in recognizing the states that have been created following the dissolution of the socialist federations in Eastern Europe. The problem of recognition of the Republic of Macedonia, as a rare precedent in setting "standards", will be a sub-context thereof. This is the very basis of some possible conclusions (further in the text) influencing the previously mentioned trend, which are also broadened to include the UN` legal practice from the aspect of "interpreting" the UN Charter concerning the issue of admitting new member states.

1. In his well-known and essential book on the states recognition, Hersch Lauterpacht[1] says that the states recognition is not an issue led by law but by politics. In analyzing the procedure (as established by the European Union in 1992) relating to the recognition of newly-emerged states in Europe, one cannot avoid the impression that Lauterpacht`s thesis is more actual today than ever before.

The institute of "states recognition" is defined as "an act of one or more states with which the fact of existing a defined territory, politically organized society being both independent from other existing states and capable to accept and accomplish its international law-based obligations, is accepted; and with this same act these states considered the new-emerged state as a member of the international community".

Therefore, the state recognition means accepting the state as a fully independent and sovereign member of the community of nations. This synthetic definition of the institute has its own history, especially from the aspect of the voluntarism of the act of accepting and perceiving the mentioned facts on the new states. That history started with the complete usurpation of the freedom to determine the fact of existence of the new state by the countries recognizing it. Further on, it developed in direction of the attempts to objectify that act and to subject it to legal considerations, wishing to make it fully formal and irrelevant to the state`s *de jure* existence. The history of the institute has been formulated in "theories": constitutive, declarative and syncretistic theory for states recognition.[2]

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[1] Hersch Lauterpacht, *Recognition in International Law*, 1947. English civilian who draws his experiences related to the above topic from court cases before the British courts concerning the Spanish Civil War (1936-39).

[2] Later, the so-called *Stimson theory* on "*states non-recognition*" emerged. It concerns the situations where the state has been established through acts that are inadmissible in the international law, such as the annexation of territories, aggression and violation of the "*ius cogens*" rules.

Despite the tendencies to objectify the act of recognizing states, this act has never lost its "political moments". Namely, the European Union`s most recent practice of recognizing the new states from Eastern Europe resulted in a dramatic return of all those value-like and political elements into the game.

The following are the consequences of recognizing the state in international law: the recognized state is entitled to request protection of its sovereignty (immunity from interfering in internal affairs) and to activate the measures of collective security; diplomatic immunity; its acts have an effect in the international community and before the courts of the other states.[3]

Namely, during the period of Lauterpacht, the predominant "constitutive theory" for states recognition was based on the presumption that the act of state recognition as an actor in the international law (practically, that it existed as a "visible one" in the international relations) was specific and always political one, made by the state`s executive power. This theory was in accordance with the prevailing opinion in the 19th century, according to which the international law was *ius gentium voluntarium*, or, it was, basically, nothing more than an agreement of wills of the member states of the international community. In such circumstances, the constitutive theory appeared as an instrument both for creating the states in the international community and the so-called *Realpolitik*.

H. Lauterpacht was the first to make a theoretical bridge between such interpretation and practice of recognition as free will, toward the recognition as an OBLIGATION of the states. In other words, his thesis bridged the chasm between the facts of the state`s existence and the political fact of its recognition (i.e. its existence). In the opposite case, according to Lauterpacht, there was a risk to increase the tension and confliction in the international relations. It is particularly relevant, according to Lauterpacht, that in case of dispute over the recognition of new state, the courts should refer to the factual state of affairs of the state`s existence (a series of factual characteristics and capabilities it meets) and not to the attitude of some other state in relation to those facts.

In this way, Lauterpacht established the up-to-date predominant legal option for states recognition, called "declarative theory". This theory claims that the states recognition is a factual situation that is verified through meeting the state`s several listed characteristics and capabilities in the internal power execution (*real capability*) and in attaining that capacity in the international relations (*independence or procedural capability*). Lauterpacht made a fine distinction and gradation between acquiring factual statehood by meeting the "objective conditions" (on one side) and the obligation arising there from for recognizing the newly emerged state and the full

[3]The states` positions about the responsibility of the state that is not recognized differ. According to the general position, the state is not released from responsibility for the legal acts of its own government, despite the fact that the latter is not recognized in the international community. Its acts are, however, irrelevant before the third countries` courts. The USA have a position that the normal trade transactions with a non-recognized state may appear in a lawsuit before the USA`s courts.

enjoying of the whole palette of international rights and obligations by the new state (on the other side). The latter emerges only after the complete recognition by the community of states. This gradation leaves room both for real application of the declarative theory and absorption of the *Realpolitik* into it.

2. States Recognition in the United Nations

Later, the practice of states recognition overlapped with the process of "application for membership in the United Nations" in a so-called "deal in package", where the membership in the UN presupposes at the same time the recognition of the given state by the member-states of the Organization.[4]

The criteria for admission of new members in the UN are listed in Article 4 of the UN Charter. According to these, four cumulative requirements should be met, as follows: the applicant IS A STATE; a peaceful one; accepts the obligations from the UN Charter; has a capability to meet the obligations arising from the UN Charter and has a will to fulfill these obligations.

Since 1955, the international law has applied literally and factually (within and outside the UN) the declarative theory for states recognition as well as the so-called criteria for becoming state, contained in the Montevideo Convention.[5] This practice is followed by applying the institute of "*uti possidetis juris*",[6] borrowed from the process of acquiring independence by some Latin American and African states during the period known as "*decolonization*".[7] The application of this institute (which is disputed by some authors as general practice) in case of recognition of newly emerging states, ensures the states` borders while the independence is being acquired. In addition, it permits confirming the right of the peoples living there and avoiding innumerable conflicts that would have emerged from the additional disputes relating to both the rights and the borders (some of

[4]For some states (for example Sweden), the state admission means an automatic recognition thereof without issuing any separate act of its government. Other states, (for example, Latin-American ones), issue a special notification on recognizing the state on the basis of its admission in the UN.

[5]Article 1 of the Montevideo Convention on the States` Rights and Obligations (1933).

[6]*Uti posseditis juris* originates from the Roman law where it is a procedural principle. According to it, the burden of proving lies with the party that does not possess the article, the land. Much later, it has been introduced in the international law where, as a theory, it means that the old administrative borders shall remain as international after the entity that used to be a colony or non-sovereign area acquires independence. See in: *Balck's Law Dictionary,* 1999; John Basset Moore, *Memorandum on Uti Possidetis,* 1913.

[7]See particularly the Report of the International Court of Justice on the case concerning the dispute over the borders of Burkina Faso and Mali, *ICJ Reports* 1986, p. 554, 565.

the conflicts relating to the borders of the divided tribes and ethno-nations could not yet be avoided and they are still going on).[8]

According to some authors (Crawford, Grant…), in its **"reasonable form"** (and because of the break-through of the principle of "self-determination of peoples after 1965), it becomes an essential component in international forums and one of the principles for creating states.[9] Therefore, there are so-called "*Montevideo plus*" criteria for the states recognition that occurs currently.

It is important to emphasize something that is also the essence of the "return through a small door" of the constitutive theory for current states recognition. It is the increased politicization and value-like assessment of the act of recognition as a fact (as rightly observed by Grant, for example) that occurs in the most objective assessment of the criteria relating to state according to the declarative theory. In addition, there is serious room for arbitrary assessments of whether and how some of them are fulfilled.[10]

In this way, both the role of the interests and the *Realpolitik* are again present at the international scene. Therefore, the real question is how to minimize the room for arbitrary assessments and ensure that objectified (unbiased) criteria play a dominant role in the process of states recognition.

It is exactly in that point that the practice concerning the criteria for states recognition introduced by the European Union in 1990 brings "doctrinaire tornado". These criteria maximally valuate and politicize the procedure of states recognition, which is done (according to some authors) on the account of the irrefutable criteria for statehood!

3. **Legal and Political Dimensions of the Policy of States Recognition in the European Union**

The short political assessment of the situation in the European countries both in terms of tackling the new situation of dissolution of socialist federations and accepting the newly emerged states, reveals an attitude of an extreme unpreparedness and confusion. It has mainly been informed by bad intelligence data on the conflictions in the newly emerged states and a low level of logistic readiness to undertake actions and preventive diplomacy. The risk signified the possibility of a new division between the European states on the priorities during recognizing the newly emerged states; a risk that would have brought in the EU the bad guests of division from (at least) the beginning of 20th century.

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[8]The irrefutable criteria for the existence and therefore, also for recognizing the states according to the declarative theory are additionally objectified in the Article 1 of the so-called Convention from Montevideo: permanent population; territory defined; sovereign power and capacity to enter into relations with other states. As such, they have been quoted in the majority of books from the field of international law.

[9] For example, the UN General Assembly Resolution 1514.

[10]There are many examples of states pleading for recognition while having "*strange*" criteria, such as Western Sahara where the population is in permanent movement; states with non-defined borders; states pleading for a territory being under other power (Palestine) etc.

The ascertained key case of such a great political risk of failure was the dissolution of the SFR Yugoslavia and the occurrence of five new states in the Balkans. Four of these requested to be recognized as independent states and to be admitted in the international organizations (Macedonia, Slovenia, Croatia and Bosnia and Herzegovina). One of them (Serbia and Montenegro, as a federation) requested to receive a recognition for its continuity with the SFRY, inherit the property and seats in the international organizations, while the other states requested to be declared as secessionist ones.[11]

The ways in which the EU preferred to conduct the dissolution process of SFRY and to control the emerging conflict were the EU`s (unwanted) priorities.

In that direction and with the above-mentioned handicaps, the EU created the so-called EU Conference on Yugoslavia (ECCY) on September 7, 1991.[12] Within the Conference, the so-called Arbitrage Commission was created. It was composed of five presidents of European constitutional courts of the European countries under the leadership of Robert Badinter (the conference was named Badinter Commission after his name, ECAC). The Commission`s aim was to evaluate what criteria for recognizing the states created from the dissolution of SFRY would be applied and on what states.

In parallel to this, the EU adopted a decision (on December 16, in Brussels) that the Yugoslav republics wishing independence may submit applications to the Badinter Commission and require their reviewing.[13]

This EU`s decision initially lists (guidelines) framework criteria, requirements for the states recognition, while referring in a

[11]Of course, the main issue and the entire confliction deriving from the disintegration was neither exhausted nor did it amount to the legal issue of states` recognition and succession. On the contrary, it concerned great-statehood-like project to create "*Great Serbia*" through altering the inter-republics` borders based on the principle of ethnic self-determination. This was supported by usurping the power of the former Yugoslav Army by Serbia and it was (and it proved to be) the main reason for both the war and almost 300 000 victims of the conflict that emerged.

[12]This resulted from the previous failure to stop the initial conflicts by the EU "Troika" monitoring mission (ECMM) and the Declaration of the EU Ministerial meeting of August 28, 1991 - Declaration on Yugoslavia. The Conference was presided by Lord Peter Carington. The Conference was expected to bring together the EU representatives, UN special representative for Yugoslavia (Sayrus Vens), Yugoslav Prime Minister Ante Markovic and the presidents of the six republics and their representatives in the Federal Presidency, as well as the Dutch Foreign Minister Hans van der Bruk. The general attitude was that the independence sought by the six republics should arise only from the successful ending of the negotiating process within this Conference. In that direction, an "arbitration procedure for resolving the crisis" was envisaged.

[13]This act was seen as an accelerated processing of the possibility for recognizing the republics` independence, due to the crisis and bad prospects of the Conference, under strong pressure by Germany. After this, the latter unilaterally recognized both Slovenia and Croatia on December 23, 199, which was followed by recognition by the other EU states (Austria, Hungary, Italy, Holy See).

doctrinaire way to the Final Act of Helsinki and the Paris Charter (in particular to the principle of self-determination). It adds that the recognition would take place according to the normal standards of both the international practice and the political reality in each specific case!?

Such a direct invocation of the "political reality" during the states recognition is a rare and maybe unseen case that also introduces a dose of a priori arbitrariness in the evaluations. On the other side, the request for submitting "an application for recognition" that would be additionally arbitrated by a special commission was until then an unseen precedent in the international law for the same practice. The following were the requests, the requirements or the criteria-related to the recognition:

- Respect of the UN Charter and the OSCE Final Act of 1975 (especially in relation to the democracy, rule of law and human rights);
- Guarantees for the rights of ethnic and national groups and minorities in accordance with the criteria of OSCE;
- Respect of the principle of non-changing the borders, which may only be changed through peaceful means and agreement;
- Acceptance of all relevant international obligations relating to disarmament and nuclear non-proliferation as well as the security and regional stability;
- Consent to resolving all states` succession-related questions and regional disputes through both an arbitrage and an agreement.

These requirements end with the *Stimson doctrine* that the EU shall not recognize the states emerged as a result of an aggression, but also that the EU "SHALL TAKE INTO ACCOUNT THE EFFECT OF RECOGNIZING THE NEW STATES ON THEIR NEIGHBORS" ??? The latter is an absolute novelty in the international law that shall remain as the most problematic "internal" provision causing very strange and non-legal situations, baptized by the EU while dealing with the issue on the states recognition.

All six states submitted their own applications to the Badinter Commission by December 23, 1992 while the latter`s reply was expected to be submitted by January 15, 1992. The Commission`s work resulted in both reviewing the constitutive documents of each republic and delivering Opinions-Decisions with the following order and contents:[14]

The Opinion No. 1(of November 29, 1991) concerned a key issue - whether the SFRY was disintegrating or it was about a

[14]In "the application for recognition" each republic was expected to: express its wish to be an independent state; accept the listed EU's framework requirements; accept the provisions of the draft-document of the Conference on SFR Yugoslavia, especially its part 2 on human rights and special status – rights of minority or ethnic groups; continue in supporting the efforts of the UN` Secretary General and Security Council and continue the Conference on Yugoslavia. For more details related to the Badinter Commission`s work, see: Alain Pellet, 'The Opinions of the Badinter Arbitrarion Committee: A Second Breadth for the Self-Determination of the Peoples', *European Journal of International Law*, 3.1.1992, p. 178-185; The Badinter Commission` Opinions are also published in the EU: *EJIL*(1992) .

secession of some states from it. The Commission stated that the SFRY`s federal authorities did not meet anymore the criteria of representativeness and the participation important for federal states. . . . as well as that the SFRY was in the process of dissolution.

The Opinion No.2 (of January 11, 1992) states that ‘’...the right of self-determination must not involve changing of the existing borders ... as from the time of acquiring independence by the republics... (*uti possidetis juris*) ...unless otherwise decided by the states themselves.’’ With this, the Commission clearly stated that "the right of self-determination" was used by the nations as nations of the republics or inside within the republics` borders.[15]

In its Opinion No. 3 (of January 11, 1992) the Commission stated that the republics` internal borders could be treated as inter-states ones from the aspect of the international law. The Commission also stated that the (less confusing) SFRY`s external borders were also unchangeable (which is easily verifiable according to the UN Declaration on Principles of Friendly Relations between the States, the OSCE Helsinki Act; Vienna Convention on States Succession of 1978 etc). However, it broadened the same to include the (until then) internal borders between the republics, which was not covered until then by some existing doctrine or international jurisprudence and, therefore, it is a novelty. The application of *uti possidetis juris* (on the other side) affirms that the Commission considered this rule (borrowed from the cases from the period of de-colonization) as a generally applicable one in the international law and, therefore, in this case as well.[16] The Commission also referred to Article 5 of the SFRY`s Constitution, according to which the Republics` territories may not be changed without their consent. The latter is done, however, by ignoring the other articles where it is stipulated that the Federation`s territory is indivisible, with the explanation that they are absorbed with the non-functioning of the Federation, as stated in the Opinion No. 1.[17]

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[15]For such an attitude, the Commission had the support of the international jurisprudence. See, for example, the Canadian Supreme Court` judgment in the case of "*Quebec` secession*", according to which: "…external secession may appear as legitimate one only if the nations inside the existing state are crudely and permanently denied the reasonable exercising of internal self-determination ...".

[16]The Commission refers to a quote from ICJ Reports on the frontier dispute Burkina Faso v. Mali, but also

to the disputes over the borders of Cambodia and Thailand; Libya and Chad. *ICJ Reports*, 1986, p. 554, 565.

[17]The majority of critics of this attitude of the Commission emphasize the "danger" if such an approach is generally accepted. They claim that it may mean introducing lasting instability in the international relations where the state`s disintegration or its alteration would be justified with the radical violating of human rights or lack of state`s legitimacy. They add that there is no legal precedent in the international law for such an approach and that altering the requirements related to the states` recognition is dangerous. Also, they claim that it resembles the period when the colonial powers have treated the colonies as "*terrus nullius*". In this period, the former determined the borders of the latter. They also remind on the modern match (pendant) for it - the so-called "*failed or rogue states*", which are used for interventions by the powerful states and for altering their political order and territorial status. See,

The Commission` reasoning on the issue relating to the application of international agreements is interesting and significant. In this case, it is the SFRY`s Constitution and the republics` constitutions, where the institute "*uti possidetis juris*" as well as the principle of effective control of territory are criteria for acquiring independence by the Republics. In the same time, the Commission isolated the criteria of geography, economy, culture, history, ideology and elitism, which may also be theoretical standpoints for territorial requests and acquiring territory in the international law.[18] Namely, according to the critics, the Commission has arbitrarily applied *uti possidetis*, through providing the latter with the character of a universal principle while recognizing the administrative borders as borders of international character, despite the non-existence of court practice and tradition for such a treatment of the institute. With such an application, the Commission acted as a political body and it produced a quasi-legal reasoning. The Commission used the case of Burkina Faso v Mali before the International Court of Justice (ICJ) in Hague in order to provide argumentation for its attitude. However, its decision was actually based on the whole ICJ`s practice. Namely, in its cases concerning territorial disputes, the ICJ has adopted a hierarchy of legal sources that it applies while resolving these disputes: existence of an international agreement (Constitution) between the parties, *uti possidetis juris* and the principle of effective control.[19] In the spirit of the International Court, the Commission considered that the international agreements between the parties in a territorial dispute (the SFRY`s Constitution) express the jointly accepted agreement on the inter-republics` borders (there are also agreements on inter-republics demarcation). As such, they express the parties` will and consent for accepting the borders, which was an important fact during their subsequent questioning. Then, the Commission has also applied "*uti posidetis juris*" in a complete accordance with the International Court`s practice (jurisprudence) as either customary international law or general principle of international law.[20] The third criterion applied by the Court, the effective control of

for example, the positions of: John Williams, Colin Warbrick, Diana Johnstone, Michel Collon, Steve Terret and particularly Raju G.C. Thomas, *Self Determination and Recognition Policy*, 1997 etc.

[18]In acting in this way, the Commission, contrary to the critics, acts in accordance with the practice and a case decided before the International Court in Hague. See particularly in: Brian T. Sumner, 'Territorial Disputes at International Court of Justice', *Duke Law Review*, 53, 2004, p. 1806-1807.

[19]See particularly in: Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice', *Duke Law Journal*, Vol. 53, 2004; Yehuda Z. Blum, 'Historic Titles in International Law', *Y.B. Int,l L*, 1965; Andrew Burghardt, 'The Bases of Territorial Claims', 63 *Geographical Review*, 1973; A.O. Cukwurah, *The Settlement of Boundary Disputes in International Law*, 1967; Norman Hill, *Claims to Territory in International Law and Relations*, 1945; R.Y.Jennings, *The Acquisition of Territory in International Law*, 1963; Surya P.Sharma, *Territorial Acquisition, Disputes and International Law*, 1997; Malcolm Anderson, *Frontiers, Territory and State Formation in the Modern World*, 1996.

territory, is subordinated to the "*uti possidetis*", taking into account first of all the administrative governance of the territory before the occurrence of changes resulting from both military actions and Serbia` aggression over the other Republics` territory.

The Opinions No. 4, 5, 6 and 7 concern the Commission`s requirements and assessments in relation to the recognition of Bosnia and Herzegovina, Croatia, Macedonia and Slovenia. The opinions No. 8, 9 and 10 concern Serbia and Montenegro.

We may conclude that, whether they criticize them (for being vague, quasi-legal or even dangerous) or they support them, the authors from the field of international law agree that both the principles and legal interpretations used by the Badinter Commission (and earlier by the EU`s framework-like principles for states recognition) establish effectively new international rules and norms in relation to the issue of self-determination of peoples, secession, succession, states dissolution and, finally and most importantly, recognition of the newly established states.

Particularly interesting and perhaps risky is the dangerously high level of arbitrariness, political assessments and European "*Realpolitik*" in the new criteria and rules (Karen Knop). Some of the criteria deserve immediate support and they provide a significant improvement of the sensitivity toward the human rights, rights of ethnic minorities and the rule of law as civilization values. Some of the criteria, however, are risky and arbitrary, while others are grotesque and dangerous. It is noticeable that the new EU policy of states recognizing, especially its political and moral part, contain a combination of two groups of values (which are frequently competing). Therefore, there is a view deriving from liberal democracy with an emphasis on the human rights-related value, democracy and rule of law on one hand, and the second group consisting of collective rights of distinction and minorities (special status for the minorities and ethnic groups; protection of group rights of distinction and the likely). They create very high level of standards that are required for recognition and much higher than the standards that are usually known in the international law.[21]

What were the EU`s most dramatic and most risky decisions in the operationalization of this approach?

Firstly, in political sense, the EU destructed its own position from the very moment of facing the crisis in the SFR Yugoslavia, when it thought that it would create criteria (whatever they are) for recognizing the newly established states in the form of the Badinter Commission. Its opinions enjoyed a very low respect (if at all) and the European states undertook (since January 1992) political arbitrary recognition of some of the newly established states, despite the recommendations prepared for that purpose in the Badinter Commission` Opinions. The Commission considered that the requirements related to the recognition were fulfilled only in the cases of two republics, Macedonia and Slovenia (and not in the cases of

[20] See also: I.C.J, 554, Dec. 22, 1986; Brian Taylor Sumner, op. cit, p. 1809.
[21]See particularly: Edward Mc Whitnney, *Sovereignty and State at the Opening of the New Millenium*; Roland Rich, *Recognition of States: The Collapse of Yugoslavia and Soviet Union*.

Croatia, Bosnia and Herzegovina, and Serbia and Montenegro). The EU recognized Croatia and Slovenia first, Bosnia and Herzegovina later. Macedonia was recognized latest and conditioned with regard to the issue of its name ???

The EU recognized states that had no control over almost one third of its own territory, while endangering seriously the requirement of the territoriality from the Montevideo criteria (Croatia, Bosnia). On the other side, it did not recognize at once Macedonia, but blackmailed it with the absurd requirement from the EU` Framework criteria (from the Brussels meeting) for recognizing states, according to which an account should be taken of the recognition-related effect on the neighboring countries of the state that is being recognized. This requirement is nonsense resulting from a pure pressure and blackmail by one EU member state (Greece) in relation to its own emotional problem with the name of the Republic of Macedonia. However, for that ‘’*Realpolitik*’’, it was not sufficient to distort the EU`s principles and policy of states recognition into voluntarism and grotesque. Actually, if there was an understanding to speed recognizing states that do not control their territory (Croatia and Bosnia and Herzegovina) with a view to send a political message to "the Serbian military" aggression on them (moral dimension), such justifications did not exist in the case of Macedonia that met all recognition-related requirements confirmed in writing by the Badinter`s Commission. Where there was violence and where international forces were called upon for the purposes of intervening, the EU declared recognition. Where everything was taking place in a procedural way and peacefully, with full control of both the processes and the territory, the EU avoided recognition, thereby succumbing itself to an arbitrary blackmail.

For the first time, that blackmail was seen in the Declaration on Yugoslavia, adopted by the EU on December 19, 1991 in Brussels. There is a paragraph saying that "the Yugoslav republics are obliged to adopt constitutional articles (before the recognition) with which they would oblige themselves for having no territorial claims/pretensions toward their neighbors including also a name (denomination) implying territorial pretensions (claims)" ??? Actually, here, the EU refused recognition on the basis of an objection raised by a neighboring country in relation to the name of the new state. The criterion of "political realities" as listed in the EU Declaration of December 16, 1991, in this case, concerns more the relations inside the EU than the situation of Macedonia. This is the point at which the international circus relating to the rules in the Macedonian case begins.

The Badinter` Commission agreed (accepted) that the constitutional change of an article encompassing the above direction (an amendment in the Constitution of the Republic of Macedonia from January 6, 1992) is good, while in its opinion it clearly suggested that "the use of the name of Macedonia may not imply any territorial pretension (claim) against other state".[22] Contrary to this opinion, the EU did not recognize Macedonia because of the opposition (protest) of Greece and therefore, the issue relating to the name of Macedonia

[22]Quoted from the Opinion No. 6 of the Commission.

became a PROBLEM. The EU adopted (at Lisbon Summit, June 26-27, 1992) Declaration which stated that "it is ready to recognize Macedonia but under a name which shall not contain the word of Macedonia" ... ???

Faced with "de facto" Greek veto, the EU was feeble (helpless) and what remained for Macedonia was only to appeal to the moral obligation of the international community to recognize it under the "normal conditions for states recognition".[23]

4. The Precedent with the UN` Admission of Macedonia: Facts and Politics

Macedonia applied for membership in the United Nations on July 30, 1992. The Security Council proposed draft-Resolution for admission of Macedonia in the UN` membership, but under the temporary reference "Former Yugoslav Republic of Macedonia".[24] The President of the Republic of Macedonia informed the UN about the Macedonia`s readiness to carry out the obligations arising from the UN` membership, but also that it may not accept the reference "Former Yugoslav Republic of Macedonia" as its own name.

On April 7, 1993 the Security Council adopted the Resolution 817, with which it determined that the applicant fulfilled the membership-related criteria according to Article 4 (paragraph 2) of the UN Charter and that Macedonia should have been addressed within the UN under the temporary reference "Former Yugoslav Republic of Macedonia". Macedonia was formally admitted in the UN on April 8, 1993.[25]

In February 1994, Greece imposed economic blockade over Macedonia unilaterally. In the EU, legal action has started (April 1994) before the European Court of Justice against Greece, under the charge for violating the EU Treaty.[26]

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[23]The statement of the President of the Republic of Macedonia (made on that occasion) stipulated that:'' ... this EU position is without a precedent, therefore leading both the state and the people in a position of non-recognition and a situation endangering the nation`s identity and dignity.'' In this period, Macedonia was recognized under its constitutional name by Turkey, Bulgaria, Russia, Belorussia, Croatia and Slovenia.

[24]Resolution 817 from 1993 was a response to the application of Macedonia; UN document S/25147.

[25]The USA have formally recognized Macedonia on February 4, 1994.

[26]The EU Treaties from Roma and Maastricht and violation of Article 224 concerning the trade competition rules. The EU`s request for undertaking urgent measures to remove the blockade was refused by the Court. On February 1, there was a secret interrogation of the Greek position. The Court` decision was expected at the beginning of 1995. After the refusal of the General Advocate` s position that the Court should not interfere in the dispute between Macedonia and Greece, the Court decided that it would limit itself to the decision on the legal basis of the blockade and not to the Greek questioning of the use of the name Macedonia. The procedure before the Court has been stopped after an agreement was reached (i.e. the Interim Accord) between Macedonia and Greece.

In the period between April 12, 1993 until September-October the same year, the co-presidents of the Conference on the Former Yugoslavia, Sayrus Vens and Lord Oven provided good services for the parties with a view to overcoming the Greek problem with the name of Macedonia (in accordance with the recommendations of Resolution 817). Because of the slowdown in finding solution, the Security Council adopted one more Resolution 845 (of June 18, 1993) with which the parties were called upon to continue the effort for achieving a solution. The mediators have also continued both with the meetings and the proposals for common solution.

The problem they have apparently been faced with is that non-legal questioning of the state`s name may not create conditions for compromise because the state the name of which is either deprived or changed has nothing to offer for compromise. Namely, it (i.e. the problem) would consist of "loss, failure" for Macedonia in any case and in any solution. Since the state name of the Republic of Macedonia is not only "a name of state" but also a direct expression of its majority nation, the Macedonians, the latter (i.e. the Macedonians) felt that the dispute related to their identity (as it was really the case). It implied questioning their identity and therefore entering into completely unsafe waters of depersonalizing the Balkan nation of Macedonians that has existed for at least 13 centuries with a clear cultural identity while being subjected to different attempts to negation and assimilation. The problem was chthonic and identity-related one, while it was a technical dispute of international character in terms of conflict of interests. In addition to this aspect, which was not fully understood by any of the mediators, there was also the complete international-legal illegality of the questioning the state`s sovereign right to be named as it would decide upon. These two facts on the Macedonian side did not leave and still do not leave room for an essential compromise with the name, which would have triggered its change in an international usage.

The mediation of this initial type ended with the adoption (on September 13, 1995) of the Interim Accord between Macedonia and Greece, although solution was not reached in the dispute over the name. It included an obligation to talk further about the dispute under patronage of the UN Secretary General and the mediator nominated by the former.[27]

[27]In the agreement, the Parties have been referred to as "the first party" and "the second party" without indicating the states` names, but all other relations were regulated mainly in a standardized way. The latter was followed by economic and political "normalization", if the earlier situation is taken as a benchmark.

5. Analysis of the Legal Aspects of the Dispute and the Admission of Macedonia in the UN

Each state has a sovereign right to manage its national affairs without interference by another state.[28] One member-state of the UN preventing another state to use the name or flag it has chosen is a serious novelty in the international law and a difficult question before the UN.[29] Neither the Security Council nor the General Assembly have dealt with such a question. The issues relating to the states` names has never moved further than a simple request of a "notification" (formal taking note that the state will be named in future as such and such...).

As an internationally recognized state and a member of the UN, Macedonia is granted certain inalienable sovereign rights, freedoms and protection. The empowerments and the privileges of the independence by analogy contain the nation`s right to decide on what name it will use. Each state is PRESUMED to have control over the important signs (indications) of the sovereignty, name and flag. Both the name and flag are basic national prerogatives and they must be respected by the other states and international organizations.

On the other side, the necessity for a state to have a name (and not a reference) comes from the necessity for the legal personality in the international law to have a legal identity. The state "without a name" (the name being an indication of the legal identity) may lose to a high degree or even completely the capacity to enter into relations with other legal actors. The name is a basic element of the legal identity and personality in the international law and therefore of the statehood. This right is an expression of the state`s self-determination (determination of its own legal personality), which as such is indivisible and inalienable one, as protected with "*jus cogens*" standards.

Within the EU, there has never been any successful objection in relation to the name chosen by some member state.

No state has right either to interfere with such a question or to mix into it in another way. If a state carries out the latter, then it

[28]The UN` Charter, Article 2 (4). See also in: John Dugard, *Recognition in the United Nations*; G. B. Davis, *Bases of International Law*; Malcolm N.Shaw, *International Law*, Cambridge University Press, 2003; Ian Brownlie, *Public International Law*, Oxford, Claredon Press, 2004; Antonio Cassese, *International Law*, Oxford University Press, 2001; as well as the works of C. H. Alexandrovicz, 'Theories on Recognizing of Fiery', *British Yearbook of International Law* 187, 1958; P.K.Menon, *States Recognition according to the International Law*, 1994 etc.

[29]Historically, there was no case relating to dissolution of a state that resulted in a dispute over the name chosen. This also includes Germany and Korea, as well as the Soviet Republics Belorussia and Ukraine. These were engaged in a procedure for changing their names and they established precedents contrary to the case of Macedonia. Namely, the change of the name was, according with the UN` Charter, treated as a "technical" issue and it was accepted without hearing and questioning.

CARRIES OUT A VIOLATION (*ultra vires* act, in the UN).[30] Appropriately, the state has right to be respected both as independent and as member of the family of nations where all have EQUAL RIGHTS. Therefore, the state has an OBLIGATION to REJECT THE INSULTS INFLICTED on its moral dignity, flag, name, hymn, as well as on its representatives and public officials...[31]

Both the procedure and the practice of admitting a new member in the UN are regulated in Article 4, in accordance with Article 2 (7) of the UN` Charter. In accordance with both the law and the practice of admitting new members, the requirements that should be met by the state with a view to become member of the UN are listed in Article 4 (paragraph 1). Both according to the interpretation of the General Assembly and the legal opinion given by the International Court of Justice (from Hague), as mentioned earlier in this paper, these requirements are treated as exhaustive and detailed ones. In addition, they are treated as necessary and sufficient, and not as framework-like or exemplary ones. Also, they should be fulfilled before the state`s application is submitted (to avoid any conditioned admission of new member-states under either time-related or material conditions in terms of necessity to complete or further meet some of the needed requirements from Article 4 of the UN Charter). It should be fully recognized that they are fulfilled in the procedure before the UN` bodies. After it has been recognized that they are being fulfilled, the country acquires the right of an unconditional admission as a full-member of the UN (while the UN have a correlative obligation to submit such a state-applicant for unconditional membership).[32]

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[30]Eventually, there may be a discussion on the state`s name, both if it overlaps with another name and if it causes unclearness from the aspect of the legal identity and personality of the actor (if there are two states with a recognized legal personality and with same name).

[31]Only the symbols of a special type are protected in the international law (the signs of the UN, the Red Cross and the likely). There are general legal rules of the customary law concerning the states` emblems and usage of flags. For example, Article 6 of the Paris and Lisbon Conventions on Protection of Industrial Property (1883, 1958) etc.

[32]In its legal opinions relating to the disputes on the requirements for admitting a country into the UN` membership, the International Court of Justice has dealt (twice) with and delivered two legal opinions: the first on May 28, 1948 and the second on March 3, 1950. The issue posed before the Court in the case from 1948 was as follows: whether, despite the fact that a state meets the requirements from Article 4, the UN` member-states may still pose additional conditions with a view to voting on admitting that state in the General Assembly? With nine votes "for" against six votes "no", the Court has responded negatively. The latter justified it with the fact that "it did not enter in the individual voting of the states because it deemed the same as dependent on the political assessment, but it held that they could not legally pose additional conditions for admission of the state-applicant apart from those listed in Article 4 of the Charter.'' The Court interpreted the character of those conditions as being exhaustive and sufficient. Therefore, they prevented the opportunity to pose additional conditions by anybody - the member-states or the UN` bodies. It added that the conditions (i.e. requirements) were sufficiently clear and therefore they did not need an interpretation. Thus, it was impossible to broaden them and complete them through extensive interpretations (despite the fact that no additional new

In the case of the admission-related application of Macedonia, there are clear and multiple violations of these rules.

In its Resolution 817 relating to the Macedonia`s admission, the Security Council stated (paragraph 2) that the country meets the admission-related requirements envisaged in Article 4! However, instead of recommending an unconditional admission of the applicant, it recommended below (paragraphs 3, 4, and Article 1 and 2) that the country should be admitted under the temporary reference "Former Yugoslav Republic of Macedonia" (instead of the latter`s constitutional name the Republic of Macedonia). In addition, it obliged Macedonia to negotiate for "quick" resolving the differences over the state`s name through the mediation of the co-presidents of the Conference on Former Yugoslavia. In the subsequent Resolution 845, the Security Council obliged Macedonia to continue the negotiations for resolving the same dispute, but now through a mediator nominated by the UN` Secretary General.

Where is the violation of the "*ultra vires*" act? Both the Security Council and the General Assembly clearly violated both the Charter and the way in which the provisions of Article 4 have been applied until then, by exceeding their own competences and the way of applying the provisions. They created "an additional" requirement - a temporary reference instead of a name - and they forced the country to negotiations for resolving the dispute over its own name??? As Macedonia had no possibility to refuse these additional modalities and it needed to keep the right of unconditional admission in the UN, for it, these modalities meant additional REQUIREMENTS. The UN` bodies violated the Charter in Article 2 (7) and Article 4. By violating the Charter, the Organization`s internal order was fractured. Namely, due to the admission-related additional requirements, illegal obligations related to the membership were created, the principle of

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requirement was added). The Court determined that there was no contradiction of the political character of the UN` bodies` functioning and the exhaustive character of the norms for admitting new member-states. The Court responded negatively to the conditioning the voting on the admission of new state with a simultaneous admission of another state.

These Court ` decisions have been adopted in the procedural rules of the Security Council, Article 60 of the Rules.

The second case, concerning the issue whether the question of admitting a state in the UN may be voted in the General Assembly only when there is no recommendation by the Security Council, the Court responded with 12 votes "for" against 2 votes "against". Namely, it determined that a state may not be admitted into membership without a cumulative consent by both the Security Council and the General Assembly. The Court has also delivered, however, an opinion on the way in which one may interpret the words in Article 4 of the Charter, according to which the words should be interpreted in their "natural and usual" meaning. Also, it prevented changing of the conditions from Article 4 of the Charter through an unusual interpretation and adding extraordinary meanings to the words. *See particularly in*: 'Admission of a State in the United Nations', *ICJ Reports*, 57, 1948; In addition, see the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, *GA res*, 2625 , XXV, 1970.

non-interference with the member-states` internal sovereignty was disturbed, as well as the principle of member-states` equality.[33]

Additionally, the Security Council violated its own procedural rules requiring application of the International Court`s legal opinions on the issues relating to new members` admission (the Opinions of 1948 and 1950) and establishing the ways of interpreting the requirements from Article 4 of the Charter.

Finally, any UN solution that would rely on this violation of the Charter implies two things - establishing a dangerous precedent while admitting countries into membership and lasting undermining of the UN` internal legal order. The way in which this problem should be resolved (more for the UN than Macedonia) is returning to the original interpretations of the Charter in the latter`s parts dealing with an admission and enabling Macedonia to be named with its own constitutional name.

Although this text does not intend to analyze the exit-options for a solution, we will shortly quote few possible legal exits:

The first option consists of using the established procedure in the UN while changing the state`s name.[34] Macedonia will notify the Secretary General for "changing the name" from FYROM (under which it has been admitted) into the Republic of Macedonia![35] The Secretary General is not entitled to object on the member-states` acts (except from procedural aspect) and it may request the UN` Legal Office to leave the subject to SC or GA.

The second option consists of submitting a Resolution by Macedonia to the Security Council (or General Assembly) with which it requests the Council to ask for an advisory opinion from the International Court of Justice. In the Resolution, it may justify the case as a legal problem (problem of correct application of the UN` law). It would invoke the principle of "*nemo judex in sua causa*", which would mean that the UN` Charter-related violation made by its bodies may not be decided upon by the same these bodies and therefore an advisory opinion of the Court is requested.

The third option consists of Macedonia` Resolution through which it requests the General Assembly to name it with its

[33]This is a violation of the state`s right of non-discrimination in their representation in the organizations of universal character, as clearly stated in Article 83 of the Vienna Convention, UNDoc.A/CONF.67/16 1975.

[34]Usage of the last precedents of Belorussia and Ukraine. The change of name of both states has been made with a simple "notification" to the UN` services. Also, one of the states did not wait for a formal reply, but it has at once changed the table before the delegation and this was accepted by the UN` service without any comment.

[35]In this case, the negotiating process opened with the Resolutions 813 and 845 should be closed. It may be done through insisting that the mediation was without result and too much long (10 years). The temporary reference becomes far from being "temporary", while the temporary period envisaged in the Resolution 817 has been run out or expired. The UN may not invoke the position that Macedonia has been admitted in the UN under a condition to be named FYROM! In the same time, Macedonia has not been obliged to reach an agreement with Greece on the name, but that it would try to resolve the dispute. The latter may also be resolved by plain application of the UN Charter without any special conditions.

constitutional name. In the Resolution, Macedonia should justify that it has acted in accordance with the requirements of the Resolution 817 and it fully participated in the negotiations with the UN` mediation during "a reasonable period of time". After the expiration of that period of time Macedonia has right to ascertain that the temporary period of using the reference of FYROM has been expired and that it likes to perform its sovereign right to request the UN to name its state as the Republic of Macedonia.

In any case, Macedonia should behave in accordance with the UN` procedure and avoid in any way to be involved in a DISPUTE relating the issue of its sovereign right to use the constitutional name in the UN. In particular, this question must not be treated in connection with the "issues relating the endangering the international peace and security".[36]

The prospects for resolving the differences with Greece about the name of Macedonia through a political agreement and compromise are unlikely. The legal question remains in the UN as a big problem for both the Organization and its legal order. Macedonia has chances (through a legal procedure accompanied by a diplomatic action) to correct the injustice and the irregularity inflicted on it during its admission in the UN. It seems that it would also be good for the UN` internal legal order, more than it is now perceived.

[36]One of the mistakes of the UN` perception during the initial admission of Macedonia was accepting the Greek absurd thesis that Macedonia`s admission under the constitutional name would have endangered the peace in the region. It resulted in a whole series of further illegal exhibitions in the UN. If the channel through the Security Council is used (following the Article 35 of the Charter), the notion "*situation*" and not the notion "*dispute*" should be used.