

INTERNATIONAL RECOGNITION EVOLVING STATEHOOD CRITERION: COMPARATIVE ANALYSIS OF PALESTINE AND KOSOVO

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Abstract

In today's 21st Century, the international community continues to develop to the extent that even the existence of a new State is possible as the world map continues to change. But what are Statehood criteria and what does a nation have to do to become a State? What if a nation fulfils the Statehood criteria and yet the international community denies it Statehood? The great gap in the appearance of such a nation, that claims statehood in the international community as a State with full international personality, appears to be the lack of international recognition by the other States, including United Nations' membership, which could demolish its potential Statehood.

International recognition is one of the most difficult concepts in international law because of both its political and legal dimensions. Between the legal framework and the States' practice, it is hard to have a solid position on whether the entity is a State or not. James Crawford, a leading scholar in the field of Statehood, emphasized the linkage between the act of recognition and the notion of Statehood as an inevitable connection. In this thesis, I will argue that the fulfilment of statehood criteria should not include the requirement of international recognition, because the existence of a nation as a State should not depend solely on the political bias of other States.

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Introduction

What is a State? The concept of ‘State’ is a critical component of international law and international relations. The most accepted definition in international law of ‘State’ is stated in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which sets the traditional criteria for Statehood: the entity must possess a permanent population, a defined territory, an effective government, and capacity to enter into relations with other State. But does this mean that every entity that fulfils such criteria and claims to be a State will be treated as a State by the international community? In other words, is statehood in international law based on the effectiveness principle? In this thesis, I will argue that the fulfilment of the Statehood criteria should not include the requirement of international recognition. In other words, an entity should gain international legal personality (ILP) in the international system regardless of the position of other States. In general, the ILP for a entity claimed to be state, create a ‘great debate’ on whether the rights and obligations of States attaches to the entity the moment it meets the objective criteria of Statehood under international law (the declaratory theory) or after the existing States have recognized such entities (the constitutive theory)¹, this argument will be will be examined in my third chapter.

The notion of Statehood was effected by various historical events; the adaptation of United Nations (UN) Charter as representative to the international family, the beginning of decolonization, which emphasized people’s rights of self-determination, the collapse of United Soviet Social Republics (USSR) and the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). Responding to these dramatic events, the world map changed and the

¹ William Thomas Worster, “Law, Politics, and the Conception of the State in State Recognition Theory” Boston University International Law Journal no. 1 (2009): 124.

international law developed in order to contain the appearance of the new entities. The full sovereign State was the only legal person under the international law, however the appearance of *de facto* State, which is an entity that has all the features of a State but failed to realize any degree of substantive recognition and therefore remains illegitimate in the eyes of the international society, enjoys to some extent the rights and obligations of sovereign State. On 17 February 2008, the Republic of Kosovo declared its independence. This declaration had mixed international reactions, for example the United States and the United Kingdom recognized Kosovo as full state, while Russia and Serbia did not. Kosovo Statehood claim, attracted reactions from legal writers and policy-makers.

I chose Kosovo and Palestine as my study cases. I chose Kosovo for different reasons; firstly, Kosovo's independence brought to the surface the idea of secession from the mother State, while the international law does not prohibit the right of secession, also it does not permit it. Secondly, the international community achieved remarkable solution to the Kosovo crisis since 2001- peaceful commissions were established, the negotiations process was continued, and international military intervention was launched, yet Kosovo neither attained its full Statehood, nor is it part of Serbia territory. Why is Kosovo not an independent State and why is it a member of the UN - the nation's club?

On 15 November 1988, the Palestinian Liberation Organization (PLO) declared its independence and was followed by recognition by 114 States. The number of States that recognized Palestine as a State now is 130 States². I chose Palestine as my second case study because Palestinians have for almost six decades been struggling to get their Statehood and from my perspective, they used every means to accomplish this aim: they fought, negotiated with

² "Q&A: Palestinian Bid for Upgraded UN Status," BBC, September 27, 2012, sec. Middle East, <http://www.bbc.co.uk/news/world-middle-east-13701636>.

Israel, used international law and even turned to the international community to try to attain Statehood. After a bloody war and being under occupation for decades, they were not admitted to the UN. My question in this thesis is whether Palestine fulfilled the traditional Statehood criteria? If yes, and if it was recognized by a number of States, why did Palestine insist on getting UN membership, should the UN membership declared that Palestine is state.

Clearly, the case of Kosovo and Palestine are not perfectly analogous, each case has its own unique characteristics. However, they both sought unilateral declaration of independence within the international law framework, both suffered from grave human rights violations and are subject to the fundamental international rights such as the right of self-determination. Most importantly, the Kosovars and the Palestinians do not see a solution to their dilemma other than a full independence State. It is thus crucial to investigate the ‘statehood’ and ‘recognition’ phenomenon.

First, I will start by asking whether Kosovo and Palestine are States under international law and what recognition role States and different international organizations such as UN and its organs, play in the Kosovo and Palestine case. Primary and secondary sources will be used to answer these questions. The thesis, divided into three main parts and chapters, will examine the Statehood doctrine under the international law, where I will review the international law historical and legal literatures on the Statehood criteria, both the traditional and the additional Criteria. I will mainly be guided by James Crawford, a leading scholar in the field of Statehood.

The second part will examine further arguments on Statehood, where the notion of *de facto* States is raised as a controversial issue under the international law. We will study the international legal personality of the *de facto* State as laid down in various literatures, e.g. *International Society and the De Facto State* by Scott Pegg.

Our final part of the thesis will be about international recognition, where the legal literatures and political State practice will be our sources. However, legal documents such as the ICJ advisory opinions in the Kosovo and Palestine context will be primary sources for this thesis.

Chapter One: The Statehood Criteria and Kosovo and Palestine

1.1 Introduction

This chapter deals with the concept of statehood in international law. It looks at the traditional statehood criteria and the development of these criteria in the modern era. It further examines the elements of traditional statehood criteria such as territory, permanent population, effective government and capacity to enter into foreign relations, as well as independence and sovereignty. Furthermore, the chapter describes additional criteria in international law and considers whether Kosovo and Palestine meets the traditional and additional statehood criteria.

The number of the new states increased from fifty at the beginning of the twentieth century, to seventy- five states after World War II, 192 states in 2005, and 200 states if we include Palestine, Kosovo and other entities that are not members in the UN³. Although the definition of statehood is a critical component of international law, there is no clear-cut definition of what a “State” actually means⁴. In this chapter, we will examine the definition of the State through the traditional statehood criteria and then scrutinize additional criteria for statehood.

1.1.1. The Traditional Statehood Criteria

Several legal writers have been unsuccessful in presenting one definition of Statehood⁵. However, the Montevideo Convention on the Rights and Duties of States can be considered the

³ James R. Crawford, "The Creation of States in International Law", 2nd ed.(Oxford University Press, USA, 2007), 4.

⁴ Thomas D. Grant, "Defining Statehood: The Montevideo Convention and Its Discontents" 37 Colum. J. Transnat'l L. 403, Columbia Journal of Transnational Law Association,(1999).

⁵ Crawford, "The Creation of States in International Law", 4.

“best known formulation of the basic criteria for statehood”⁶. Article 1 of the convention provides the traditional criteria of statehood;-

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.⁷

The question, however, remains whether these criteria are sufficient in defining statehood and if they are at all necessary⁸. This concern will be handled later in the additional statehood criteria section, as well as examining whether Kosovo and Palestine meet the traditional statehood criteria.

a. Defined Territory

Crawford has pointed out that States are “territorial entities”⁹. Firstly, the territorial element of Statehood requires the exercise of government power on “some area of territory”¹⁰. There is no “minimum area of the territory” that is obliged to become a State.¹¹ For example, Liechtenstein is a State with 160sq km and became a United Nations’ member in 1990. Secondly, the territory of the State in international law does not require continuity of the territory¹². As Crawford points out, “[s]overeignty comes in all shapes and sizes”¹³.

Thirdly, the claims to the entire territory of the State could be a problematic issue in admitting members to the United Nations, but the territorial claims cannot affect the actual

⁶ Ibid.

⁷ Ibid., 111.

⁸ Vidmar, Jure cre, “Democracy and State Creation in International Law” (UNIVERSITY OF NOTTINGHAM, March 2009), 65.

⁹ Crawford, “The Creation of States in International Law”, 46.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid. 47.

¹³ Ibid.

existence of the State¹⁴. For example, both Israel and Palestine have had disputes about boundaries but that has not affected their existence as States.

b. Permanent population

The permanent population criterion is probably the least controversial of the four traditional statehood benchmarks. Permanent population has been defined as “[a]n aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be different in colour”¹⁵. Likewise, in the territory case no minimum population is required to qualification as a State, also the absence of part of the population over a period of time necessarily vitiate a State status¹⁶. Furthermore, the international community has accepted that “ a population need not be restrictively defined in order to be considered permanent, nor does it need to be located in one designated place for any specific duration of time”¹⁷, this issue will be examine regarding to the Palestinian Refugee problem, who are not located in the Palestinian territories.

c. Government

The government, as Crawford argues, is “the most important single criterion of statehood, since all the others depend upon it”.¹⁸ The government is represented by the State in the international community. In other words, the arms of government such as the Legislature, Executive and Judiciary, act as indicated by the State¹⁹. Therefore, the government should have an effective control over the territory and its people, and ensure independence from foreign

¹⁴ Ibid., 49.

¹⁵ Vidmar, Jure cre, “Democracy and State Creation in International Law,” 57.

¹⁶ William R. Slomanson, *Fundamental Perspectives on International Law* (Cengage Learning, 2010), 48.

¹⁷ P. Epstein, “Behind Closed Doors: Autonomous Colonization in Post United Nations Era-The Case for Western Sahara,” *Ann. Surv. Int’l & Comp. L.* 15 (2009): 107.

¹⁸ Crawford, “The Creation of States in International Law”, 55.

¹⁹ Ibid., 56.

interference. Effective government is, thus, an important criterion of Statehood, since it allows the next requirement of ‘the capacity to enter into relations with other state’.

d. Capacity to enter into relations with other state

While some writers classify the Foreign Relations requirement is “a consequence of statehood” and not a “criterion”²⁰, others argue that it is a “decisive criterion” for statehood²¹. The capacity to enter into relations with other States is related to State policy and for that, the Statehood criteria does not impose an obligation on States to enter in such relations²². A State can enter into these relations even without having an effective control over its population and territory²³. For instance, Somalia is a state and conducts relations with other countries, even if it lost effective control over its territory²⁴. Therefore, the capacity to enter into foreign relations by States is a consequence rather than a criterion for Statehood.

e. Independence

Crawford has described the criterion of State independence as a “central criterion for statehood”²⁵. Other academics have also suggested that this criterion could be implied from the fourth criterion, implying that “without independence, an entity cannot operate fully on the international scene”²⁶. “The independence of a State is demanded in order to prove that the entity can lead a separate existence. And that the entity should not be a continuation of another State”²⁷. An independent State has two related elements: “the separate existence of an entity within

²⁰ Ibid., 61.

²¹ Slomanson, "Fundamental Perspectives on International Law", 62.

²² Vidmar, Jure cre, "Democracy and State Creation in International Law," 58.

²³ Slomanson, Fundamental Perspectives on International Law, 62.

²⁴ Vidmar, Jure cre, "Democracy and State Creation in International Law," 59.

²⁵ Crawford, "The Creation of States in International Law", 66.

²⁶ Ademola Oladimeji Okeowo, "Statehood, Effectiveness and the Kosovo Declaration of Independence," SSRN eLibrary (November 3, 2008): 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1316445&download=yes.

²⁷ Nii Lante Wallace-Bruce, Claims to Statehood in International Law (Carlton Pr, 1994), 57.

reasonably coherent frontiers; and its not being ‘subject to the authority of any other State or group of States’²⁸. This means that a State has ‘no other authority than that of international law’²⁹.

The question that arises is from what the State must be independent. Generally, independence has two categorizations: the formal and actual or real independence³⁰. According to Crawford, “[f]ormal independence exists where the powers of government of a territory (both in internal and external affairs) are vested in the separate authorities of the putative State”; whereas actual independence is defined as “the minimum degree of real government power at the disposal of the authorities of the putative State, necessary for it to qualify as ‘independent’”. Some academics have emphasized that actual independence is more necessary than formal independence as a fulfillment for this criterion³¹. On the contrary, others have argued that only when the two types of independence exist, does the entity qualify as a State.

f. Sovereignty

Various scholars have argued that sovereignty is a fundamental criterion for the State, that it is a “occasional synonym for state or nation” and that the State cannot exist without ensuring full sovereignty in its territory³². State sovereignty has been described as “the evolving relationship between the State and civil society between political authority and the community...[being] as both an idea and an institution integral to the structure of western thought... and to a geopolitical discourse in which territory is sharply demarcated exclusively controlled”³³.

²⁸ Crawford, "The Creation of States in International Law", 66.

²⁹ Ibid.

³⁰ Ibid.

³¹ Wallace-Bruce, "Claims to Statehood in International Law", 58.

³² Crawford, "The Creation of States in International Law".

³³ Slomanson, "Fundamental Perspectives on International Law", 59.

1.1.2 Additional Statehood Criteria

The traditional Statehood criteria were based on the effectiveness principle, but a dramatic change made this effectiveness insufficient to justify Statehood. The world map changed after the end of colonialism, with several new states emerging. If the international community was able in nineteenth-century accept that a new entity meets the traditional statehood criteria to its community, this situation changed after nineteenth-century³⁴.

The questions however remain whether the traditional criteria are sufficient for Statehood and are they necessary? In practice, some entities seem to have met the traditional Statehood criteria, yet their claims of Statehood have been rejected; e.g. Rhodesia, however, entities that did not seem to meet the traditional Statehood criteria have been accepted as States into the United Nations, e.g. Congo 1960³⁵.

Consequently, additional criteria have been identified in international law, which ride on the principle of legality and legitimacy. Therefore, in the contemporary international law the effectiveness principle is not enough for Statehood claims.

a. Violation of International Law

New entities must not violate the main human rights to earn Statehood, meaning that if an entity claims to be a State, it must respect the rules that the international community has laid down. “[However] [t]he question is whether modern law regulates the creation of states to any greater degree than this, in a situation involving illegal use of force”³⁶. For this reason no matter how effective is the existence of the entity in the international scenes, the statehood claims must

³⁴ V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence. V Jure Vidmar,” Vanderbilt University, School of Law (May 30, 2009) 42 VNJT 779: 822, accessed March 11, 2012, <http://www.amazon.com/International-responses-Kosovos-declaration-independence/dp/B002BNDZII>.

³⁵ Crawford, “The Creation of States in International Law”, 56.

³⁶ Crawford, The Creation of States in International Law, 132, For instance, the international community responded on the Iraq’s annexation of Kuwait in 1990.

be denied if the existence of this entity was illegal according to international law³⁷. Therefore, legal writers think that the legality of the state is an “additional fifth criterion of statehood”³⁸, in addition, Scott Pegg points out that the legality of the creation of the entity is not just a criterion, but rather is now “the only criterion for statehood”³⁹. For example, the international community rejection to the unilateral declarations of statehood by Rhodesia on the ground that the establishment of this entity was the result of illegality based on its discrimination racist policy⁴⁰.

b. Self- Determination

The right to self-determination is a fundamental and inalienable human right. This right is highlighted in the UN preamble as; “We the Peoples of the United Nations Determined... [to] respect principle of equal rights and self-determination of peoples”⁴¹. It is “the people’s right to choose how they will organize and be governed”⁴². The question is “[whether] the right of self-determination has become a criterion of Statehood, and if so, with what [effects on international law]”⁴³. Many international conventions emphasize the people’s right to self-determination, for instance Article 1 of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), among others^{44,45}. Additionally, the concept of self- determination was accepted as a part of customary international law, and as a part of *jus cogens*⁴⁶, this means the right to self-determination could be interpreted

³⁷ Wallace-Bruce, “Claims to Statehood in International Law”, 67

³⁸ Wallace-Bruce, “Claims to Statehood in International Law”, 20.

³⁹ Scott Pegg, *International Society and the De Facto State* (Ashgate Pub Ltd, 1999), 127.

⁴⁰ “United Nations Security Council Resolution 216,” accessed November 26, 2012, <http://daccess-ods.un.org/TMP/5399942.99411774.html>.

⁴¹ UN charter article 1.2 (Purposes and principles)

⁴² Slomanson, *Fundamental Perspectives on International Law*, 71

⁴³ Crawford, *The Creation of States in International Law*, 107

⁴⁴ Vidmar, *Jure cre*, “Democracy and State Creation in International Law,” 62.

⁴⁵ Wallace-Bruce, *Claims to Statehood in International Law*, 68.

⁴⁶ Wallace-Bruce, *Claims to Statehood in International Law*, 69

beyond the colonial context, where this right could be extended to Kosovo and Palestine cases, even if they are not a colonization cases.

The right to self-determination was a foundation for many of the colonial entities to claim and gain their Statehood, regardless of how much effective government requirements might be fulfilled⁴⁷. Thus, if the nation had the right to self-determination the traditional Statehood criteria are not required to be fully fulfilled by the entity, e.g. the right to self-determination had affected on the government requirement, where the lower level of effectiveness of government could be accepted specially in decolonization situations⁴⁸. Actually, the right of self-determination enabled many entities be granted State status, even without fulfilling the traditional Statehood criteria⁴⁹. The self-determination principle may affect the Statehood criteria if it affects willingness of States to recognize a new entity⁵⁰. For instance, self-determination can occur within a state where certain group (s) within a State can decide to secede from a State, e.g. Kosovo case⁵¹.

In summary, the additional Statehood criteria have been advanced by some scholars while others do not recognize them⁵². The purpose of these additional Statehood criteria is to ensure a legal basis for Statehood claim by entities⁵³. The additional Statehood criteria will support my claim in my cases study.

⁴⁷ Crawford, *The Creation of States in International Law*, 60.

⁴⁸ Vidmar, Jure cre, "Democracy and State Creation in International Law," 60

⁴⁹ Crawford, *The Creation of States in International Law*, 60.

⁵⁰ Zohar Nevo and Tamar Megiddo, "Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence," *Journal of International Law & International Relations* 5, no. 2 (July 2009): 94.

⁵¹ Ibid., 94.

⁵² Vidmar, Jure cre, "Democracy and State Creation in International Law," 62.

⁵³ Vidmar, Jure cre, "Democracy and State Creation in International Law," 62

1.2 Kosovo Statehood Claimed

In 2008, Kosovo unilaterally declared itself independent. The declaration stated one of the main reasons for Kosovo's independence as "years of strife and violence in Kosovo that disturbed the conscience of all civilized people"⁵⁴. Ninety-four states have recognized Kosovo's independence⁵⁵, but others consider its Statehood invalid according to international law, thus to them Kosovo is not a State. In this section, I examine if Kosovo meets the Statehood criteria.



1.2.1 Kosovo Statehood Criteria

Some scholars evaluate Kosovo as a State that has met all the requirements of the Montevideo Convention. On the contrary, others argue that it would be difficult to determine the Statehood of Kosovo according to the Montevideo requirements. In my opinion, the recognition of Kosovo as a State is a political issue rather than a legal one. I will expand this argument by examining Kosovo Statehood claim first, using the traditional Statehood criteria and the additional arguments for Kosovo's independence.

1.2.1.1 Traditional Statehood Criteria

a. *Permanent Population*

The requirement of permanent population is not a difficult issue in Kosovo's Statehood claims. As mentioned earlier, there is no minimum population required for an entity to qualify

⁵⁴ "Full Text: Kosovo Declaration," *BBC*, February 17, 2008, sec. Europe, <http://news.bbc.co.uk/2/hi/europe/7249677.stm>.

⁵⁵ "Who Recognized Kosova?," *KosovoThanksYou*, accessed November 26, 2012, www.kosovothanksyou.com/.

for Statehood⁵⁶. Kosovo had nearly two million inhabitants, 90 per cent of whom were ethnic Albanians⁵⁷.

b. Defined Territory

The requirement of a territory could be more problematic than other demands. According to Crawford it is enough to have an “effective government” control over “some area of territory” to fulfill this requirement⁵⁸. Some argue that Kosovo’s borders are stipulated in the Constitution of the Socialist Autonomous Province of Kosovo of 1974. That under the 1946 Yugoslavia Constitution, Kosovo organized as an autonomous region under the Republic of Serbia, but not a republic by itself⁵⁹. It, however, enjoyed equal rights almost as a republic⁶⁰. Soon after the dissolution of SFR, Kosovo’s Assembly proclaimed the independence of Kosovo in 1991⁶¹. By the independence declaration, Kosovo seceded from its motherland Serbia. While, Serbia claims that Kosovo’s land still a part of its sovereign territory⁶², Kosovo claims that it is an independence State with a defined territory. Thus, “substantial boundary or territorial dispute” does not affect Statehood⁶³. Israel, Kuwait, the Islamic Republic of Mauritania and Belize are countries that existed despite the fact that, they had conflict about their territorial sovereignty⁶⁴. Hence, as it was ruled in the Court in the *Island of Palmas Case*, territorial sovereignty “involves the exclusive right to display the activities of a State”⁶⁵, which can be seen in Kosovo today.

⁵⁶ Crawford, *The Creation of States in International Law*, 55.

⁵⁷ Ibid., 407.

⁵⁸ V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence. V Jure Vidmar.”

⁵⁹ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 98.

⁶⁰ Ibid.

⁶¹ V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence. V Jure Vidmar,” 789.

⁶² V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence. V Jure Vidmar.”

⁶³ Crawford, *The Creation of States in International Law*, 48.

⁶⁴ Ibid.

⁶⁵ Crawford, *The Creation of States in International Law*, 46. *Island of Palmas Case* (1928) 1 RIAA 829, 839 (Arbitrator Huber) 4 ILR 3, 103, 108, 110, 111, 113, 114, 418, 479, 482, 487, 492.

c. Effective Government

The effective government criterion mainly means that the government has the power to maintain a certain degree of law over its territory⁶⁶. Some writers argue that Kosovo does not satisfy this criterion and that the government has “substantial shortcomings, even if UN and EU reports showed that Kosovo’s government achieved significant progresses to build up an effective institutions system in Kosovo”⁶⁷. Furthermore, it is questionable whether Kosovo really has such a government, because “Resolution 1244 remains in force even after Kosovo’s declaration of independence—there is still international territorial administration present”⁶⁸. Moreover, the main functions of Kosovo’s territory are under international missions effective control, such as UNMIK, EULEX⁶⁹ and NATO. In addition,

Kosovo has formed a functional assembly and established a police force; however, other powers, such as the primary responsibility for law and order, customs or monetary policy, are still in the hands of international representatives. Local administration is still weak and ineffective; assessed in 2007 at 45 percent effectiveness by the World Bank Institute. The presence of international forces is still substantial; including some 13,000 NATO KFOR soldiers and some 1,600-law enforcement and justice EULEX personnel⁷⁰.

However, some scholars have suggested that the government in Kosovo was established by the resolution 1244 and the Constitutional Framework⁷¹, and that the government could be represented by The Provisional Institutions of Self- Government (PISG) in Kosovo, together

⁶⁶ Ibid., 55.

⁶⁷ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 98.

⁶⁸ V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence. V Jure Vidmar,” 820.

⁶⁹ The European Union Rule of Law Mission In Kosovo, it work under the framework of UN Security Council Resolution 1244, the aim of the mission is “The central aim is to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas”. See online: <http://www.eulex-kosovo.eu/en/info/whatisEulex.php>

⁷⁰ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 99.

⁷¹ V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence. V Jure Vidmar,” 799.

with the Kosovo Police Service and the Kosovo Protection Corps⁷². Moreover, the government exercises effective authority and does so “independently of Serbia” as well having “a completely separate legal and institutional system from Serbia”⁷³.

The main obstacle to the territorial requirement faced by Kosovo’s government is in the North, where majority Serbians live and reject Kosovo’s declaration of independence. In short, “the difficulties of asserting governmental power in North Kosovo do not preclude the conclusion that Kosovo has governmental structures in place that represent the people of Kosovo”⁷⁴. In fact, the creation of independent Croatian and Bosnia-Herzegovinian States was possible despite their government did not exercise control over their territories⁷⁵. Therefore, Kosovo could satisfy the effective government requirement, even if it is under international administration⁷⁶.

d. The Capacity to Enter into International Relations

The capacity to enter into international relations as a requirement for Statehood, as seen at earlier, is more a consequence of rather than a criterion for Statehood⁷⁷. The capacity to enter into international relations is to rely on foreign presence, which I will discuss in the Kosovo *de facto* state chapter. In general, Kosovo had been part of international relations; it is a member in

⁷² Robert Muharremi, “Kosovo’s Declaration of Independence: Self-Determination and Sovereignty Revisited,” *Review of Central and East European Law* 33, no. 4 (2008): 426, doi:10.1163/157303508X339689.

⁷³ Ibid

⁷⁴ Muharremi, “Kosovo’s Declaration of Independence,” 427.

⁷⁵ Malcolm N. Shaw, *International Law* (Cambridge University Press, 2003), 201.

⁷⁶ V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence. V Jure Vidmar,” 819.

⁷⁷ Crawford, *The Creation of States in International Law*, 61.

World Bank, and the International Monetary Fund (IMF)⁷⁸ and had a foreign presenter in many countries, such as United States⁷⁹, United Kingdom⁸⁰.

e. Kosovo's independence

The independence of a State, which may be described as sovereignty, means, “the State has over it no other authority than the international law, and it is not placed under the legal authority of another state or group of states”⁸¹. Proponents of Kosovo's independence argue that the “the international presence and the continuing process of institution-building ensure Kosovo's ability to become a viable independent entity, thus meeting the criteria”⁸². However, as Charlesworth and Chinkin claim, the “restraints on independence” do not infringe on Statehood if they “are accepted voluntarily”⁸³. Therefore, the international presence can be viewed as a situation consented by Kosovo and thus “indicating--and not disproving--its sovereignty”⁸⁴.

However, objectors of Kosovo's independence argue that the international presence in Kosovo was not a result of its consent, because by the time the Resolution 1244 and the Constitutional Framework were adopted, Kosovo had not yet declared its independence⁸⁵. They also argue that the situation of Kosovo is different from that of Bosnia-Herzegovina for instance, where “the limitation on the independence of its government was accepted by Bosnia-

⁷⁸ Bureau of Public Affairs Department Of State. The Office of Website Management, “Kosovo Joins the IMF and World Bank” Press Release|Media Note, *U.S. Department of State*, June 29, 2009, <http://www.state.gov/r/pa/prs/ps/2009/06a/125489.htm>.

⁷⁹ “Text of a Letter from the President to the President of Kosovo,” accessed November 27, 2012, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html>.

⁸⁰ “Country Profile: Kosovo,” accessed November 27, 2012, http://www.fco.gov.uk/content/en/country-profile/europe/fco_cp_kosovo?profile=intRelations.

⁸¹ Muharremi, “Kosovo's Declaration of Independence,” 428.

⁸² Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 103.

⁸³ V Jure Vidmar, “International Legal Responses to Kosovo's Declaration of Independence” 820.

⁸⁴ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 103.

⁸⁵ Ibid.

Herzegovina voluntarily and after it had already become a state”⁸⁶. In contrast, Kosovo did not accept the “restrictions to independence” voluntarily, but it accepted “to comply with the pre-existing legal arrangements governing its territory”. Additionally, Kosovo does not have the “constitutional capacity to demand the withdrawal of international forciers”⁸⁷, and, the requirement of independence as a criterion of Statehood in Kosovo might be considered “deficient”.

In summary, although opponents to Kosovo’s independence raise strong arguments, the claim for Statehood by Kosovo could still be valid. As we are going to point out in chapter three, States’ practice showed that “the creation of states on the basis of such international consensus does not necessarily require the strict application of the principle of effectiveness and independence to assess whether the entity in question fulfills the requirements to be a state pursuant to international law”⁸⁸. In 1913, Albania was recognized as a State, Israel in 1948, Congo in 1960 and in 2011, the State of South Sudan was admitted as the 193rd member state of the UN⁸⁹. In all these cases, the countries did not completely fulfill the traditional Statehood criteria. For example, Congo’s application in 1960 for a UN membership was accepted⁹⁰, despite several arguments that Congo was not a “State” according to international law⁹¹. Congo did not have independence or an ineffective government, two factions in the country also claim to be the lawful government, and it faced political and military foreign interference from Belgium. Additionally, there were movements propagating secession and causing violence in the territory,

⁸⁶ C. Hillgruber, “Article. The Admission of New States to the International Community,” *European Journal of International Law* 9, no. 3 (1998): 491.

⁸⁷ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 103.

⁸⁸ Muharremi, “Kosovo’s Declaration of Independence,” 428.

⁸⁹ “Member States of the United Nations.,” accessed October 9, 2012, <https://www.un.org/en/members/nonmembers.shtml>.

⁹⁰ Crawford, *The Creation of States in International Law*, 57.

⁹¹ *Ibid.*, 57.

requiring the immediate and continued international aid. Despite all the above, Congo was recognized as a State⁹².

1.2.1.2 Additional Arguments Support Kosovo Statehood Claimed

This section will show that, even if the traditional Statehood criteria does not qualify to give Kosovo Statehood, other possible considerations go beyond the classical criteria and support Kosovo's independence. These arguments are based on the right of self-determination as a fundamental right. Kosovo's people had the right to choose the way to achieve their determination, and they did by declared their independence in 1999. Also, the massive human rights violation by the Serbs in Kosovo, give us an additional criteria that Kosovo had the position to claim statehood. Therefore, it will be helpful to examine other arguments in Kosovo's independence issue, could support Kosovo statehood claim.

a. Kosovo and the Right of Secession

The state secession is a problematic issue under the international law. Secession refers to "the severing of one portion of a State for the typical purpose of achieving independence"⁹³. For instance, Pakistan separated from India in 1947, and then in 1971, Bangladesh separated from Pakistan⁹⁴. The question is what the legal status of Kosovo was at the time the Kosovo Assembly declared it independent. The UN resolution 1244 did not "interfere with Serbia's official sovereignty over Kosovo; it did effectively curtail Serbia's ability to govern the province"⁹⁵. This means that Kosovo was a part of Serbia, when it declared its independence. However, if we assumed that Serbia had held sovereignty over Kosovo at the time of independence, the issue that would arise is whether Kosovar had right of the unilateral secession from Serbian territory.

⁹² Ibid., 56.

⁹³ Slomanson, *Fundamental Perspectives on International Law*, 70.

⁹⁴ Ibid.

⁹⁵ "Bridgette_Martin.pdf," accessed March 12, 2012, http://www.otago.ac.nz/law/oylr/2008/Bridgette_Martin.pdf.

The international law neither acknowledges the right of ethnic groups to unilaterally secede from a parent State nor explicitly prohibits this kind of secession⁹⁶. This is because secession according to international law is “at odds with the fundamental principle of territorial integrity”⁹⁷. However, as a result of the modern Statehood changes, the right to ‘remedial secession’ was established. The 1970 Declaration on Friendly Relations maintained the principle of territorial integrity, although the Declaration “implicitly acknowledges an exception to its protection when government denies people the right to self-determination and equality”⁹⁸. This exception was supported by international law writers who suggested that international law allows for ‘remedial secession’ in exceptional circumstances, for example, in situations of extreme violations to human rights without the possibility of internal solutions, or when the right of self-determination was denied of a minority group⁹⁹. However, other writers argued against the existence of a right to remedial secession, depending on the lack of international practice and *opinio juris* in this field. The Bangladesh secession could, for instance, support the idea of the possibility of remedial secession¹⁰⁰. In 1971, the Pakistani government attacked the Bangladesh movement in a campaign that included severe human rights violations¹⁰¹. As a result, the Indian armed forces reopened and attacked Pakistan, “effectively paving the way for Bengali independence”¹⁰².

⁹⁶ B. S. Brown, “Human Rights, Sovereignty, and the Final Status of Kosovo,” ed. H. H. Perritt, *CHICAGO KENT LAW REVIEW* 80, no. 1, Symposium: Final Status for Kosovo: Untying the Gordian Knot (2005): 256.

⁹⁷ Ibid.

⁹⁸ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 105.

⁹⁹ Ibid.

¹⁰⁰ A. Orakhelashvili and M. Planck, “Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo,” *Max Planck YB UN L* 12 (2008): 6.

¹⁰¹ Ibid.

¹⁰² Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 96.

Reports were shown that Kosovars was subjected to systemic violation of human rights, such as ethnic cleansing and discrimination under Serbian ruling¹⁰³. The Kosovo government engaged in non-effective peaceful negotiations¹⁰⁴. This argument was supported by both the United State and the United Kingdom, as the representative of United State argued that;

Towards the end of the decade [1990s], the Serbian Government of Slobodan Milosevic brought ethnic cleansing to Kosovo. Responding to that humanitarian disaster and clear threats to international peace and security, NATO led a military intervention that stopped the violence and brought peace to Kosovo. The Security Council solidified that peace by adopting resolution 1244...an unprecedented resolution that provided for an interim political framework and circumscribed Serb sovereignty in that territory, and that called for the determination of Kosovo's final status¹⁰⁵

In summary, international law should leave the door open for territories facing human rights violation to get their own independence, as a means to solve international conflict. In Kosovo, the Serbian army committed ethnic cleansing crimes. In light of this human right violation, the international community should recognize remedial secession for Kosovo.

b. The Significance of International Involvement and Administration

Another possible framework which could legitimize Kosovo's independence is the international involvement. This view suggested that because of the international involvement, Kosovo should no longer be governed by Serbia¹⁰⁶. Moreover, the international involvement and institution-building could be seen as a step towards Kosovo's fulfilment of the traditional Statehood criteria. In this case, Kosovo would be in the same position as Timor-Leste "where international administration and guidance in institution-building promoted the international

¹⁰³ Ibid., 99.

¹⁰⁴ Ibid., 106.

¹⁰⁵ *Security Council Meeting on Feb. 18, 2008, at 18*

¹⁰⁶ Nevo and Megiddo, "Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence," 106.

recognition of Statehood”¹⁰⁷. However, the opponent’s of Kosovo independence believed that this international involvement is “forbidding Kosovo from declaring independence unilaterally”¹⁰⁸. In my opinion, international involvement indicates that the international community accept the Kosovo future State. In the 1244 UN Resolution, which was adopted by the UN Security Council, emphasized in its preamble that “territorial integrity of the Republic Of Yugoslavia” must be guaranteed. However, the resolution decided that the “Member States and relevant international organizations establish the international security presence in Kosovo.”¹⁰⁹. The resolution further decided to deploy “international civil presences” that authorized the UN Interim Administration Mission in Kosovo (UNMIK) to provide “an interim administration for Kosovo, facilitating Kosovar ‘substantial autonomy’ and ‘meaningful self-administration’”¹¹⁰. Additionally, the political determination of a final status of Kosovo, without setting a deadline, was suggested by the resolution thus;

in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo¹¹¹

Although, the purpose of the resolution was to ensure that the people of Kosovo would be able to enjoy substantial autonomy, its outcome was not effective. Therefore Kosovo became an “internationally administered territory being put under the international trusteeship system of Chapter XII of the UN Charter”¹¹².

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence.” 796.

¹¹⁰ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 99.

¹¹¹ “NATO & Kosovo : UN Resolution 1244 (1999) - 10 June 1999,” accessed November 27, 2012, <http://www.nato.int/kosovo/docu/u990610a.htm>.

¹¹² V Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence.” 799.

c. Non-Productive Negotiations

This argument indicates that the political process envisioned by Resolution 1244 has failed, thus Kosovo's supporters believe that there is no other option but independence for Kosovo¹¹³. The supporters explained that the deadlocked negotiations and the political instability caused the uncertainty to its future and that could reflect Kosovo's development, such as attracting foreign investment¹¹⁴. Therefore, there is no other way than full independence Kosovo State.

d. Avoiding Destabilization

The main aim of the UN is to promote peace and security in the international community. For that reason another argument used by the supporters of Kosovo's independence is that we cannot repeat the past by reintegrating Kosovo into Serbia¹¹⁵. This argument was supported by the Ahtisaari plan which claims that reintegration of Kosovo into Serbia Kosovo "is not a viable option, and that the return of Serbian rule over Kosovo would be "unacceptable to the vast majority of the people of Kosovo and would provoke violent opposition"¹¹⁶. It added that "the assumption at the root of this argument is that in a case where reaching an agreed solution is impossible, the solution causing the least violence and unrest should be chosen"¹¹⁷. Which is to create s full Kosovo State.

1.2.1.3 Conclusion

In my opinion, Kosovo is a State. From the factors presented in this section, Kosovo is entitled to declare its independence. Firstly, the traditional Statehood criteria could be

¹¹³ Nevo and Megiddo, "Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence," 106.

¹¹⁴ Ibid.

¹¹⁵ Ibid., 107.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

imperfectly complete, but under these criteria, we could see Kosovo as a State. Secondly, for decades, the Kosovar have suffered from abuses and unfairness, they were seen as second class citizens under Serbia's rule and for that reason, the only option after all these years of instability is to be independent, to rule themselves, and to choose their future, since they have the right of self-determination. In other words, the Additional Statehood criteria, of Self- determination and mass violation of human rights give Kosovo legitimate appearance as a State. Thirdly, if Kosovo had a problem with the international presence that does not mean it loses the right to 'have a State'. Actually we can say that this presence would support Kosovo to settle and declare her independence. Additionally, deadlocked negotiations, promoting peaceful atmosphere for Kosovo and avoiding destabilization, are reasons that the international community should consider as reasons for Kosovo's declaration of independence. Finally, for the last years, Kosovo has shown a strong political commitment for protection of human rights and has been a peaceful State. For that, the international community cannot just keep Kosovo's unsettled status forever but to reach a final decision and have a new State on the world map.

1.3 Palestine Statehood Claimed

In 2011, Mahmoud Abbas, the president of the Palestinian National Authority (PNA) and chair of the Palestine Liberation Organization (PLO)¹¹⁸ submitted a formal request to the UN-General Assembly to recognize Palestine as a State with full UN membership¹¹⁹. Palestine's Statehood was unilaterally declared by the Palestine National Council in 1988 and from that

¹¹⁸ The PLO is "a political and military body formed in 1964 to unite various Palestinian Arab groups in opposition to the Israeli presence in the former territory of Palestine", Al-Fatah Palestinian party, led by Yasser Arafat, was the dominated Party in the organization. The PLO was recognized by the Arab nations as ' the representative of all Palestinians'. And the Palestine National Council is the PLO legislation council. "Palestine Liberation Organization OxfordReference", n.d., <http://www.oxfordreference.com/view/10.1093/oi/authority.20110810105543875?rskey=A5aba&result=3&q=the%20Palestine%20National%20Council>.

¹¹⁹ Khaled Elgindy, "Palestine Goes to the UN," *Foreign Affairs* 90, no. 5 (October 2011): 102–113.

time, about 128 countries have recognized Palestine as a State¹²⁰. In this section, I will examine Palestinian Statehood criteria, in order to see, whether it is a state or not.



1.3.1 Palestine Statehood Criteria

Palestine has sought to have official international recognition as a State more than once. In 1989, the PLO applied for membership in the World Health Organization (W.H.O); however, the United States' political and financial influence stopped this attempt¹²¹. The W.H.O subsequently asked the PLO to withdraw Palestine's application¹²². A few weeks after the withdrawal of Palestine's application, the PLO submitted a ratification document to the 'Geneva Conventions of 1949' to Switzerland but the government responded that "Due to the uncertainty

¹²⁰ Negotiations Affairs Department (25 September 2011). "International recognition of the State of Palestine". Palestinian National Authority. Retrieved 7 April 2012. "English 127 (235x444) Map.jpg (JPEG Image, 444x235 Pixels)," accessed September 21, 2012, <http://www.nad-plo.org/userfiles/image/English%20127%20%28235x444%29%20map.jpg>.

¹²¹ John B. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, 2010).

¹²² (n.d.)35 Rutgers L. Rec. 1, 1 (2009).

[sic] within the international community as to the existence or the non-existence of a State of Palestine” it is not in a position to determine whether Palestine is a State or not¹²³.

The legal status of Palestine continued to be under scrutiny by different authorities. For instance, in 2004, the International Court of Justice (ICJ) in an advisory opinion regarding ‘the Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory’ ruled that the construction was against international law, where the court recognized Palestine as an ‘occupied territory’¹²⁴, the Palestinian Statehood and the occupation will be argued later in this section. Also, in 2011, the International Criminal Court (ICC) rejected Palestine’s declaration accepting the court’s jurisdiction under Article 12(3) of the Rome Statute, which allows States not party to the statute to accept the Court’s jurisdiction over crimes against humanity and war crimes. Palestine’s declaration was in regard to the crimes committed by Israeli army in Gaza during the ‘Operation Cast Lead’ of December 2008¹²⁵. The ICC General Prosecutor said that “Palestine should be recognized by the U.N as a State first before its request to investigate crimes within its territories can be accepted”¹²⁶. However, finally in October 2011, Palestine became the 195th full member of UNESCO by 107 to 140 votes and 52 abstentions¹²⁷. Recently, in September 2011, Palestinians submitted an application for admission to membership in the United Nations for ‘the State of Palestine’¹²⁸. On the Palestinian first attempt they bid for “full-member State membership, however recently they shift the request for “non-member State”

¹²³ Ibid.

¹²⁴ “ICJ Advisory Opinion on the Wall in the Occupied Palestinian Territory”, n.d., <http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/11542;jsessionid=4862851B962613642014EAB C8328DCE1>.

¹²⁵ *ICC Rejects Palestinian Request to Investigate Crimes Within Its Territories*, 2012, http://www.youtube.com/watch?v=rp8SfQUWTus&feature=youtube_gdata_player.

¹²⁶ Ibid.

¹²⁷ Steven Erlanger and Scott Sayare, “Unesco Accepts Palestinians as Full Members,” *The New York Times*, October 31, 2011, sec. World / Middle East, <http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html>.

¹²⁸ “Application of the State of Palestine for United Nations Membership(23 Sept 2011)”, n.d., <http://www.un.int/wcm/content/site/palestine/pid/29805>.

membership, the different between the both legal status will be examine under the UN recognition in chapter three.

With this long history of seeking to get international recognition for Palestinian Statehood, legal scholars and policy makers have been debating the viability of the future of the Palestinian State. This section will determine whether Palestine is or could be a future State on the world map by answering two questions? 1) Has Palestine met the requirements for traditional and additional statehood criteria? 2) What are the other legal scenarios for the Palestinian statehood application?

1.3.1.1 Traditional Statehood Criteria

According to the Montevideo Convention 1933, in order to become a State, Palestine must possess the following qualifications; ‘a permanent population; a defined territory; government and the capacity to enter into relation with other States’.

a. Permanent Population

The Palestinian population in the West Bank and Gaza Strip fulfills the requirement of a ‘permanent population’, which is recognized as such by the international community¹²⁹ and the Israeli government¹³⁰.

However, one of the controversial issues under this criterion is the 1948 and 1967 Palestinian refugees, concerning whether they would be part of ‘Palestinian population’ or not. Some legal writers have emphasized that the creation of the Palestinian State, with just the recognition of its population, would leave 4,766,670 of Palestinian refugees¹³¹ “accidentally

¹²⁹ Council of League of Nations, *Mandate for Palestine*, arts. 2 & 3 ; GA Res. 181, UN GAOR, 2d Sess., UN Doc A/RES/181 (1947); GA Res. 12/43, UN GAOR. 45th 43rd Sess, UN Doc A/RES/ 43/21 (1988).

¹³⁰ Article III “Annex: Declaration of Principles on Interim Self-Government Arrangements,” *European Journal of International Law*, no. 4 (1993): 572.

¹³¹ “UNRWA”, n.d., <http://www.unrwa.org/index.php>.

disenfranchised” and without a legal representation in the UN, if the PLO loses its ‘observer-state status’ in UN¹³². However, the fact that large number of population is out of the country, is in itself no bar of Statehood as long as there is a “substantial number of permanent inhabitants”¹³³. This was the position of International Court of Justice in the *Western Sahara* case, where the court consider the population of *Western Sahara* (Sahrawis) is sufficient for the purposes of Statehood¹³⁴.

I think that the refugee issue is intimately related to the outcome of the permanent-status negotiations. The refugee dilemma cannot therefore, defeat the creation of the Palestinian State or cause the end of the PLO as a representative of the Palestinian People until a solution to the refugee problem is reached, as Goodwill said;

The interests of the Palestinian people are at risk of prejudice and fragmentation, unless steps are taken to ensure and maintain their representation through the Palestinian Liberation Organization, until such time as there is in place a State competent and fully able to assume these responsibilities towards the people at large¹³⁵

In summary, even if there is a problem regarding the Palestinian refugees, still the population on Palestinian territories appears to be satisfied at least with the West Bank and Gaza Strip population.

¹³² “Palestinian State Could Leave Millions of Refugees with No Voice at UN,” *The Guardian*, August 26, 2011, <http://www.guardian.co.uk/world/2011/aug/26/palestinian-state-refugees-voice-un>.

¹³³ D. Raič, *Developments in International Law Vol 43: Statehood and the Law of Self-Determination* (Martinus Nijhoff Publishers, 2002), 59.

¹³⁴ W. S. Case, “Advisory Opinion,” *ICJ Rep* 12 (1975).

¹³⁵ “Palestinian State Could Leave Millions of Refugees with No Voice at UN.”

b. Defined Territory

Palestine's defined territory is the West Bank and Gaza Strip with its capital being East Jerusalem, known as POT since 1967¹³⁶. However, the defined territory raises three main points: fragmentation, imprecise demarcation, and the borders dispute.

Firstly, the Palestinian territory is a fragmented territory. While Tel Becker, claimed that the "areas under Palestinian Control are highly fragmented and non-contiguous"¹³⁷, other writers stress that the territory of the State in international law does not require continuity of the territory¹³⁸. For example, Alaska is a separate territory but is still part of the United States, the same for East Prussia for Germany between 1919 and 1945¹³⁹.

Secondly, the imprecise demarcations issue, according to Francis A. Boyle, the "territory of a state does not have to be fixed and determinate", therefore Palestine does not have to declare its borders¹⁴⁰.

Thirdly, Palestine's borders are disputed, but that does not affect the existence of a State. In short, the State's existence does not depend on the delimitation of boundaries, even if there are "substantial boundaries or territorial dispute"¹⁴¹. It is thus sufficient for an entity to have

¹³⁶ Nevo and Megiddo, "Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence." As it was stated on the Palestinian Declaration of independence. Also, the Palestinian territory as such is defined by the international community, for example in the ICJ in its advisory opinion about the wall in the occupied Palestinian territory, stating that 'Palestinian territories which before the armed conflict of 1967 lay to the east of the 1949 Armistice demarcation line (or "Green Line") and were occupied by Israel during that conflict" also on the UN S.C Resolutions 242, 338

¹³⁷ Tal Becker, 'International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas', online: Jerusalem Center for Public Affairs <jcpa.org/art/beckerl.htm> [Becker]. Dr. Tal Becker is a international lawyer and member of the Israel Bar Association, working as an assistant legal adviser at the Israeli Ministry of Foreign Affairs.

¹³⁸ Crawford, *The Creation of States in International Law*, 47. also see, Boyle, "The Creation of the State of Palestine."

¹³⁹ The Republic of the Marshall Islands consists of 1,225 islands grouped into twenty-nine atolls and five individual islands. Population 67,182, the capital is Majuro and with Land area 181 km. Roberta Baxter, *Marshall Islands* (Great Neck Publishing, 2011).

¹⁴⁰ Boyle, "The Creation of the State of Palestine."

¹⁴¹ Crawford, *The Creation of States in International Law*, 49.

“sufficient consistency territory” where it “exercises independent public authority over that territory” to have Statehood¹⁴². Both Israel and Palestine had a dispute over their boundaries; however, the UN accepted Israel’s application for Statehood, despite the Israeli-Palestinian conflict over these frontiers¹⁴³.

In other words, Palestine’ territory sufficiently fulfills the ‘defined territory’ requirement since the fragmentation, imprecise demarcation, and borders dispute factors do not defeat the requirement¹⁴⁴. In fact, the government of Israel and the future government of Palestine could enter peaceful negotiations to determine these borders as two States/governments¹⁴⁵.

c. Effective Government

The effective government requirement seems to be one of the most problematic requirements in the Palestinian Statehood claim. Some analysts argue that the PNA, which was created under the D.O.P, is a government with limited sovereign powers¹⁴⁶, and that the PNA just had effective control over its population, not over its territory¹⁴⁷. In support of this argument, Tal Backer stats that even if the D.O.P gave some administrative powers to PNA, the main State powers will be exercised by Israel itself, not the PNA; such as the external security and diplomatic relations, and Israeli cooperation or approval to be exercised by the PNA; such as the “conferral of permanent residency status” power, which made the PNA in practical dependent on Israel¹⁴⁸.

¹⁴² Crawford, *The Creation of States in International Law*, 49–50.

¹⁴³ Boyle, “The Creation of the State of Palestine.”

¹⁴⁴ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence.”

¹⁴⁵ Boyle, “The Creation of the State of Palestine.”

¹⁴⁶ Crawford, “The Creation of the State of Palestine: Too Much Too Soon?” *E.J.I.L.* 1990, 1(1/2), 307-31, also “Tal Becker, ‘International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas’

¹⁴⁷ *Ibid.*

¹⁴⁸ “‘International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas’ by Tal Becker”, n.d., <http://jcpa.org/art/becker2.htm>.

Israel collects the tax revenues that comprise two thirds of the [PNA] budget; the Palestinian economy is very dependent on the Israeli market for employment; the [PNA] does not have its own infrastructure and receives its electricity and fuel from Israel; and Israel controls all exits and entrances to the [PNA]. Furthermore, Israel has not refrained from using its power over the [PNA], or applying pressure on its leaders, especially after the Hamas ascendance to power in 2006¹⁴⁹.

Regarding to this argument, firstly, the PNA constitutes an ‘effective government’ for the new Palestinian Statehood, since, Article I of the D.O.P stats that “the West Bank and Gaza Strip would be considered a single territorial unit,” over which the PNA “would have sole jurisdiction”¹⁵⁰. Accordingly, the PNA has the authority to exercise legislative, executive, judicial, and internal security authorities, and in practice, it has exercised unlimited power to administrate the West Bank and Gaza Strip¹⁵¹.

Secondly, the limitation on its responsibilities, such as the external security and diplomatic relations, does not necessarily defeat the requirement of effective government, because international law does not necessarily require an entity to exercise all these powers in order to satisfy the government criterion¹⁵². Monaco, San Marino and Liechtenstein, which are widely regarded as States, do not exercise external security and diplomatic relations, yet they are considered to be States¹⁵³. Thirdly, some analysts believe that the limitation on the PNA’s powers may no longer be valid, because the D.O.P agreement is limited in time, and it expired by September 13, 2000¹⁵⁴.

¹⁴⁹ .”5 J. Int’l L. & Int’l Rel. 89, 108)

¹⁵⁰ William Worster, “THE EXERCISE OF JURISDICTION BY THE INTERNATIONAL CRIMINAL COURT OVER PALESTINE” (n.d.)26 Am. U. Int’l L. Rev. 1153, 1154 (2011).

¹⁵¹ Ibid.26 Am. U. Int’l L. Rev. 1153, 1154 (2011).

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ “‘International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas’ by Tal Becker”, n.d., <http://jcpa.org/art/becker2.htm>.

However, the government requirement is challenged in Palestine's context, because two parties claim to have lawful control over the territory¹⁵⁵. Fatah and Hamas, the two Palestinian political parties, claim to be entitled to governmental power. However, we can say that at present, Palestine's political faction; Fatah (PNA), Hamas, and eleven other groups, have agreed to resolve their internal political differences and support the creation of a unity government. "...in principle, the factions agreed on; the establishment of new government, a new parliament, a unified political leadership, and holding presidential and parliamentary election to allow Palestinians to choose their leader"¹⁵⁶.

Furthermore, Prime Minister Salam Fayyad had in August 2009 started a 'Two-Year path to Palestinian Statehood'. His plan aimed to build the State's democracy; effective institutions and vibrant economic structures, to enable Palestinians govern themselves and build a *de facto* State¹⁵⁷. The World Bank credited him "with making substantial improvements in Palestinian State institutions" for his management of the West Bank¹⁵⁸.

In other words, we could say that the effective government requirement is fulfilled, since Palestine's limited powers and a potentially fractured territory does not mean the PNA is not government for the purpose of establishing Palestinian Statehood.

¹⁵⁵ Sломanson, Fundamental Perspectives on International Law, 62.

¹⁵⁶ "Palestinian Factions Agree Pact," BBC, May 4, 2011, sec. Middle East, <http://www.bbc.co.uk/news/world-middle-east-13277734>.

¹⁵⁷ "Prime Minister Salam Fayyad's Two-Year Path to Palestinian Statehood | Jerusalem Center For Public Affairs," *Jerusalem Center For Public Affairs*, accessed September 27, 2012, <http://jcpa.org/article/prime-minister-salam-fayyad%e2%80%99s-two-year-path-to-palestinian-statehood-2/>.

¹⁵⁸ Ethan Bronner, "Reports See Fiscal Woes Undermining Palestinians," *The New York Times*, September 11, 2011, sec. World / Middle East, <http://www.nytimes.com/2011/09/12/world/middleeast/12palestinians.html>.

d. The Capacity to Enter into International Relations

An entity which is incapable of engaging in foreign relations cannot be defined as a State¹⁵⁹. Within the D.O.P framework, the PNA “will not have powers and responsibilities in the sphere of foreign relations...”¹⁶⁰. However, The PLO was accepted to conclude international agreements with States or international organizations “for the benefit of the PNA”, which implied that the PNA could have the capacity in the future to hold the responsibilities of international relations. Furthermore, the relationships between the international community and the PNA indicted that Palestine is a State¹⁶¹, which means the PNA is able and ready to enter into international relations.

For example, the UN is treating Palestine as a ‘State’. For instance, in 1989, its General Assembly was planning to have a resolution to name ‘Palestine’ as a State in its documents. However, this resolution was never put to vote because of United States’ interference, which again threatened to withhold its UN dues¹⁶². Also, the UN Security Council “let [Palestine] participate routinely in Security Council sessions when relevant issues were on its agenda. Under Security Council rules, only a “State is entitled to participate”¹⁶³. Besides, after the Palestinian Declaration of Independence in 1988, the General Assembly adopted Resolution 43/177, essentially to “acknowledg[e] the proclamation of the state of Palestine ...” by 104 in favor, the US and Israel opposed, and 44 abstaining¹⁶⁴. As John Quigley stats, “this strong vote indicates that Palestine was regarded as a State” and if the international community considers the

¹⁵⁹ Ibid, 56, Also, super note 185 Becker

¹⁶⁰ Ibid

¹⁶¹ (n.d.)35 Rutgers L. Rec. 1, 1 (2009)

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ See ,super note 178 Boyle 302, Also super note 175 Quigley

Palestinian Declaration of Independence as invalid as they did with the Turkish Republic of Northern Cyprus, they will reject it “so loudly and clearly”¹⁶⁵.

Secondly, it may be argued that Israel itself has supported the claim that the Palestinian State exists¹⁶⁶. Israel defined its boundaries after the Jewish People’s Council accepted to declare sovereignty over the territory recommended by the UN Partition Plan for decades, which means Israel accepted the 181 resolution that created the Jewish and Arab States¹⁶⁷. Furthermore, for decades, Israel has emphasized Palestine’s recognition of her right “to exist in peace and security”.

Israel entered into a long peaceful negotiation with Palestine and signed peaceful agreements implying that all these agreements could lead to Palestinian Statehood. Or why were they going through years of negotiation, why was the international community encouraging Palestine to negotiate and reach a peaceful agreement with Israel¹⁶⁸? If the PNA representing the State of Palestine was not responsible for its international conducts, these efforts would be meaningless. Furthermore, the Israeli government defended its last war in Gaza arguing that it was exercising its right to self-defense under Article 51 of the UN charter. This meant that Israel was under armed attack by Palestine –which, although restricted within the Gaza Strip, was a State¹⁶⁹.

¹⁶⁵ (n.d.)35 Rutgers L. Rec. 1, 1 (2009)

¹⁶⁶ John Reynolds, “Sovereignty, Colonialism and the ‘State’ of Palestine Under International Law,” SSRN eLibrary (June 13, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682636.

¹⁶⁷ “Israel Has No Fixed Borders? On May 22 1948 Israel Confirmed It’s Borders in a Letter to the UNSC. The Hasbara Does Not Explain, It Justifies the Usurping of the Palestinians,” *First, Find Out What Isn’t True...*, accessed October 1, 2012, <http://talknic.wordpress.com/2010/12/16/israel-has-no-fixed-borders-on-may-22-1948-israel-confirmed-its-borders-in-a-letter-to-the-uns-c-the-hasbara-does-not-explain-it-justifies-the-usurping-of-the-palestinians/>.

¹⁶⁸ Ibid

¹⁶⁹ Reynolds, “Sovereignty, Colonialism and the ‘State’ of Palestine Under International Law.”

Thirdly, more than 100 countries recognize Palestine as a State, while others maintain diplomatic relations with the Palestinians in one form or another¹⁷⁰. Finally, UNESCO is the first international organization to give full membership to the State of Palestine, “in a diplomatic victory won despite stiff resistance from the United States and Israel”¹⁷¹.

Therefore, we can assert that Palestine had the capacity to enter into international relations, despite non-recognition by many States and their refusal to engage with her in international relations.

e. Independence & Sovereignty

An entity can be acknowledged as a State if it possesses independence¹⁷². State independence means “the right to exercise therein, to the exclusion of any other state, the functions of a state”¹⁷³. Palestinians cannot claim to a totally functional independent State, in fact, her economy, as indicated earlier, is dependent on Israel with two thirds of its budget and is heavily reliant on foreign aid with 30% of the GDP¹⁷⁴.

Although Palestine does not have control over its borders, or its airspace¹⁷⁵, it is not easy to establish an independent State, and many existent States also depend on foreign aid¹⁷⁶. Some people have argued that the main obstacle to Palestine’s attainment of independence is Israel’s conduct. For instance, former United States President Jimmy Carter says: “Israel’s continued

¹⁷⁰ “Palestinian Statehood Recognized by over 100 Countries, Iceland Most Recent in Europe to Do so | News | National Post,” *National Post*, accessed September 30, 2012, <http://news.nationalpost.com/2011/12/15/palestinian-statehood-recognized-by-more-than-100-countries/>.

¹⁷¹ Ibid.

¹⁷² Crawford, *The Creation of States in International Law*.

¹⁷³ Crawford, *The Creation of States in International Law*, 62.

¹⁷⁴ “‘International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas’ by Tal Becker,” accessed September 26, 2012, <http://jcpa.org/art/becker2.htm>.

¹⁷⁶ For example, In Ethiopia, aid constitutes more than 90% of the government budget, still Ethiopia is state Dambisa Moyo, “Why Foreign Aid Is Hurting Africa,” *Wall Street Journal*, March 21, 2009, <http://online.wsj.com/article/SB123758895999200083.html>.

control and colonization of Palestinian land have been the primary obstacles to a comprehensive peace agreement in the Middle East ”¹⁷⁷.

Secondly, besides a ‘defined territory’ and an ‘effective government’, an entity has to have sovereignty over its territory and population. In that regard, we shall discuss who has sovereignty over the West Bank, Gaza Strip, Gaza Strip was under Egyptian control from 1948 to 1967, although Egypt never proclaimed that Gaza Strip is under its sovereignty and always treated it as part of Palestine¹⁷⁸. However, the West Bank was under Jordanian control from 1948 to 1967. “Jordan did assert sovereignty, but did so subject to Palestine’s overriding claim to the territory”. But again, in 1988 Jordan renounced its sovereignty claimed over the West Bank¹⁷⁹.

After the 1967 war, Israel controlled the West Bank and Gaza Strip, but as a belligerent occupant, Israel could not claim sovereignty over the two territories; applying to the international law rule that “upon entry of a belligerent occupant “[t]he legal (*de jure*) sovereignty still remains vested where it was before the territory was occupied”¹⁸⁰. The occupier does not, therefore, in any way, acquire sovereign rights in an occupied territory; therefore, the sovereign must go back to the original inhabitant of the territory, for instance, after the Ottoman Empire lost sovereignty, the Palestinian State emerged¹⁸¹. As Crawford asserts

the obligation arises irrespective of the legality of the underlying use of force, for example it does not matter whether Israel was acting in self-defence in occupying the West bank and Gaza Strip during the Six Day War: whether or not it was then acting lawfully, third states are obliged not to recognize its sovereignty over those territories pending a final settlement¹⁸².

¹⁷⁷ Jimmy Carter, *Palestine: Peace Not Apartheid* (Simon & Schuster, 2007).

¹⁷⁸ (n.d.)35 Rutgers L. Rec. 1, 1 (2009)

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Crawford, *The Creation of States in International Law*, 171.

All in all, Palestine meets the traditional Statehood criteria: it has a population living in a defined territory - the West Bank and Gaza Strip. Also, the PNA as an effective government has control over Palestine its territory and proven its capacity to enter into international relations. However, opponents to this conclusion argue that Palestine does not meet these traditional criteria. Therefore, on the next section, we will explore some additional statehood criteria to support the Palestinian Statehood claims.

1.3.1.2 The Additional Statehood criteria

The Additional Statehood requirements assert that an entity seeking recognition has to demonstrate that it has not been established illegally; it works according to international law, and that its claim to Statehood is compatible with the right to self-determination¹⁸³. Thus, it is necessary to determine whether Palestine satisfies these criteria.

a. Violation of International law

Contemporary jurists have affirmed that “unlawful acts associated with the establishment of a nascent State prevent its recognition by the international community”¹⁸⁴. Few can deny the legality of the creation of the Palestinian State; to begin with, the Palestinian Declaration of Independence was widely acknowledged by the international community¹⁸⁵. Secondly, the Israeli government believes that the Palestinian State will exist, but it still insists on negotiation as the only path to the Palestinian Statehood¹⁸⁶.

¹⁸³ “‘International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas’ by Tal Becker”, n.d. <http://jcpa.org/art/becker2.htm>

¹⁸⁴ Ibid

¹⁸⁵ See, 1947 UN partition Plan UN GA, 43/77 Resolution, SC 242, 338 Resolutions.

¹⁸⁶ Benjamin Netanyahu Address to the 67th Un General Assembly 2012, 2012, http://www.youtube.com/watch?v=LBmASXXPYTo&feature=youtube_gdata_player.

While many are against the establishment of the Kosovo State, the eventual outcome of Palestine Statehood is widely accepted, since they view its creation as in accordance with International Law.

Secondly, the willingness and ability to abide by the international law as a precondition to Statehood has become a feature to recognize an entity as a State. Becker in his article asserts that “the illegality associated with [Palestine’s] current unilateral claim to Statehood demands that recognition be withheld” on the ground that Palestine did not fulfill its international obligation to resolve all outstanding issues by peaceful negotiation¹⁸⁷. Additionally, through the years of the Palestinian-Israel conflict, Palestinians engaged in it in good faith, and they kept ensuring their commitment to all the international duties and rules. For instance, Yasser Arafat in a 1988 speech stated that Palestine rejects “the threat or use of force, violence and intimidation against its territorial integrity and political independence or those of any other State”¹⁸⁸. In regard to Palestine’s application for admission to membership in the UN, it was affirmed that “the state of Palestine is peace-loving nation and it accepts the obligations contained in the Charter of the UN”¹⁸⁹.

b. Self-determination

Palestinians’ right to self-determination is recognized by the international community¹⁹⁰. Many international legal writers claim that Self-determination “has been strictly interpreted beyond the colonial context” and that the right to self-determination is more linked to people’s right to representative government or to intra-state minority protection rather than absolute

¹⁸⁷ “‘International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas’ by Tal Becker.”

¹⁸⁸ Francis A. Boyle, “The Creation of the State of Palestine,” in *The Palestine Question in International Law. Compiled and Ed. Victor Kattan* (London: British Institute of International and Comparative Law, 2008), 669–674.

¹⁸⁹ “A/66/371-S/2011/592 of 23 September 2011,” accessed September 30, 2012, <http://unispal.un.org/UNISPAL.NSF/0/F6CF1ED25A5D8FE9852579170050C37F>.

¹⁹⁰ GA. Res.181, SC Res. 242, 338 (citation)

entitlement to sovereign statehood¹⁹¹. However, the wide recognition of Palestine's right to self-determination indicates a further reason why the international community had to accept Palestine as a State, even if there is lack of justification of the traditional criteria of Statehood¹⁹². This shows that the right to self-determination had a particular role on the process of the creation of States in international law, where a nation's self-determination right can explain the acceptance international community's position to the nation statehood claim which clearly failed to meet traditional statehood criteria¹⁹³. Additionally, in the case of *Legal Consequence of The Construction of a Wall in the Occupied Palestinian Territory* (Israeli apartheid separation wall), the court addressed Israel's construction of a "security barrier" already the Palestinian territory in the West Bank, much of this barrier is lay within the Occupied Palestinian Territory, as a result of this construction, Palestinian villages were separate and Palestinians population in the West Bank were lost their land, it create a enclaves of the Palestinian towns and impeded travel between the various part of territory. The UN General Assembly called Israel to "stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice line of 1949 and is in contradiction to relevant provisions of international law"¹⁹⁴. The court ruled "the construction of the wall violated Israel's obligation to respect the right of self-determination of the Palestinian people". And that its violating the international law"¹⁹⁵. Noting that the court in East Timor case, the court

¹⁹¹ "'International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas' by Tal Becker."

¹⁹² Nevo and Megiddo, "Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence."

¹⁹³ David Raič, *Statehood and the Law of Self-determination* (Martinus Nijhoff Publishers, 2002).

¹⁹⁴ Crawford, *The Creation of States in International Law*, 172.

¹⁹⁵ "ICJ Advisory Opinion on the Wall in the Occupied Palestinian Territory," accessed September 30, 2012, <http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/11542;jsessionid=4862851B962613642014EABC8328DCE1>.

stated that “the rights of self-determination is a right opposable against all states”¹⁹⁶. Eventually, it is broadly supported that after sixty-four years of Israeli occupation, which is much alike colonialism to Palestine, the world should seek to make the Palestine exercise its right to self-determination and to become a State¹⁹⁷.

1.3.1.3 Additional Arguments Support Palestine Statehood

a. *The continuing statehood argument*

An argument to support the Palestinian Statehood claim is that Palestine is not a new State¹⁹⁸. As Quigley argues, Palestine is an already existent State, therefore there is no need to restrict¹⁹⁹. He says that after the collapse of the Ottoman Empire’s sovereignty over Palestine, this sovereignty must be transferred to the inhabitants of Palestine²⁰⁰. Therefore, after putting Palestine under the League of Nations mandate system “The people, in their collectivity, were recognized as the ultimate holder of sovereignty”²⁰¹. Therefore, Palestinians have sovereignty over Palestine and on political change would change this fact, thus, the British Mandate, the Egyptian occupation of Gaza Strip, and the Jordanian control of the West Bank, and the final Israeli occupation of the Palestinian territories, did not change the existence of the Palestine State and its sovereignty over their territories. It’s just a change in the legal status.

This argument is established in the Balfour Declaration, stating that “the establishment in *Palestine* of a national home for Jewish people”. Also, Under the League of Nations, Palestine

¹⁹⁶ Crawford, *The Creation of States in International Law*, 172.

¹⁹⁷ Reynolds, “Sovereignty, Colonialism and the ‘State’ of Palestine Under International Law.”

¹⁹⁸ Chantal Meloni and Gianni Tognoni, *Is There a Court for Gaza?: A Test Bench for International Justice* (Springer, 2012).

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ Quigley, *The Statehood of Palestine*.

was an existing State according to Article 22 of League's Mandate.²⁰² Besides, Palestine was a party to many treaties, which were published on the League of Nations Treaty Series, like any other State²⁰³. It was also party to other multilateral treaties, e.g. the treaty on the 'Establishment of an International Agency to Deal with Locust Plagues' referred to the contracting states as "contracting States"²⁰⁴. Palestine was party to bilateral treaties with Egypt; such as the 'Treaty regarding to Reciprocal Enforcement of Judgment' and the treaties of Exchange of Postal Parcels with Switzerland, Italy, Greece, and France²⁰⁵. In 1947, the UN Partition Plan

Recommends to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the UN the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union set out below²⁰⁶

Thus, "the 1988 declaration read as a reaffirmation of an existing status of Palestine Statehood"²⁰⁷. Also, Palestine's sovereignty was reflected in the arrangement for citizenship, after the inhabitants of Palestine lost their Ottoman nationality and Palestinian nationality²⁰⁸.

b. Non-productive Negotiations

The peace process between the Palestinian-Israeli did not achieve its aims - it did not create peace in the Middle East and it did not build up 'Two states live side by side in Peace'²⁰⁹. The non-productive negotiations which prevailed for most of the twentieth century²¹⁰, pushed

²⁰² Article 22 of League's Mandate "Certain communities formerly belonging to the Turkish empire have reached a stage of development where their existence as independent nations can be provisionally recognized... until such time as they are able to stand alone.

²⁰³ Quigley, The Statehood of Palestine.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Nevo and Megiddo, "Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence."

²¹⁰ Eran, Oded. "Arab-Israel Peacemaking." The Continuum Political Encyclopedia of the Middle East. Ed. Avraham Sela. New York: Continuum, 2002, page 121

many Palestinians to lose faith, hope, and trust in the negotiation and Israel's intentions towards the attainment of their Statehood. Many of them called for an end to negotiations with Israel²¹¹.

While some argue that Palestine's independence is internationally acceptable, the unilateral declaration of Statehood would not be acceptable, and that independence and Statehood should come only by negotiations. For example, Becker claims that Palestinians and the Israeli had an "independent and continuing legal duty...not to engage in unilateral measures and to resolve the conflict by good faith negotiation", and that the negotiation obligation is not time-sensitive²¹². This meant the negotiation was infinite at least from the Palestinian side, and that they must stick to the interim agreement, until Palestinian and Israeli reach an agreement to create the State of Palestine.

Oslo and its Interim Self-Government status was signed under specific circumstances, and for limited time, and through the years, this circumstances change. However, in 2012, and after fourteen years for Oslo, specified timetables were missed, including permanent issues such as positions on Jerusalem, Palestinian refugees, Israeli settlements, security and borders. However, the refugees problem still on, the borders problem and security issue was not achieved on both sides. Israel launched a war on Gaza in 2008 and kept bombing and killing and Palestinians launched rockets over the Israeli settlement and these circumstances changed. Records show that the Palestinian-Israeli negotiation is going to nowhere, and that both sides breached the peaceful agreements more than once.

²¹¹ "Hundreds Protest Negotiations in Ramallah," *Occupied Palestine* / □□□□ □□, accessed September 29, 2012, <http://occupiedpalestine.wordpress.com/2012/07/03/hundreds-protest-negotiations-in-ramallah/>.

²¹² "'International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas' by Tal Becker."

c. Additional factors

Additionally, Palestine for almost sixty-four years has been laid under Israeli occupation, and this occupation must end one day. In this argument, many consider that Israel still occupies the POT, this was the ICJ position in its advisory opinion of “The Construction of a Wall in the Occupied Palestinian Territory”, where the Court considered Israeli army as an occupier of the Palestinian Territory²¹³. While the Palestinians were under occupation for more than sixty-four years, this occupation has to end and establish the Palestinian State.

Besides, Israel argues that its security is essential in establishing any future Palestinian State, therefore the Prime Minister of Israel called for ‘demilitarization of the Palestinian State’²¹⁴. However, I can argue that the ‘National Security’ for the Israeli State could not be accomplished without peaceful co-existence with neighbors and that could only be achieved by “mutual recognition and respect for each other’s right to exist”²¹⁵. Therefore, the Palestinian State, which recognized Israel’s existence and provided good territorial compromise, would be in Israel’s option, better than years of conflict, which did not achieve security for either States.

Additionally, the most desirable Palestinian regime for ensuring a lasting and peaceful coexistence would be democratic polity. PNA leaders Mahmoud Abbas and Salam Fayyed are trying to build up a State committed to democracy and the protection of human rights. This has enabled them “enjoy international sympathy” and build “peace partners”²¹⁶, that are more likely to acknowledge a unilateral Palestinian declaration²¹⁷.

²¹³ “ICJ Advisory Opinion on the Wall in the Occupied Palestinian Territory.”

²¹⁴ Benjamin Netanyahu Address to the 67th Un General Assembly 2012.

²¹⁵ Mark A. Heller (1997): Towards a Palestinian State, Survival: Global Politics and Strategy, 39:2, 5-22

²¹⁶ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence.”

²¹⁷ Ibid.

All in all, the creation of a Palestinian State under these circumstances is a necessary condition for moving towards peace and security.

1.3.1.4 Conclusion

Many of the criteria for Statehood could be said to be satisfied to certain extent in the Palestinian context. The PNA already enjoys numerous State-like attributes; it is exercising effective control over a defined territory with more than 2.4 million Palestinians in West Bank and Gaza Strip. It has a functioning Executive, Legislature, Judiciary, and Security structures. The PNA also enjoys widespread international recognition, with representatives in several countries, the UN and other international organizations.

Palestinians have proved to the world that they are a peaceful and democratic nation, especially with their concern about the viability of the peace process and whether the permanent-status agreement would be reached. Moreover, Palestine has been under occupation for more than sixty-four years and for all these factors, it has to have its own State.

Clearly, the cases of Kosovo and Palestine are “not perfect analogous, and each has its own unique characteristics”²¹⁸. However, I believe they both satisfy the traditional and additional Statehood criteria, and combined with other factors they should have their independence. Additionally, the international community should accept any unilateral declaration of independence by Palestine or Kosovo, because the existence of both is a matter of fact not a matter of law. This argument takes us to the discussion of the legal status of Kosovo and Palestine in the international law and the international community, without being able to grant the international recognition. Are Kosovo and Palestine *de facto* states, and what is the legal personality of such entities? The next chapter will discuss these issues.

²¹⁸ Ibid.

Chapter Two: The *De Facto* State

2.1 Introduction

In the first chapter, we discussed the Statehood criteria, and we concluded that theoretically, both Kosovo and Palestine fulfill the Statehood requirements. However, if Kosovo and Palestine meet the traditional and traditional Statehood criteria, does that mean that these entities should be regarded automatically as States, at least in the legal sense? The answer is no, at least in regard to what modern State practice shows. The international legal personality (ILP) for *de facto* States or unrecognized States has constituted anomalies in the international system, and often presents significant challenges for policymakers. Before I discuss international recognition, including United Nations recognition, and the role it plays in blocking nations and *de facto* states from exercising their right to Statehood and gain ILP, I will look at Kosovo and Palestine's legal status today. Although many academic analysts have concluded that Kosovo and Palestine do not meet the Statehood criteria according to international law, [implying that they are not States but just entities claiming to be States], the two nations under the international law have the legal personality as *de facto* States.

In this chapter, we will determine whether Kosovo and Palestine could present a stark illustration of the mismatch between internationally recognized sovereignty and *de facto* States. In the first section, we will have an overview of the phenomenon of *de facto* States and examine if Kosovo and Palestine are *de facto* States. Later, we will address the broad issue of whether *de facto* State possess legal personality under international law and debate the legal personality for *de facto* States.

2.2 The De Facto State Doctrine

The position of the *de facto* State and its legal status has received scant academic attention²¹⁹. It is thus necessary to define what a *de facto* State is and whether Kosovo and Palestine fit under this definition. We will, however, first examine the reasons for raising the *de facto* States argument in the Kosovo and Palestine context, especially since the international law primarily focuses on relations between existing States²²⁰. Firstly, The ILP is for Sovereign States who are holders of rights and obligations under international law²²¹. Thus, the case of entities such as Kosovo and Palestine is an argumentative one under international law, and so, we need to understand how the international community copes with their existence, and how *de facto* States interact with the international system of Sovereign States.

Secondly, the international community has widely recognized the right of Kosovo and Palestine to the self-determination²²². However, this creates a conflict between ‘self-determination’ and ‘territorial integrity’ as two fundamental principles of international law²²³. Therefore, it can be argued that the *de facto* States formed could achieve a balance between these two basic international law principles²²⁴. The ICJ, for instance, in its advisory opinion in the Western Sahara case, acknowledged that “an act of self-determination need not result in sovereign independence”²²⁵, i.e. in some cases the right to self-determination would not solve the problem of claims by entities to statehood, because a *de facto* State can serve as a functional

²¹⁹ H. Lauterpacht, *International Law Reports* (Cambridge University Press, 1951); Pegg, *International Society and the De Facto State*.

²²⁰ Robert Jennings (deceased) and Arthur Watts KCMG QC (deceased), *Oppenheim’s International Law: Volume 1 Peace* (Oxford University Press, USA, 2008); Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2010); the late Antonio Cassese, *International Law* (OUP Oxford, 2004).

²²¹ This was stated on the Peace of Westphalia of 1648 Taslim Elias, *International Court of Justice and Some Contemporary Problems: Essays on International Law* (Kluwer Academic Pub, 1983), 119.

²²² See above, the Kosovo’s self-determination, and Palestinian’s self-determination

²²³ Pegg, *International Society and the De Facto State*, 50; *Unrecognized States in the International System*, Exeter Studies in Ethno Politics (Milton Park ; New York: Routledge, 2011), 8.

²²⁴ Pegg, *International Society and the De Facto State*.

²²⁵ Ibid.

‘non- solution’ to the problem²²⁶. Therefore, we will look at how these entities develop in the context of non-recognition²²⁷.

Finally, the notion of ‘territorial integrity’ has helped in creating states with a lack of governmental functions - what Rebert Jackson refers to as ‘quasi-states’²²⁸. For sure, the quasi-states are sovereign states under the international law, they have flags, embassies, capital cities and most importantly a seat in the United Nations, i.e. they have full recognition by the international community, and they are ‘*de jure*’ states under international law²²⁹. The quasi-states situation in some cases creates *de facto* States when entities secede from the mother State and start administrating over that region, such as the *de facto* State of Kosovo²³⁰. The protection of the territorial integrity explains why the international community supports the existence of the ‘quasi-state’, with full sovereignty and limited effectiveness, and it denies the legitimacy for any entities or the *de facto* States’ claim of the right to a new state²³¹. Therefore, we will examine whether the *de facto* States are a new form of States or are “states-in-waiting” under the international law²³².

2.2.1 The *De facto* Definition

A common definition of the *de facto* state is that²³³ it is a geographical and political entity that has all the features of a State but is “unable to achieve any degree of substantive recognition

²²⁶ Ibid.

²²⁷ *Unrecognized States in the International System*.

²²⁸ Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press, 1993).

²²⁹ Pegg, *International Society and the De Facto State*; Jackson, *Quasi-States*.

²³⁰ Pegg, *International Society and the De Facto State*.

²³¹ Ibid.

²³² *Unrecognized States in the International System*.

²³³ These entities have also variously been describe as separatist state, almost-states, contested state, or unrecognized quisi-statessee,ibid., 8.

and therefore remains illegitimate in the eyes of the international society”²³⁴. Therefore, the *de facto* State must have effective control over a defined territorial area and population for a significant period of time, enjoying a popular support²³⁵. The *de facto* entity can build up State institutions²³⁶ and according to Scott Pegg, the *de facto* State status can lead to “complex economic incentives”, which can enable entities achieve State-building²³⁷. Most importantly, the “*de facto* State views itself as capable of entering into relations with other States”²³⁸. Thus, the *de facto* State actually does not want to be against the international law, in contrast, it simply wants to become ‘a member of the club’ seeking for “ full constitutional independence and widespread recognition as a sovereign State” so it can legally transit to be a *de jure* sovereign State²³⁹. Subsequently, the fulfillment of the Statehood criteria is essential for the *de facto* State because it seeks to become a *de jure* sovereign State²⁴⁰ such as the republic of Somaliland, Kosovo and Palestine²⁴¹.

Furthermore, it is useful to distinguish the *de facto* State from other entities that are similar, but which differ in several crucial aspects. Firstly, there is a difference between a sovereign and recognized State or *de jure* State and the *de facto* State under international law. The sovereign recognized State is a complete legal person under international law, while the *de facto* State is not²⁴². This is because Statehood is a “precondition for a territorially-defined political entity to enter into treaties, to be eligible for membership of organizations that possess international law status, to exercise standing before international tribunals and, in general, to be

²³⁴ Pegg, International Society and the De Facto State, 26.

²³⁵ Ibid.

²³⁶ Unrecognized States in the International System, 3.

²³⁷ Ibid., 14.

²³⁸ Pegg, International Society and the De Facto State, 26.

²³⁹ Ibid.

²⁴⁰ Ibid., 44.

²⁴¹ Barry Bartmann, *De Facto States: The Quest For Sovereignty* (Taylor & Francis, 2003), 188.

²⁴² Aust, *Handbook of International Law*, 15.

the bearer of powers, rights and obligations in international law relations”²⁴³. One way to distinguish between these two very different entities is the power versus recognition. So the *de jure* State is when an entity gains power and recognition, while the *de facto* State gains power to control the territorial unity without being recognized .

There is also a difference between the *de facto* state and *de facto* regime or a *de facto* government. The latter refers to entities that have “some effective [...] authority over a territory within a State”²⁴⁴. This degree of effective authority is coupled with a certain degree of political and organizational capacity²⁴⁵. The main difference between the *de facto* States and the *de facto* regimes is that the *de facto* State seeks to have full recognition, which will change its status from *de facto* State to full sovereign State, for example in the cases of Kosovo and Palestine. However, the entity that constitutes a *de facto* regime “aspires to be recognized by the international community as being the official government of an already existing State” leaving the mother State and its territories intact²⁴⁶, for example, the National Transitional Council, which controls large parts of the Libyan territory²⁴⁷. As a result, there is an important distinction between a recognition of the government and recognition of the *de facto* State²⁴⁸. For example, the acknowledgment of PLO as a sole legitimate representative of the Palestinian people by the UN does not mean recognition of the *de facto* State of Palestine, but merely means the UNat considers the PLO as the political representative of to the Palestinians.

²⁴³ J.D. van der Vyver, Statehood in International Law, 5 Emory Int'l L.Rev. 9, 11 (1991)

²⁴⁴ Michael Schoiswohl, De Facto Regimes and Human Rights Obligations - The Twilight Zone of Public International Law, 2001, 50.

²⁴⁵ Jonte van Essen, “De Facto Regimes in International Law,” *Merkourios : Utrecht Journal of International and European Law* no. 74 (2012): 33.

²⁴⁶ Pegg, International Society and the De Facto State.

²⁴⁷ Jonte van Essen, “De Facto Regimes in International Law,” 33.

²⁴⁸ Crawford, The Creation of States in International Law, 34.

2.3 Kosovo and Palestine as De Facto States

The unrecognized State definition is based on three criteria; first, the entity has to achieve a *de facto* independence with territorial control²⁴⁹. As we explained in Chapter One, both Palestine and Kosovo have effective control over their territorial units, and this control should be absolute²⁵⁰. The second criterion is that the *de facto* State should not gain international recognition and “even if they have been recognized by some States, they are still not full members of the international system of sovereign state”²⁵¹. Kosovo and Palestine have been ‘partially recognized’ by many existent States; however, they are not members of many international organizations, such as the UN, and they do not have access as States to many international community organs such as the International Criminal Court and the W.H.O organization²⁵². The third requirement of a *de facto* entity is that it has to demonstrate an aspiration for full, *de jure* independence, “either through a formal declaration of independence, through holding a referendum...or show the desire for a “separate existence”²⁵³. As we stated before, neither of our cases see another solution than ‘full independence and sovereign states’.

In summary, the *de facto* Status is widely accepted in the Kosovo case,²⁵⁴ but many writers such as Scott Pegg do not include Palestine under the same category since it is more widely recognized than other unrecognized States²⁵⁵. However, other writers such as Geldenhuys actually include Palestine as a *de facto* State²⁵⁶. In our part, we will introduce what the legal status to these unrecognized states in the international community, and the international law, so that we can draw an outline of the ILP for our cases.

²⁴⁹ Unrecognized States in the International System, 3.

²⁵⁰ See Palestine pages 38-43, and Kosovo pages 14-20

²⁵¹ Unrecognized States in the International System, 3.

²⁵² See note 157-159 Also, *ibid.*

²⁵³ *Ibid.*, 3,4.

²⁵⁴ *Ibid.*, 5; Pegg, International Society and the De Facto State, 8.

²⁵⁵ Unrecognized States in the International System, 8.

²⁵⁶ Deon Geldenhuys, *Contested States in World Politics* (Palgrave Macmillan, 2009), 235.

2.4 The De Facto State and the International Community

As we discussed above, Kosovo and Palestine are States, with control over their own territories and population, and they have relations with other States which recognize them as States. However, due to the Russian and Chinese objections to Kosovo's Statehood, and that of the Americans and Israelis for Palestine, they are blocked from having full international legal personality and are not States. However, Kosovo and Palestine need legal personality to be able to act on the international level. In the following section, we will debate how the international society deals with *de facto* States. We will also shape the legal personality of these entities, so that we can assess their rights and obligations under international law.

2.4.1 The Necessity to Recognize the *De Facto* State

Before discussing the position of *de facto* States in the international community, we need to clarify why the international community needs to recognize the existence of entities such as Kosovo, Palestine, etc.

First, the dealing of international community with the *de facto* States has three scenarios, either it totally ignores them, harshly punishes them, or partly accepts them. Somaliland is a good example where the international community simply ignores its existence, while the Turkish Republic of Northern Cyprus (TRNC) is an example of active opposition to its *de facto* State status, while Kosovo and Palestine have met with limited acceptance and acknowledgement by the international community. Scott Pegg says the limited acceptance of *de facto* States "... might not contribute to success toward the ultimate goal of sovereignty as constitutional independence, this type of limited acceptance coupled with the provision of humanitarian assistance can potentially ease a number of pressing problems facing the *de facto*

state”²⁵⁷. In other words, it blocks the *de facto* State from developing as a State and interact in the international arena. Some of these entities are not allowed membership in intergovernmental organizations, especially the UN, and they cannot benefit from bilateral or multilateral treaties²⁵⁸.

Secondly, it is essential to for the *de facto* States to be recognized by the international community as such, because they have substantive impact on international politics in two main areas: conflict and human rights²⁵⁹. The creation of *de facto* States is usually combined with conflicts and wars, for instance, Somaliland and other *de facto* States implicated the sheer number of people killed, wounded, and displaced. E.g., Palestine as a *de facto* State imports almost five million displaced persons; and in Kosovo, it was estimated that approximately three-quarters of a million Kosovo refugees fled to other countries after 1999 war. This means that the existence of *de facto* States usually creates an unstable political environment, which leads to breach of international peace and security.²⁶⁰ Thus, the international community should try to put an end to these conflicts because the *de facto* State may be a solution to messy conflicts²⁶¹. Another issue is that the people in *de facto* States are considered stateless, their human rights are ignored, which is a humanitarian reason for the international society to recognize the *de facto* State. The *de facto* state populations do not have access to many international organizations because of non-recognition status to their countries. This will lead us to our next discussion on how the international community deals with the *de facto* States of Kosovo and Palestine.

²⁵⁷ Pegg, International Society and the De Facto State, 50.

²⁵⁸ Ibid.

²⁵⁹ Ibid. 155.

²⁶⁰ Pegg, International Society and the De Facto State.

²⁶¹ Ibid.

2.4.2 The International Community Dealing with Kosovo and Palestine

The action of the international community has had crucial impact on the survival, or extinction of *de facto* States²⁶², with the latter impact presented by Tamil Eelam, Sri Lanka²⁶³. The international community supports the *de facto* Palestinian and Kosovo's states survival in two major ways: first the state-building policy through humanitarian aid and the foreign policies with limited recognition.

There are arguments that international recognition has various degrees, such as full recognition including UN membership, e.g. the recent recognition of South Sudan²⁶⁴, or recognition by key great powers, such as the United States²⁶⁵ and the United Kingdom that recognized Kosovo²⁶⁶. Until the collative non-recognition of Somaliland²⁶⁷, the *de facto* Palestinian State had higher recognition level and support from the international community than any other *de facto* States²⁶⁸. Briefly, we will look at the international community's impact on both Kosovo and Palestine.

The *de facto* States of Kosovo and Palestine are fragile; therefore, the international community supports their state-building processes. In the Palestinian state-building, for example, the UNSCO AHLC 2012 report stats that "donors are still urged to front-load funding for 2012

²⁶² Unrecognized States in the International System, 53.

²⁶³ Tamil Eelam has no official status or recognition by world states though sections of the Eelam were under *de facto* control of the LTTE for most of the 2000s, in 2009 Tamil Tiger rebel movement has dropped a demand for a separate Tamil homeland. "Tamil Separate State Call Dropped," *BBC*, March 13, 2010, sec. South Asia, http://news.bbc.co.uk/2/hi/south_asia/8566114.stm.

²⁶⁴ United Nations News Service Section, "UN News - UN Welcomes South Sudan as 193rd Member State," *UN News Service Section*, July 14, 2011, <http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=South+Sudan&Cr1#.UH6atK6Hntk>.

²⁶⁵ Embassy of the United States, Pristina. Kosovo Bureau of Public Affairs Department Of State. The Office of Website Management, "Kosovo and U.S Recognition" Background Notes, *U.S. Department of State*, January 11, 2012, <http://www.state.gov/r/pa/ei/bgn/100931.htm>.

²⁶⁶ Kosovo, Pristina, British Embassy "Kosovo and United Kindom Recognition," accessed October 17, 2012, http://www.fco.gov.uk/content/en/country-profile/europe/fco_cp_kosovo?profile=intRelations.

²⁶⁷ A. Arieff, "De Facto Statehood-The Strange Case of Somaliland," *Yale J. Int'l Aff.* 3 (2008): 60.

²⁶⁸ *Unrecognized States in the International System*, 131.

and to help meet the US\$1.1 billion level of funding to allow the PNA meet its obligations and avoid accruing further arrears²⁶⁹. Additionally, Palestine is a full member of UNESCO²⁷⁰ and had the observer status at the UN General Assembly²⁷¹. The EU maintains a representative office in Palestine²⁷², while USAID played a significant role in funding the Palestinian State-building²⁷³. Also, The UNDP and UNRWA, have also worked in Palestine to assist Palestinians²⁷⁴. This illustrates the international community's view of Palestine as a future State otherwise they would not inject all funding in the state-building process. Meanwhile, Kosovo depends on substantial economic aid from the EU²⁷⁵ and the World Bank²⁷⁶ for its state building process. As it was describe by Lucia Montanaro, "the international donor community successfully mobilised and spent €1.96 billion of donor funds on Kosovo between 1999 and 2003"²⁷⁷. Additionally, The UNMIK- United Nations mission, and the European Union - EULEX mission, have been assisting Kosovo in its state-building process²⁷⁸. As Palestine, the international community's involvement in building the Kosovo State implies that they accept the future Kosovo Statehood.

²⁶⁹ "UNSCO AHLC Report March 2012.pdf," accessed October 8, 2012, <http://www.unsco.org/Documents/Special/UNSCO%20AHLC%20report%20March%202012.pdf>.

²⁷⁰ Note.162

²⁷¹ "Member States of the United Nations."

²⁷² "European Union - EEAS (European External Action Service) | Political and Economic Relations," accessed October 9, 2012, http://eeas.europa.eu/delegations/westbank/eu_westbank/political_relations/index_en.htm.

²⁷³ "Obama Spending \$300 Million for 'Palestinian State'," *WND*, accessed October 9, 2012, <http://mobile.wnd.com/2012/09/obama-spending-300-million-for-palestinian-state/>.

²⁷⁴ "UNDP - Programme of Assistance to the Palestinian People," accessed October 9, 2012, <http://www.undp.ps/en/index.html>.

²⁷⁵ European Union Office in Kosovo / European Union Special Representative in Kosovo F. Bislimi, "Kosovo: The Building of a European State or Just Another State in Europe?" (2010): 27, <http://dalspace.library.dal.ca/handle/10222/13090>.

²⁷⁶ Kosovo, Joined the World Bank in June 29, 2009 Department Of State. The Office of Website Management, "Kosovo Joins the IMF and World Bank."

²⁷⁷ L. Montanaro, "The Kosovo Statebuilding Conundrum: Addressing Fragility in a Contested State," *FRIDE & International Alert, Working Paper* 91 (2009), http://www.initiativeforpeacebuilding.eu/resources/WP91_Kosovo_Statebuilding_Conundrum.pdf.

²⁷⁸ "United Nations Interim Administration Mission in Kosovo (UNMIK)," accessed October 17, 2012, <http://www.un.org/en/peacekeeping/missions/unmik/>; "EULEX Kosovo - European Union Rule of Law Mission in Kosovo Official Website," accessed October 17, 2012, <http://www.eulex-kosovo.eu/en/front/>.

Secondly, in regard to foreign policy, diplomatic recognition and economic trade relations enable *de facto* entities to survive and to achieve some kind of recognition²⁷⁹. It also shows that the *de facto* State is on its way to fulfilling the criteria for Statehood²⁸⁰, albeit it's less recognition as a sovereign State²⁸¹.

As *de facto* States, both Kosovo and Palestine have had diplomatic recognition and enjoyed economic trade relations, where they had their Ministry of Foreign Affairs with representative offices or missions abroad²⁸². They also have relations with some States²⁸³ and with international organizations, such as the International Monetary Fund (IMF)²⁸⁴ and the World Bank²⁸⁵.

In the Palestinian diplomatic relations, important distinction must be made between the PLO and the PNA. As we stated earlier, the PNA, under the Oslo Agreement does not have the ability to engage in foreign affairs; however, the PNA was engaged in such relations through the PLO²⁸⁶. However, in practice, the PNA engages in foreign affairs, for example, it has an official Palestinian representative in Egypt -designated as a PNA official. The PLO representative in

²⁷⁹ S. R. Silverberg, "Diplomatic Recognition of States in Statu Nascendi: The Case of Palestine," *Tulsa. J. Comp. & Int'l L.* 6 (1998): 2.

²⁸⁰ Unrecognized States in the International System, 128.

²⁸¹ Silverberg, "Diplomatic Recognition of States in Statu Nascendi," 2.

²⁸² Kosovo Ministry of Foreign affairs "Ballina - Ministria e Punëve Të Jashtme - Kosova," accessed October 9, 2012, <http://www.mfa-ks.net/>; Palestinian Ministry of foreign affairs "Palestinian Ministry of Foreign Affairs," accessed October 9, 2012, <http://www.mofa.pna.ps/ar/index.php?p=home>.

²⁸³ while The United States, the United Kingdom and France recognized Kosovo as sovereign State, Russia recognized Palestine as state Z. Nevo and T. Megiddo, "Lessons from Kosovo: The Law of Statehood and Palestinian Unilateral Independence," *J. Int'l L & Int'l Rel.* 5 (2009): 89.

²⁸⁴ Kosovo joined the IMF in June 25, 2009; Department Of State. The Office of Website Management, "Kosovo Joins the IMF and World Bank"; while Palestine had a IMF Resident Representative Office in West Bank and Gaza "IMF Resident Representative Office in West Bank and Gaza," accessed October 17, 2012, <http://www.imf.org/external/country/wbg/rr/index.htm>.

²⁸⁵ "West Bank & Gaza and the World Bank," accessed October 17, 2012, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,menuPK:294372~pagePK:141132~piPK:141121~theSitePK:294365,00.html>; for Kosovo World Bank membership see Department Of State. The Office of Website Management, "Kosovo Joins the IMF and World Bank."

²⁸⁶ Silverberg, "Diplomatic Recognition of States in Statu Nascendi," 6.

Moscow, on the other hand, signed a protocol on security cooperation with Russia in the name of the PNA. Also, the PNA joined the International Airport Council, while Morocco has a “liaison” office in Gaza²⁸⁷. Additionally, the PNA has engaged in economic relations, for example, in 1998, a meeting was launched between representatives of the EU, United States, Norway, and the World Bank, to work on the Palestinian state-building, and perhaps more important was the announcement of a planned signing of two protocols by France and the PNA worth \$20 million.

It was pointed out by the Palestinian representative that the “protocols fall within the framework of French action to bolster the establishment of the Palestinian state...France does not sign such agreements except with fully independent countries; Palestine is the only country [sic.] that is not totally independent with whom France has signed this kind of agreement²⁸⁸.”

Likewise, Kosovo has engaged in foreign policy with the USA and the British government²⁸⁹ as well as the EU²⁹⁰. Regarding, economic relations, Kosovo is a member of the IMF and World Bank²⁹¹. All these indicators show a prospect for international recognition of Kosovo’s Statehood²⁹².

In other words, even if the international community had limited acceptance of both Kosovo and Palestine and engaged with them in foreign and trade relations, still, as Edward Mihalkanin notes: “[R]ecognition is vitally important because it allows access to the public good that the international community doles out via institutions such as the International Monetary Fund and the World Bank”²⁹³. This is the case for Palestine at least where unlike Kosovo; it is not a member of both IMF and the World Bank, since the West Bank and Gaza ‘is not a

²⁸⁷ Ibid., 7.

²⁸⁸ Ibid.

²⁸⁹ See super notes; 306,307

²⁹⁰ See super note; 319

²⁹¹ see super note 325G. Wilson, “Self-determination, Recognition and the Problem of Kosovo,” *Netherlands International Law Review* 56, no. 3 (2009): 460.

²⁹² Montanaro, “The Kosovo Statebuilding Conundrum.”

²⁹³ E. Mihalkanin, “The Abkhazians: A National Minority in Their Own Homeland,” *De Facto States: The Quest for Sovereignty* (2004): 157.

sovereign state' according to IMF and World Bank. Thus, Palestine is "not eligible for the sources of financing normally available to member states"²⁹⁴. Yet both IMF and World Bank tried to assist in Palestine State-building, through the establishment of the Trust Fund for Gaza and West Bank (TFGWB) 1993. Additionally, in order for economic relations to develop and produce positive results, political stability must serve as a foundation²⁹⁵ and yet the nations under study present great difficulty obtaining loans, capital investment and other necessary resources for a functioning economy²⁹⁶. Therefore, the international community may have a fundamental bearing on the prospects for unrecognized States such as Kosovo and Palestine²⁹⁷. Yet they are not full recognized States, had limited access to the international organizations, this will be examined in the coming section.

2.5 The International Legal Personality to De Facto State

What is the legal status for Palestine and Kosovo? Are they full States or *de facto* States under international law? Answering these questions need a comparison of the international legal personality for each of these *de facto* States and fully recognized States, so that we can assess their rights and obligations under international law. While in the Third Chapter we will examine the ILP to the complete *de jure* sovereign State, here we will test the ILP for *de facto* entities. This comparison will clarify the necessity of recognizing Kosovo and Palestine as new States in the international community.

²⁹⁴ "West Bank & Gaza : Country Brief," accessed November 6, 2012, <http://www.mefacts.com/cache/html/human-rights/11235.htm>.

²⁹⁵ S. R. Silverburg, "Palestine Liberation Organization in the United Nations: Implications for International Law and Relations, The," *Isr. L. Rev.* 12 (1977): 2.

²⁹⁶ Mihalkanin, "The Abkhazians," 157.

²⁹⁷ *Unrecognized States in the International System*, 137.

While rights and obligations under international law theoretically seem to be attached to *de facto* States²⁹⁸ and States in practice do not regard unrecognized States as ‘exempt’ from international law²⁹⁹, in literature, the rights and obligations of unrecognized State under international law have rarely been examined³⁰⁰. In general, the ILP to both *de facto* and full sovereign states, create a ‘great debate’ on whether the rights and obligations of States attaches to the entity the moment it meets the objective criteria of Statehood under international law (the declaratory theory) or after the existing States have recognized such entities (the constitutive theory)³⁰¹. This will be examined in our next chapter, but to clarify the *de facto* entity ILP, we will assert that the theoretical and practical elements of the international recognition, give different approaches to this debate³⁰². Briefly, the Declaratory Theory states that recognition merely means the existing States declare its willingness recognize the *de facto* States, which already has rights and obligation under international law. The Constitutive Theory on the other hand, states that *de facto* States cannot possess the international legal personality unless they gain international recognition. However, while the jurist mainly goes in favour of the Declaratory Theory, the State political practice bases on the Constitutive Theory³⁰³, making the ILP for *de facto* States a controversial issue. In this section, I will argue that the *de facto* Kosovo and Palestinian States possess the ILP, yet they have limited personality. I will also investigate the rights and the obligations that *de facto* entities have under international law, the applicability of international law to *de facto* states, and the accessibility of such entities to international organs.

²⁹⁸ K.kelly Malone, “THE RIGHTS OF NEWLY EMERGING DEMOCRATIC STATES PRIOR TO INTERNATIONAL RECOGNITION AND THE SERBO-CROATION CONFLICT” (n.d.).

²⁹⁹ Crawford, *The Creation of States in International Law*, 26.

³⁰⁰ Pegg, *International Society and the De Facto State*, 7.

³⁰¹ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 124.

³⁰² *Ibid.* 120.

³⁰³ *Ibid.* 119.

Crawford defines the ILP as “the capacity to bear rights and duties under international law”, however, it has been regarded as synonymous to Statehood for centuries and yet full sovereignty of States is the only person of the international law³⁰⁴. However, legal scholars have argued that the ILP can be to other entities; such as international organization, transnational corporations, and even individuals³⁰⁵ - all of which have limited capacity. A capacity is given to them by the existent State in order “to put into effect their rights and powers in judicial and other proceedings to enforce [the new actors] rights”³⁰⁶. Thus, the ILP was extended to the *de facto* entities as highlighted in different ICJ opinions³⁰⁷ and national courts also treats the new entities as States before recognition³⁰⁸. In supporting such extension, it was argued that “while unrecognized territorial communities are not States, neither is they *terra nullius*; as a community, they enjoy some rights associated with [ILP]”³⁰⁹. Also Brownlie emphasized that “[f]or certain legal purposes it is convenient to assume continuity in a political entity and thus to give effect, after statehood has been attained, to legal acts occurring before independence”³¹⁰. The ILP of *de facto* State is of central importance in determining how international law applies to them³¹¹.

³⁰⁴ Crawford, *The Creation of States in International Law*, 28–29.

³⁰⁵ *Ibid.*, 29.

³⁰⁶ *Ibid.*

³⁰⁷ Where ICJ pronounced that the “the failure to maintain effective control during the process of dissolution of a state does not extinguish the legal entity as per the UN”; See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, Judgment, 2007 I.C.J. 91 (Feb. 26) (discussing F. Zacklin, U.N. Under-Sec’y-Gen. & Legal Counsel, Letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, U.N. Doc. A/47/ 485 (Sept. 29, 1992) (stating that the effect of G.A. Res. 47/1 (Sept. 22, 1992), as well as impliedly S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992), was not to terminate or suspend the S.F.R. Yugoslavia’s membership in the U.N.)). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 1993 I.C.J. 3, 14 (Request for the Indication of Provisional Measures, Order of Apr. 8)) (the Court did not reach a finding on the status of the S.F.R. Yugoslavia).

³⁰⁸ R. Sloane, “The Changing Face of Recognition in International Law: A Case Study of Tibet,” *Emory International Law Review* 16 (2002): 117.

³⁰⁹ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 126.

³¹⁰ The Late Ian Brownlie Q.C, *Principles of Public International Law*, 7th ed. (Oxford University Press, USA, 2008), 66.

³¹¹ Crawford, *The Creation of States in International Law*, 28; Aust, *Handbook of International Law*, 15.

2.5.1 The Applicability of International Law to a *De Facto* State

By definition, a *de facto* State lacks juridical standing in the society of States³¹². However, as many legal writers have argued, international law is capable of dealing with the presence of these entities³¹³. They argue that *de facto* states constitute a legal person under international law and receive the full panoply of State rights and obligations prior to international recognition³¹⁴. My argument is that the international law is applicable to the *de facto* State to some extent, but not in a way to have ‘full panoply’ of States rights and obligations, where they act in limited capacity under international law.

The full ILP approach based international norms, are thus applicable to all entities whether or not it is a State, including the legal and illegal *de facto* States in the same way that they apply to sovereign States³¹⁵. Therefore, if one accepts that such things as the prohibition of genocide, torture, and the use of force except for self-defence have attained the status of *jus cogens*, it will be applicable to *de facto* States³¹⁶. For example, the International Human Rights Law, which aim to protect human rights, is applied to all entities: *de facto* States, *de facto* regimes and full States. The prohibition of torture as a *jus cogens* rule, for instance, also binding to the *de facto* States (for instance in *Ahmed v. Austria* case, the German Court reserved an opinion held by the European Court of Human Rights, urging Austria not to deport a defendant to Somalia, where it was suspected he would be subjected to violation of Article 3 of the

³¹² Pegg, *International Society and the De Facto State*, 187.

³¹³ Shaw, *International Law*, 197.

³¹⁴ *Unrecognized States in the International System*, 6.

³¹⁵ Pegg, *International Society and the De Facto State*, 187,188.

³¹⁶ *Ibid.*, 187.

European Convention on Human Rights because of the lack of State control over non-state agents, where ‘non-state agent’ had a *de facto* control over the territory)³¹⁷.

Another example is the International Humanitarian Law, which aims to control armed conflicts, and which has been applied to the Palestinian-Israeli conflict. Thus, the Palestinian *de facto* entity has the right to self-defence, regardless of its non- recognition as a State³¹⁸. Even where Palestine launched rockets on Israel after the Israeli killing of people in Gaza, the move can be considered a legitimate act by a *de facto* State and not that of terrorism³¹⁹, however if this rockets aimed to target civilians it will be regard illegal act from a State. In the same vein, Israel was ‘practicing the fundamental right of self-defence’ as a State³²⁰ when it launched war on Gaza. Israel violated the territorial integrity of Palestine as a *de facto* State by continuing to build settlements and construct separation wall in the Palestinian *de facto* territory³²¹. Additionally, the Common Article 3 of the Geneva conventions, as a part of *jus cogens* applies in our two cases³²². Also, the International Criminal Law, which applies to those crimes that are regarded as so grave that they ‘constitute offence against world community’, is applicable to the Serb-Kosovo conflict and the crimes committed in 1999’s Kosovo war³²³.

³¹⁷ Ahmed v. Austria, 24 Eur. Ct. H.R. (Ser. B) at 278 (1996). Silverberg, “Diplomatic Recognition of States in Statu Nascendi,” 4.

³¹⁸ Article 3 of Montevideo Convention provide that “Even before recognition the state has the right to defend its integrity and independence” see “Montevideo Convention on the Rights and Duties of States,” *Council on Foreign Relations*, accessed October 17, 2012, <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.

³¹⁹ “Israeli Forces Launch Airstrike on Gaza Militants After Border Town Hit with Rocket Attack | Israel & Middle East | World | News | National Post,” *National Post*, accessed October 9, 2012, <http://news.nationalpost.com/2012/10/08/israeli-forces-launch-airstrike-on-gaza-militants-after-border-town-with-by-rocket-attack/>.

³²⁰ “LegitEngl.pdf,” accessed October 9, 2012, <http://www.friendsofisraelinitiative.org/uploads/papers/pdf/LegitEngl.pdf>.

³²¹ “ICJ Advisory Opinion on the Wall in the Occupied Palestinian Territory.”

³²² Pegg, *International Society and the De Facto State*, 190.

³²³ Cassese, *International Law*, 436; Pegg, *International Society and the De Facto State*, 187.

We agree that the *jus cogens* international norms are applicable to the *de facto* entity, but our objection is on other international laws and norms, which did not reach the status of *jus cogens* universal status. Do they also apply to the *de facto* States? Is a *de facto* State entitled to protect the right to property of everyone under its jurisdiction as required under International Human Rights Law? If yes, why did the European Court of Human Rights (ECtHR), in case of *Lizidou Vs. Turkey*, decide that Turkish Republic of Northern Cyprus (TRNC), as a *de facto* entity, did not violate Mrs Loizidou's right of property³²⁴? The case involved a Cypriot plaintiff, who owned plots of land in the northern Cyprus but could not access them following the Turkish invasion of 1974. She then claimed that this violated her right to property as guaranteed in Article p1-1 of the European Convention on Human Rights (ECHR)³²⁵. What concerns us is the Turkish government's objection to the court decision that "the land in question is not Turkish but is part of the (TRNC)". The court also responded that the international community does not regard 'TRNC' as a State under international law and that the Republic of Cyprus is the sole legitimate Government of Cyprus, but Turkey has effective control over TRNC and thus is responsible for the policies and actions of the TRNC³²⁶. Therefore, the ECtHR did say that the *de facto* control of TRNC makes it liable to protect human rights of people under its jurisdiction, which show that the *de facto* States does not have a full ILP under the International Law but limited legal personality.

The limitation on the legal personality of Palestine and Kosovo could thus prevent them from being part of multilateral treaties where Statehood is a precondition for admission; such as the 1949 Geneva Convention and their Additional protocols of 1977.

³²⁴ "UNHCR Loizidou V. Turkey," accessed October 17, 2012, <http://www.unhcr.org/refworld/country,,ECHR,,CYP,,402a07c94,0.html>.

³²⁵ Ibid.

³²⁶ Ibid.

2.5.2 Accessibility to International Organs by *de facto* States

Crawford states that “an entity not recognized as a State but meeting the requirements for recognition has the rights of a State under international law in relation to a non-recognizing State”³²⁷. However, “not being a State is to be denied independent access to those forums that States-themselves or through international organizations- still control”³²⁸. Therefore, the membership of Kosovo in the IMF and the World Bank does not mean that it can be a member of the World Trade Organization³²⁹. Likewise, the Palestinian membership in UNESCO does not mean it can have access to the World Health Organization, or to the ICC³³⁰.

Another indicator to the limited ILP of *de facto* entities is the *de facto* States legal status in the domestic legal system for another State. It should be noted that the recognition or non-recognition of *de facto* States is a political question, where the Executive branch of a State decides whether the entity is a State or not. Such recognition or non-recognition could affect its access to the courts *locus standi*, privileges and immunities, the legal status of individuals, the rights to recover State property in the forum, and the judicial cognizance of foreign legal acts.

The *de facto* States’ lack of recognition their rights and obligations “exist only to the extent to which they have been expressly conceded or legitimately asserted by reference to compelling rules of humanity and justice, either by the existing members of international society or the people claiming recognition”³³¹. Of course, some legislation has sometimes had to be passed into law to authorize courts to treat unrecognized entities as ‘law areas’ for various

³²⁷ Crawford, *The Creation of States in International Law*, 93.

³²⁸ Ibid., 44.

³²⁹ see super note, 322 Department Of State. The Office of Website Management, “Kosovo Joins the IMF and World Bank.”

³³⁰ See super note 311, “Palestine | United Nations Educational, Scientific and Cultural Organization,” accessed October 10, 2012, <http://www.unesco.org/new/en/unesco/worldwide/arab-states/palestine/>.

³³¹ Crawford, *The Creation of States in International Law*, 93.

purposes, such as to not separate entities from the recognition consequence³³², or accepting travel passport issued by the *de facto* State.

2.6 Conclusion

A *de facto* State is a 'state in all but name'. If Kosovo and Palestine are not full independent States as many writers argue, at least the *de facto* State solution could be a better option available to international society in an effort "to find a vehicle to prevent those territories from becoming exempt from international law"³³³. Additionally, to be a *de facto* State does not preclude other future settlement possibilities, and it would be an "alternative for State sovereignty"³³⁴.

Subsequently, the *de facto* form of States can provide a probable solution to entities who claim Statehood by making their inhabitants have their travelling documents and not be stateless. Stephen Krasner points out that "the *de facto* would be easier to find a solution to the problem of the West Bank if there were additional; legitimate options available besides either full sovereignty for the Palestinians or continued military occupation by the Israelis"³³⁵. However, *de facto* State's legal personality has limited capacity in the international legal system, which takes to, the concern whether the *de facto* status of entities can be a probable solution and yet, "no such possibility is acceptable, not simply because of the utilitarian calculus of the actors involved but also because the sovereign state is the only universally recognized way of organizing political life in the contemporary international system. It is now difficult to even conceive of alternatives"³³⁶.

³³² Ibid., 18.

³³³ Worster, "Law, Politics, and the Conception of the State in State Recognition Theory," 135.

³³⁴ Ibid.

³³⁵ S. D. Krasner, "Sovereignty an Institutional Perspective," *Comparative Political Studies* 21, no. 1 (1988): 90.

³³⁶ Pegg, *International Society and the De Facto State*, 190.

If you visit Kosovo or Palestine, you will find a State even if they are not complete States. One will also find it difficult to believe that Kosovo is still part of Serbia or that Palestine is still under occupation.

There are a lot of entities who claim to be *de facto* State; however, there is no international rule of law except what is decided by the UN Security Council, where decisions tend to be based on politically-desirable and existing power equations. The *de facto* State has been treated as a legal grey area or fundamental holes in the world map. However, we can say that “whether the State is created or merely acknowledged may not really be a distinction that matters if recognition opens the gate to full access to the international [community]”³³⁷.

³³⁷ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 137.

Chapter Three: International Recognition

3.1 Introduction

The main argument for this thesis is that, if an entity fulfils the Statehood criteria, it does not need to be recognized as a State by other existent States. Although this is what the international law imposed, the reality is different. An entity cannot exercise its rights and obligations under international law without being accepted by the international community; even if it is considered a *de facto* State, it needs some kind of recognition from the international community. For example, nationality and the right of self-defence are to international norms depending on the existence of the entity as a State, accessing to some international organs need to be a state, such as the UN or EU. Does a State exist when recognized by existing States or is it already a State and recognition is to merely declare its existence? The answers to these questions create ‘great debate’ between international law jurists, and States practice. We will, however, argue that recognition is not a condition for Statehood in international law.

In this chapter, we will look at the general principles of international recognition in international law, because modern State practice focuses more on the act of the recognition and its legal effects, than other criteria of Statehood³³⁸. Our discussion will briefly examine the theoretical and practical approaches of international recognition in order to understand the international community’s shift from the principal of effectiveness of Statehood to the legitimacy principal. Then we will evaluate the legal consequences of the recognition State act. Later, we will discuss the international recognition in international organizations, specifically the United Nations and the European Union. In our last section, the international recognition regarding Kosovo and Palestine will be examined.

³³⁸ Crawford, *The Creation of States in International Law*, 19.

3.2 International Recognition: Theory and Practice

International recognition is “a procedure whereby the governments of existing States respond to certain changes of States in the world community”³³⁹. There are two theories of recognition that exist in the international legal sphere which determine when the entity should be a State under international law. However, in practice, the recognition of a new entity is governed not only by international law, but by a “complex calculus of factors that include...The self-interest of other States, politics, personality, and strategic considerations-including the management or prevention of conflict”.³⁴⁰ Therefore, each country sets up its own criteria on when and how to recognize an entity as a State. However, Lauterpacht argues that the granting or refusal of recognition is not just a matter of political expediency, but it is binding to a legal principle³⁴¹. Other analysts also argued that the recognition of new States is a matter of politics and has nothing to do with the law³⁴². And, I will argue that States recognition is a political act and has nothing to do with the legal framework.

3.2.1 The Theories of International Recognition

Legal scholars have divided the international theories of recognition into two categories; the Declaratory Theory and the Constitutive theory. According to supporters of the ‘Constitutive Theory’, recognition of Statehood is a Western idea, arguing that in the olden days, States existed without the need to be recognized by other existing States; however, after several events in modern history, this idea changed and recognition by other states is now crucial for an entity to join the international community, including the United Nations.

³³⁹ Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger, 2007), 5.

³⁴⁰ “083206arieff.pdf,” accessed October 12, 2012, <http://yalejournal.org/wp-content/uploads/2011/01/083206arieff.pdf>.

³⁴¹ Hersch Lauterpacht, *Recognition in International Law* (Ams Pr Inc, 1947), 4.

³⁴² D. Turk, “Recognition of States: a Comment,” *Eur. J. Int’l L.* 4 (1993): 3.

a. *Constitutive Theory of Recognition*

According to theory, recognition creates (constitutes) the State. According to Oppenheim, the State is and becomes only and exclusively an international person through recognition³⁴³. Crawford describes the Constitutive Theory by “the rights and duties pertaining to statehood derived from recognition by other States”³⁴⁴. Therefore, the recognition is a *conditio sine qua non* for Statehood³⁴⁵. This theory is supported by the notion that the obligations that States hold in the international community comes from individual State consent; and while the existence of new a State will bring such legal obligation to the existing State, the existence of this new State should be by the consent of the existing States³⁴⁶.

However, this theory presents some queries, firstly by adopting a constitutive view of recognition and yet individual recognition present serious difficulties³⁴⁷; i.e. does the entity become a State if one existing State recognizes it? What would happen if some States recognized the new entity as State, while other did not? This will definitely lead to conflict between existing States and makes it difficult to determine whether the State emerges or not³⁴⁸. The ‘Constitutive Theory, does not include just a unilateral recognition, i.e. that recognition of one or few more states cannot be constitutive’³⁴⁹. Lauterpacht defends this by calling for ‘the establishment of a standard [collective] procedure for the recognition of new States’³⁵⁰. Also, some legal scholars argue that after the implementation of the United Nations Charter; unilateral recognition is

³⁴³ L. Oppenheim and Ronald Roxburgh, *International Law: A Treatise* (The Lawbook Exchange, Ltd., 1920), 135.

³⁴⁴ Crawford, *The Creation of States in International Law*, 5.

³⁴⁵ C. Ryngaert and S. Sobrie, “Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia,” *Leiden Journal of International Law* 24, no. 02 (2011): 469.

³⁴⁶ Crawford, *The Creation of States in International Law*, 13.

³⁴⁷ *Ibid.*, 540.

³⁴⁸ *Ibid.*, 5.

³⁴⁹ Cassese, *International Law*, 49.

³⁵⁰ Crawford, *The Creation of States in International Law*, 540.

incompatible with international law, because “if other States were to decide alone, who should be a State and who not; the crucial principle of sovereign equality of State will be shunned”.³⁵¹

Another argument in support of theory is that “in every legal system some organ must be competent to determine with certainty the subject of the system” and in the present legal system, the State is the only organ to do so³⁵². Crawford responds by saying that this argument is “not applicable in international law”³⁵³. And, that any decision, whether the States conduct is valid and constitutive or not also involves ‘difficult circumstances of fact and law’³⁵⁴. Consequently, international law is not just about individual States’ expressing opinion about the existence of a new State because it would make international law just a “system for registering the assent and dissent of individual State”. However international law should be a system for “resolving problems, not merely expressing them”³⁵⁵.

Additionally, if an existing State does not recognize one entity, does it mean that this State does not exist in fact or it is a *terra nullius*³⁵⁶? For instance, the Arab world does not recognize Israel as a State, does that mean that Israel is not a State and has no legal status ? Another point is that recognition under the Constitutive Theory could be a form of intervention in internal affairs of a new State and, the right to Statehood would be demolished,³⁵⁷ thus violating the principle of the quality of States³⁵⁸. For all the above reasons, academic writers have sided with the Declaratory Theory, which I will look at next.

³⁵¹ Cassese, *International Law*, 49.

³⁵² Crawford, *The Creation of States in International Law*, 20.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 120.

³⁵⁷ Crawford, *The Creation of States in International Law*, 4.

³⁵⁸ Shaw, *International Law*, 445.

b. Declaratory Theory of Recognition

According to this theory, an entity becomes an existent State if it fulfils the factual objective of the Statehood criteria as required under international law, and the recognition is just to acknowledge its existence³⁵⁹. The Declaratory Theory stipulated in the first sentence of the Article 3 of Montevideo Convention argues that “The political existence of the State is independent of recognition by other States”³⁶⁰. Thus, recognition here is a political act, not a necessary element for Statehood³⁶¹, which James Crawford asserted should be based on specified criteria because the existence of a new State is a matter of fact, not on individual State discretion³⁶². Therefore, recognition presupposes a State’s existence, it does not create it³⁶³.

Even if majority of contemporary scholars seem to be in favour of this theory³⁶⁴, it has some criticisms. First, the State practice does not support this theory, where the State will not accept a new obligation until other States are recognized³⁶⁵. Also, the declaratory theory may undermine the principle that the international law is a law made by States³⁶⁶.

Regardless of these criticisms, we will concur with what Crawford said that “statehood is opposable to non-recognizing state”, and this position can avoid the logical and practical difficulties involving the Constitutive Theory while recognition still plays a role as matter of fact³⁶⁷. Under this theory, Kosovo and Palestine States exist, and their recognition by other States is just to declare this existence.

³⁵⁹ Ryngaert and Sobrie, “Recognition of States,” 470.

³⁶⁰ Crawford, *The Creation of States in International Law*, 20.

³⁶¹ Ryngaert and Sobrie, “Recognition of States,” 470.

³⁶² Crawford, *The Creation of States in International Law*, 4,22.

³⁶³ “Explaining the Legal Effects of Recognition I.C.L.Q. 2012, 61(2),” n.d., accessed October 12, 2012.

³⁶⁴ The Late Ian Brownlie Q.C, *Principles of Public International Law*, 7th ed. (Oxford University Press, USA, 2008); Crawford, *The Creation of States in International Law*.

³⁶⁵ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 119.

³⁶⁶ Ibid.

³⁶⁷ Crawford, *The Creation of States in International Law*, 22.

In summary, the ‘Constitutive Theory’ creates the State, and an entity has to fulfil certain standards to be recognized, yet in some cases even if it is a complete State, the international community for purely political reasons would not regard it as a State. In the Declaratory Theory, the State exists as a matter of fact and States’ recognition -either individually or collectively is not required, it is merely the expression of willingness by an existing State to accept the new member of the international community, and to have relations with it as a new State. Therefore, I will go with Crawford’s assertion that the great debate between the two theories “has done nothing but confuse the issue”³⁶⁸, and while some writers combine both declaratory and constitutive element³⁶⁹, he defends the Declaratory Theory thus;

The question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing States to act as if it was not a state- to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law. The answer must be no, and the categorical constitutive position, which implies a different answers, is unacceptable³⁷⁰

However, this does not mean that recognition is not important; on the contrary, it has a legal and political effect, and it is a tool to regularize a new State³⁷¹, i.e. it affects the international personality of an entity, determines if a new State exists as a legal person before or following the recognition; which will be examined in the legal consequences of recognition. However, as we asserted earlier, the Declaratory Theory is based on the effectiveness principle, which means that the law grants Statehood for the new entity, regardless of recognition by existing States. Our next step is recognition as a States practice, which seems to be the legitimate principle³⁷².

³⁶⁸ Ibid., 26.

³⁶⁹ see generally Lauterpacht, *Recognition in International Law*.

³⁷⁰ Crawford, *The Creation of States in International Law*, 27.

³⁷¹ Ibid.

³⁷² Lauterpacht, *Recognition in International Law*, 427.

3.2.2 The International Recognition in States' Practice (Politics of Recognition)

After examining the legal framework of recognition, we will deal with some of the State practice of recognition. Recognition in practice is controversial issues and is misleading because “neither theory of recognition can satisfactorily explain modern practice”³⁷³. Therefore it seems the rules of State recognition does not have any strict content, although some legal writers argue that the recognition of new States is not just consisting of the factual criteria, but also political criteria³⁷⁴. We will use the explanation of some recognition concepts to argue that the States policy either in recognition or non-recognition of new State is far from being a consistent application of a legal norm because it is mainly a political discretion act of the existing States.

a. *Recognition of a Government v. Recognition of a State*

The first State practice in the recognition issue is that there is a difference between existing States recognizing a State or recognizing a government³⁷⁵. For clarification, a State is basically a legal concept; it acts through its government³⁷⁶. One can say that there is a close relation between a government and state, although they are not synonymous³⁷⁷. There is a difference between existing States recognizing an entity as a State and when their act is merely meant to recognize a government as an administrative authority for the State³⁷⁸. The issue of recognition of government arises only when an unconstitutional governmental change occurs because a change of government should not affect the State and its legal personality, unless if the

³⁷³ Crawford, *The Creation of States in International Law*, 20; Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 131.

³⁷⁴ this is support by Jurist such as Blix, De Visscher, Hackworth, Kunz and Schwarzenberger, see T. Becker, *International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas* (Jerusalem Center for Public Affairs, 1999); Crawford, *The Creation of States in International Law*, 131.

³⁷⁵ See notes, 277-282

³⁷⁶ Aust, *Handbook of International Law*, 26.

³⁷⁷ Crawford, *The Creation of States in International Law*, 30.

³⁷⁸ Shaw, *International Law*, 456.

change is illegal³⁷⁹. Thomas Galloway, summarizes the State approaches in recognizing government as the Traditional Approach, the Estrada Doctrine, and the Tobar or Betancourt Doctrine³⁸⁰.

The Traditional Approach mainly combines the “concept of control and democracy and traditional concepts of international comity in recognizing a particular government”³⁸¹, while according to the Estrada Doctrine, only the existing State has to recognize a new State³⁸². Under the Traditional Recognition Doctrine, the government recognition judgment must change each time the a government changes; however, the Estrada Doctrine argues that government recognition interferes in the internal affairs of the country, therefore existing States must recognize only a State and not the government³⁸³. The Tobar or Betancourt Doctrine, on the other hand, State that a State cannot be recognized until it is proven that the government emerged through legitimate means³⁸⁴. Recognition therefore, becomes a tool of “public and foreign policy” used by existing state to ensure that the new government was created through constitutional means. This creates a new recognition criterion, where “recognition often is totally unrelated to a new government's control over the corresponding territory”³⁸⁵. There is therefore, a difference in States modern practice, where for instance, the United States recognizes unconstitutional governments if the people accept it. In the case of Palestine, the United States did not recognize the State of Palestine, but it has some diplomatic recognition by opening a PLO Mission to United States in 1994, which was upgraded to the “PLO General Delegation to

³⁷⁹ Ibid., 454.

³⁸⁰ L. Thomas Galloway, *Recognizing Foreign Governments :the Practice of the United States /* ([Washington ; 1977), 5, [http://hdl.handle.net/2027/mdp.3901500867947720091111\\$\\$p214](http://hdl.handle.net/2027/mdp.3901500867947720091111$$p214).

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid., 10.

³⁸⁵ 6 Temp. Int'l & Comp. L.J. 81, 6 TMPICLJ 81 (Sprg 1992)

United States” in 2010³⁸⁶. The United Kingdom, on the other hand, does not recognize governments apart from states. All in all, the political element controls either State or government recognition; however, there is difference between Russia’s recognition of Palestine as a full State³⁸⁷ and Austria’s recognition of PLO as a representative of the Palestinian people, and the recognition of the State of Palestine³⁸⁸.

b. Collective and Individual Recognition

Recognition in the modern States’ practice can either be an individual or collective act³⁸⁹, and, the legal consequences are different in both recognitions³⁹⁰.

Firstly, if we adopted a constitutive view of recognition, individual recognition presents serious difficulties³⁹¹. The question remains what legal consequences exist in the case of individual recognition. Does the entity become a State when one existing State recognizes it as such? If we agree that recognition is a precondition for the existence of legal rights, “how many states must recognize a putative state before it becomes a ‘real’ state”? And what are the legal consequences for such individual recognition, does this mean that the entity only exists for states that have expressed recognition, formally or informally?³⁹²

Secondly, the problem of collective recognition arises regarding the principle of equality of States principle under international law and United Nations³⁹³. The principle of equality

³⁸⁶ The PLO Mission to the United States received its current status in 1994 as a result of the Oslo Accords signed by Israel and the PLO in September 1993. At the time of its establishment in 1978, the Mission was known as the Palestine Information Office. In 1988 it became the Palestine Affairs Center and maintained that status until 1994 when it became known as the PLO Mission. In 2010 the PLO mission officially was renamed to the PLO Delegation of the United States.

³⁸⁷ “The News and Courier - Google News Archive Search,” accessed October 17, 2012, <http://news.google.com/newspapers?id=2lhJAAAAIBAJ&sjid=-QsNAAAAIBAJ&pg=3596,1106046&dq=&hl=en>.

³⁸⁸ Quigley, *The Statehood of Palestine*, 151.

³⁸⁹ Crawford, *The Creation of States in International Law*, 239.

³⁹⁰ Ibid.

³⁹¹ Ibid., 540.

³⁹² Sloane, “The Changing Face of Recognition in International Law,” 117.

³⁹³ Crawford, *The Creation of States in International Law*, 504.

implies that new legal obligations “may not be imposed on a State nor may their existent legal rights be impaired by the action of other State without their consent”³⁹⁴. This means that the collective recognition will extend a recognition decision made by collective States on another State which was not a part of it and yet State must act for its “own reasons and in light of its own policies”³⁹⁵. Therefore, it can be argued that collective recognition does not mean, for example, that a UN member has to start diplomatic relations with a new State for it to be recognized, the UN membership can merely be a “powerful evidence of Statehood”³⁹⁶. Therefore, Palestine’s admission to the UN does not mean that the United States, or Israel recognizes it as a State.

Finally, the collective recognition within international organizations such as the United Nations and the European Union is considered a substantial support from existing member States³⁹⁷. Due to the admission criteria to such international organizations basing on substantial independence³⁹⁸ for instance, leads to the requirement of the legal status of an entity as a State. Again, the State in the international community has two interests, the national, and international; however even if a State acts individually or collectively, it always gives priority to its national interests.

c. Collective Non-Recognition Vs. Recognition

The non- recognition doctrine means that the duty not to recognize an entity was based on its illegal creation or emergence and thus against international law³⁹⁹. According to Grant, non-recognition is based on two reasons: non-recognition for political reason, which is a

³⁹⁴ Ibid.

³⁹⁵ Ibid.

³⁹⁶ Shaw, *International Law*, 466.

³⁹⁷ Crawford, *The Creation of States in International Law*, 239.

³⁹⁸ Ibid., 543.

³⁹⁹ Shaw, *International Law*, 466; Ryngaert and Sobrie, “Recognition of States,” 473.

‘discretionary’ act, and legal non-recognition, where an entity does not qualify for Statehood⁴⁰⁰. The main argument supporting non-recognition for legal reasons is that “legal rights cannot be obtained from an illegal situation” *ex injuria jus non oritur*⁴⁰¹. For example, the Security Council’s collective non-recognition of the legal status of Jerusalem with a 478 of 20 resolution on August 1980, stated that the Council “ ‘would not’ recognize...actions by Israel that...seek to alter the character and status of Jerusalem, and called state not to treat Jerusalem as the capital of Israel”⁴⁰². The States’ practice is consistent with this resolution; the UK policy, for instance, stated “we do not recognize Israeli sovereignty over any part of Jerusalem or recognize Jerusalem as the capital of the state of Israel”⁴⁰³. Again, the ICJ addressed the collective non-recognition in the case of the ‘Construction of a Wall in the POT’, where the court ruled that the construction was against international law. Here, Crawford argues that this ruling created obligation on the other States not to recognize the legality of the Wall⁴⁰⁴.

We can thus argue that the prohibition of recognizing entities, which emerge as a result of violation of the international norms, also interferes with the notion of effectiveness of Statehood, since an entity is not considered a State, no matter how effective it is⁴⁰⁵. For example, the non-recognition of TRNC⁴⁰⁶, Somaliland⁴⁰⁷ shows that the principal of legitimacy has dominated the States’ practice. However, the Statehood of Kosovo was neither subject to collective recognition nor that of non- recognition.

⁴⁰⁰ Grant, *The Recognition of States*, xx; Turk, “Recognition of States,” 68.

⁴⁰¹ Shaw, *International Law*, 468; Grant, *The Recognition of States*, xx.

⁴⁰² Crawford, *The Creation of States in International Law*, 161.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid., 173.

⁴⁰⁵ Ryngaert and Sobrie, “Recognition of States,” 473.

⁴⁰⁶ Pegg, *International Society and the De Facto State*, 5.

⁴⁰⁷ Arieff, “De Facto Statehood-The Strange Case of Somaliland,” 4.

d. *De Facto v. De Jure Recognition*

According some legal writers⁴⁰⁸, there is significant difference between *de facto* and *de jure* recognition⁴⁰⁹ of States. However, this difference merely qualifies the legal status of the entity as either *de facto* or *de jure* and not the nature of the recognition. As Aust explains, “recognition *de jure* means that the entity fully satisfies the applicable legal criteria; recognition *de facto* is only of the current position of the entity, and is therefore usually provisional”⁴¹⁰. A classic example is when United Kingdom recognized the Soviet Union as a *de facto* State in 1921 and a *de jure* in 1942⁴¹¹. Shaw argues that since the *de facto* recognition includes ambiguity, it gives States the chance to decide according to political facts and interests⁴¹². Thus, we could argue that the States’ recognition of Kosovo and Palestine fit under the *de facto* recognition, where the *de facto* does not itself include the exchange of diplomatic relations⁴¹³ and where the states are waiting to settle their final status through peaceful negotiations.

e. *The Premature Recognition*

Recognition in some cases, within State practice, comes before entities fulfil the Statehood criteria but become States and are accepted as members of the United Nations, e.g. Israel, Congo, and Kuwait. Kuwait’s legal personality “was not deemed extinguished by the UN even though it had been invaded, conquered and annexed to Iraq both in fact and under Iraqi law”⁴¹⁴. Again, politics changes the legal assumption, implying that recognition is not based on objective criteria but political ones.

⁴⁰⁸ Shaw, *International Law*, 460.

⁴⁰⁹ Aust, *Handbook of International Law*, 26.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² Shaw, *International Law*, 460.

⁴¹³ Ibid.

⁴¹⁴ S.C. res. 661, UN Doc. S/RES/661 (Aug.6.1990) (implementing measures to restore Kuwaiti government) Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 134.

f. The Conditional Recognition

The conditional recognition implies that “recognition made dependent upon the fulfilment of stipulation other than the normal requirement of statehood”⁴¹⁵. This type of recognition was used by the great powers in Europe after World War I where they required, as a condition of their recognition, that entities accept and sign treaties for protecting minorities’ rights⁴¹⁶. Another example is the recognition of PLO as a sole representative of the Palestinians, where the international community emphasized that the PLO recognizes the State of Israel and to denounce terrorism⁴¹⁷, as conditions for it to be recognized. This again brings us to the inevitable tension between legal order of Statehood and the States’ practices.

g. Implied Recognition

There is no clear way how States express their recognition to a new State, so while some scholars have argued that ‘it is necessary to be clear,’ on the recognition act with all the legal consequences⁴¹⁸, others argue that recognition can be implied by dealing with a State or government⁴¹⁹. To know whether or not an existing State recognizes an entity by implication, we need to look into certain circumstances, such as launching diplomatic relations and signing a bilateral treaty to justify the implied recognition⁴²⁰. For example, a congratulatory message to a new State upon its independence could be seen as recognition; however, a unofficial contact would consider as such⁴²¹. However, signing multilateral treaties such as the United Nations Charter does not mean that all the signed States recognize each other. This is a fundamental

⁴¹⁵ Crawford, *The Creation of States in International Law*, 544.

⁴¹⁶ Ibid.

⁴¹⁷ KIM MURPHY, “Israel and PLO, in Historic Bid for Peace, Agree to Mutual Recognition,” *Los Angeles Times*, September 10, 1993, http://articles.latimes.com/1993-09-10/news/mn-33546_1_mutual-recognition.

⁴¹⁸ Lauterpacht, *Recognition in International Law*, 346; Shaw, *International Law*, 463; Grant, *The Recognition of States*, 102.

⁴¹⁹ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 139.

⁴²⁰ Silverberg, “Diplomatic Recognition of States in Statu Nascendi,” 6.

⁴²¹ Shaw, *International Law*, 463.

approach as it means it will violate the principle of the equality of States⁴²², e.g., Israel and many Arab countries are UN members, but that does not change the Arab countries' non-recognition of the State of Israel⁴²³. In summary, implied recognition is not used in the modern States' practice because official recognition is preferred⁴²⁴.

In summary, the overwhelmingly political character of the recognition discussion is obvious. However, some analysts do not contend that neither is recognition a totally political issue, nor is it a legal one. The recognition of new States is an issue where both the "political state practice and normative international law inevitably blend together"⁴²⁵. I think no theory of recognition has explained the acts of States, because no political choice has gained universal acceptance. Therefore, as Crawford points out, "the assumption of political leaders that they are, or should be free to recognize or not to recognize on ground of their own choosing. If this is the case, the international states and rights of whole people and territories will seem to depend on arbitrary decisions and political contingencies"⁴²⁶. Therefore, that the recognition seem merely to mean to declare the existence of a State and not to create it.

3.3 Legal Consequences of Recognition

As we conclude, we'll note that recognition does not create a State; however it has effect on the international legal personality (ILP) of the new entity⁴²⁷. While we earlier concluded that the *de facto* State in practice has limited ILP, now we will look at the legal consequences of the recognition on the ILP at the international and national levels. We will note again that legal personality depends on the different theories of recognition, where in the Declaratory Theory, the

⁴²² Crawford, *The Creation of States in International Law*, 504.

⁴²³ Shaw, *International Law*, 464.

⁴²⁴ Ibid.

⁴²⁵ Ryngaert and Sobrie, "Recognition of States," 471.

⁴²⁶ Crawford, *The Creation of States in International Law*, 19.

⁴²⁷ Worster, "Law, Politics, and the Conception of the State in State Recognition Theory," 124.

new entity exists before recognition and regardless of the existing States; the Constitutive Theory on the other hand, implies that an entity is granted its rights and obligations under international law following its creation by recognition from existing States⁴²⁸.

a. National level

Here, we will look at the legal consequences of recognition on the domestic legal system of the recognizing state/states and the non- recognition. Firstly, as we discussed earlier, recognition is a unilateral act of a State, and that act has legal consequences. So recognition creates rights and obligations as per the recognizing state⁴²⁹, not for others. Therefore, the first legal consequence is that the recognizing State declares its willingness to have a diplomatic relation with the new State on the basis of State/state⁴³⁰. The new State after recognition, gains full international personality and no one can deny this new position.

Schoiswohl argues that in situation where doubts remain whether the entity fulfils the requirements of Statehood, recognition by the international community can balance this, where the recognition would have an ‘evidential value’ and could contribute to the fulfilment of the criteria of Statehood (particularly the criterion of effective control)⁴³¹. “Conversely, non-recognition presumptively reflects, he argues, non-fulfilment of the traditional criteria of Statehood (particularly the absence of effective control)”⁴³². That means that even if an entity

⁴²⁸ Ibid.

⁴²⁹ Ibid., 129.

⁴³⁰ Shaw, *International Law*, 466.

⁴³¹ Yaël Ronen, “Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of ‘Somaliland’ by Michael Schoiswohl,” *The American Journal of International Law* 99, no. 4 (October 1, 2005): 953–959, doi:10.2307/3396705.

⁴³² Ibid.

claims Statehood, if it does not qualify for it, recognition by States may affect it on a bilateral basis⁴³³, for example, Turkey and TRNC.

Another consequence is that the new State will be a subject for privileges and immunities within the domestic legal order⁴³⁴, which means the two States are ready to enter into optional or discretionary- diplomatic, political, culture or economic relations. However, as we stated in the *de facto* ILP, the entity could achieve some consular relations, although this would differ after getting full recognition, which could include opening a 'liaison office. For instance, Gaza for Morocco is different from having the embassy Full consular and diplomatic relations, thus seem to require (and are effects of) recognition⁴³⁵.

The relations between the new State and non-recognizing State/States, in principle, the non-recognition may mean that the State is not prepared to enter into treaties, diplomatic relations or other bilateral arrangements with the unrecognized entity⁴³⁶. However, the ILP does not depend on State recognition as such by other states. So the States, whether it is recognized or not, is still entitled to the rights and subject to the general duties of the international system, at least at the international level⁴³⁷. For example, in the case of *Great Britain Vs Costa Rica, 1923*, the United Kingdom alleged a certain claim against the Costa Rican obligations under international law, even if United Kingdom had not at that time recognized the Costa Rican government⁴³⁸. Here we can say that if Palestine gets UN admission, as a collective recognition, it means Palestine can allege a claim against Israel's obligation under the international law.

⁴³³ Crawford, *The Creation of States in International Law*, 158.

⁴³⁴ Shaw, *International Law*, 445.

⁴³⁵ Silverberg, "Diplomatic Recognition of States in Statu Nascendi," 7.

⁴³⁶ Martin Dixon, *Textbook on International Law* (Oxford University Press, 2007), 119.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

However, the Declaratory Theory contends that non-recognition does not affect the existence of the State, however, the State could be required by other States which do not recognize it, to comply with the international law norms⁴³⁹, e.g. if States enter into an international agreement which is signed by a State which is not recognized, the existing States have the right to ask for a fulfilment of the responsibilities under this agreement⁴⁴⁰.

b. International level

In general, recognition of a State by the international community has significant consequences for an entity and its relations with the international community. Without recognition, Kosovo and Palestine cannot benefit from bilateral aid or receive loans from international organisations; they also cannot access a lot of international recognition, especially from the ICC⁴⁴¹ or enter multilateral treaties, such as United Nations Convention on the law of the sea. Furthermore, no economic development can be reached in these entities because foreign investors will regard them as “failed states” and war-zones. Palestinians and Kosovars living abroad also face obstacles and problems related to their nationality and legal status. In general, they are subject to human rights violation because of the non-recognition of their State. For example, the rejection of Palestine’s acceptance of the ICC jurisdiction over Gaza 2008’s war, on the grounds that Palestine has to become a State for it to become party to the Rome Statute of the ICC. All these obstacles could be solved if Kosovo and Palestine had the collective recognition by the UN that would also enable them to access dozens of UN agencies.

Therefore, the recognition of Kosovo and Palestine as States would entitle them to all the privileges and responsibilities of Statehood under international law and also in the national legal

⁴³⁹ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 124.

⁴⁴⁰ Shaw, *International Law*, 471.

⁴⁴¹ See super note; 369, 370

system. On the other hand, for those States that do not recognize Kosovo and Palestine as States, under the Declaratory Theory, the entities will be entitled to the rights and obligations under the international law, and not in the domestic legal system. Under the Constitute Theory, and State practice, the legal status for Kosovo and Palestine would be a controversial matter.

3.4 The International Recognition in the International Organizations

As examined in the previous section, it seems the State practice supports the idea that ‘recognition creates the State’, where an entity becomes a State prior to engaging with international organizations. We will look at the United Nations and European Union in our case study because of their applicability.

3.4.1 Recognition of United Nations

To be admitted to the United Nations, an applicant must be a State. Article 4 of the United Nations Charter states that “Membership in the United Nations is open to ... states”⁴⁴². Article 11 (2) of the UN Charter requires Statehood to bring questions concerning international peace and security, or any other dispute before UN⁴⁴³. To be a part of the United Nations Security Council without voting concerning any dispute, the participant must be a State⁴⁴⁴. Also, an entity has to be a State, according to Article 93 (2) of the Charter, to become a part of the Statute of ICJ⁴⁴⁵. Therefore, as Crawford suggests, it seems to be an “opportunity for disagreement about development of notion of statehood in UN organs”⁴⁴⁶. We will, therefore, look at what a ‘State’ is according to the UN charter. We will also ascertain what kind of

⁴⁴² CONDITIONS OF ADMISSION OF A STATE TO MEMBERSHIP IN THE UNITED NATIONS (ARTICLE 4 OF THE CHARTER) ICJ Advisory opinion 1948, p 57,62 *ibid.*, 174.

⁴⁴³ Crawford, *The Creation of States in International Law*, 175.

⁴⁴⁴ Article 32 of the Charter *ibid.*

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

membership the UN has, and the membership criteria and the future of the Palestinian application to become a member of the UN.

a. What is a 'State' according to UN Charter?

The use of the term State by UN organs does not give us clear-cut meaning because it was used in different meaning in various situations⁴⁴⁷. For example, Palestine was invited to participate in the UN Security Council under Article 35 (2) of the Charter, which states that a “state which is not a Member of the United Nations may bring to the attention of the Security Council”⁴⁴⁸, where States only have the right to engage in S.C sessions⁴⁴⁹. Crawford has argued that the term ‘State’ was given different meanings for specific purposes, i.e. that may I be an entity would not justify being a ‘State’. Thus, “an entity which is not a State for the purpose of UN membership may, nonetheless be a State for purposes of admission to a regional or functional organization”⁴⁵⁰, for example, Palestine is a member of the UNESCO, a UN functional organ⁴⁵¹. But still there is significant role in the UN Charter in the definition of Statehood because it gives new understanding of collective recognition, which legitimizes States through recognition. This will be examined later.

Mainly, the UN Charter distinguishes between different memberships of the UN as the fifty-one *Original members*, who signed the Charter of the United Nations Conference on International Organization in San Francisco 1945 and the second membership that includes all *other states* which joined the UN after 1945⁴⁵². Also, the Charter has five permanent members

⁴⁴⁷ Ibid.

⁴⁴⁸ Article 35 (2) “Charter of the United Nations,” accessed October 11, 2012, <http://www.un.org/en/documents/charter/>.

⁴⁴⁹ “UNIFIL SRES523.pdf,” accessed October 11, 2012, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNIFIL%20SRES523.pdf>.

⁴⁵⁰ Crawford, *The Creation of States in International Law*, 175.

⁴⁵¹ “Palestine | United Nations Educational, Scientific and Cultural Organization.”

⁴⁵² “History of the United Nations,” accessed October 11, 2012, <http://www.un.org/en/aboutun/history/>.

(P5) including China, France, Russia, the United Kingdom, and the United States, who have veto power in the Security Council⁴⁵³. However, the UN has extended an Observer Status for two entities: the PLO and the SWAPO⁴⁵⁴, since the General assembly gave these ‘liberation movements’ an observer status, even if the Charter is silent on the issue of observer status⁴⁵⁵. We will discuss this more in regard to Palestine and the UN.

b. What are the UN’s Membership Criteria?

Article 4 (1) of UN Charter provides five requirements for admission to UN. Thus, an applicant must 1) be a state, 2) be peace loving, 3) accept the obligation of the Charter 4) be able to carry out the Charter obligation, and 5) be willing to do so⁴⁵⁶.

This Article implies that every member of UN is a State; however, that does not mean that the UN membership is a precondition for becoming State⁴⁵⁷, e.g. Switzerland joined the UN in 2002, yet no one denies that Switzerland had been a State before. Some academicians argue that the admission of new States to the UN is a good indicator that the entities fulfil the Statehood criteria: they are States because only States can join the UN⁴⁵⁸. But if one turns this assumption around, one can argue “that non- admission of entities willing to join the UN means that they do not fulfil the Statehood criteria and hence are solely entities with people without legal status”⁴⁵⁹. Does that mean if Palestine fails to obtain the UN membership then it is not a State? Of course not! Even if the UN Charter adopted the Traditional Statehood Criteria, the

⁴⁵³ “The UN Security Council,” *United Nations Foundation*, accessed October 12, 2012, <http://www.unfoundation.org/what-we-do/issues/united-nations/the-un-security-council.html>.

⁴⁵⁴ Crawford, *The Creation of States in International Law*, 193.

⁴⁵⁵ “Permanent Observer Mission of Palestine to the United Nations - Background Paper Related to Palestine Status,” accessed October 12, 2012, <http://www.un.int/wcm/content/site/palestine/pid/11550>.

⁴⁵⁶ Crawford, *The Creation of States in International Law*, 179; Article 4 (1) “Charter of the United Nations.”

⁴⁵⁷ Crawford, *The Creation of States in International Law*, 193.

⁴⁵⁸ Worster, “Law, Politics, and the Conception of the State in State Recognition Theory,” 165.

⁴⁵⁹ Hans Aufricht, “Principles and Practices of Recognition by International Organizations,” *The American Journal of International Law* 43, no. 4 (October 1, 1949): 679, doi:10.2307/2193259.

acceptance of new members has never been a legal question but a political one, with the existing States' interest implied to accept the new entity. This argument was cited in the ICJ admission opinion⁴⁶⁰ and as Crawford notes, "if the Charter permits certain political consideration to be taken into account, it is difficult to tell whether the real political factors at issue in any specific case have been permissible ones"⁴⁶¹.

Additionally, looking through the UN admission history, we can highlight many admission cases where the entities hardly fulfilled the Article 4 criteria such as: Kuwait, Congo, and Israel, whose admission is considered to be controversial but they were accepted to the UN⁴⁶². In other words, the UN admission history is misleading to what 'Statehood' is according to UN Charter⁴⁶³. Finally, as highlighted earlier, non-recognition does not mean that the entities cannot act as States with rights and obligation under the international law.

c. UN Membership procedures and their Criticism

If we look at Article 4 of the UN Charter, we can argue that UN shifted from the principle of effectiveness of Statehood to the principle of legitimacy. The principle of effectiveness has been deduced from Montevideo Convention, implying that an entity becomes the addressee of legal rights and obligations, which are connected to Statehood, after the fulfilment of the Montevideo Convention criteria. However, on the principle of legitimacy of States, an entity has to be legitimized by other States in order to satisfy the Statehood criteria and become a State. However, it depends on the individual State's will to recognise or not recognize a new State. So, the UN admission procedures moves back to legitimacy, with new entities requiring the UN's collective recognition to become a State.

⁴⁶⁰ Crawford, *The Creation of States in International Law*, 180.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid., 181.

Secondly, if we conclude that the recognition of State today seems to be based on collective recognition by the international community, assembled in the UN, and since the UN admission Criteria seems easy to fulfil and it seems to have a universal membership⁴⁶⁴, an entity has to be peace loving, and to accept and adhere to the Charter's obligations. So where is the problem? The problem lies with the UN admission procedures, with membership tending to be complicated. If 130 out of 193 UN member States recognized Kosovo as a State, and 130 of them recognized Palestine, why are the two nations not a States in the UN? That is a difficult question, but with quite a simple answer. Article 4 (2) says;

The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

It is true that the General Assembly, consisting of all member States, is final in deciding about membership, but the real selection takes place in the Security Council. Specifically, decisions that will be considered for members will be taken by the Security Council, with a requirement of nine votes in the Security Council, without a use of veto power from one of the five permanent members (P5), which could stop the Security Council decision. In other words, the arbitrary composition of the Security Council can affect the vote without the influence of the General Assembly, but even more dramatic is the fact that the P5 have to affirm their readiness. For instance, since US is a close ally of Israel, it is in a position to block any recognition of Palestine as a State, although a large majority of States would avow a collective recognition. The same is true for Kosovo where Russia and China have political interest not to recognize Kosovo as a State.

⁴⁶⁴ Worster, "Law, Politics, and the Conception of the State in State Recognition Theory," 165.

What we can conclude from this? The UN admission framework and its collective recognition to decide the destiny of new entities and their people depends as whole, upon the P5 or five States of the international community to legislate for the world.

3.4.2 The European Union Recognition

a. Recognition Criteria in the EU

The Declaration on the Guidelines on the recognition of New States in Eastern Europe and the Soviet Union was adopted by the EU Member States' Ministers for Foreign Affairs in 1991, in response to the collapse of S.F.R of Yugoslavia⁴⁶⁵. The declaration stated that the condition that the new entity had to fulfil before they could be recognized as; a minimum standards of the rule of law, democracy and human rights, guarantee of minority rights, respect for the inviolability of existing boundaries, and acceptance of all relevant commitments with regard to disarmament and recourse to arbitration⁴⁶⁶. The difference between the declaration and the traditional Statehood framework mentioned the right of self-determination as an important principle to be taken into consideration of the EU and its members in their recognition policies⁴⁶⁷. However, Roland Rich pointes out that the guidelines and the European States practice disregarded one of the classical criteria for recognition, which is "the criterion of effectiveness of the government" of the new State⁴⁶⁸.

b. Recognition in Practice

In practice, the European Community decided in 1992 to recognize Slovenia and Croatia⁴⁶⁹. However, the recognition criteria could be applied in a flexible way⁴⁷⁰; for instance,

⁴⁶⁵ Turk, "Recognition of States," 68.

⁴⁶⁶ Ryngaert and Sobrie, "Recognition of States," 475.

⁴⁶⁷ Ibid.

⁴⁶⁸ Turk, "Recognition of States," 68.

⁴⁶⁹ Ryngaert and Sobrie, "Recognition of States," 476.

⁴⁷⁰ Ibid.

while Croatia was suffering from a lack of effective government, it had control over its territory; it also violated the EU recognition requirement where the Croatian constitution did not fully meet the minority protection requirement⁴⁷¹. Again under the EU recognition framework, political and legal elements seem to be inevitable in relation to recognition as we explained about the recognition of both Macedonia, Bosnia and Herzegovina⁴⁷².

3.5 The International Recognition: Kosovo and Palestine

There is a large gap between international recognition and genuine independence based on the Statehood criteria, as it was explained in the First and Second Chapter in regard to Kosovo and Palestine as *de facto* States seeking to achieve international recognition. If we conclude that States and the international organizations' practice of recognition is based only on political reasons, we will argue that the non-recognition of Kosovo and Palestine is just a political act. Thus, we will look at the process of gaining international community recognition by Kosovo and Palestine. We will divide the case into the unilateral recognition of Kosovo and Palestinian States and then the International Organizations' recognition of both.

3.5.1 The State of Kosovo and International Recognition

The Republic of Montenegro was formally admitted to the United Nations in June, 2006, followed by a number of countries, which recognized the new State, which became a member of the Council of Europe on November, 2007. Montenegro had a federation with Serbia, a part of which was known as the former Socialist Federal Republic of Yugoslavia (S.F.R Yugoslavia), successes to severance of its federation with by holding a public referendum⁴⁷³. Kosovo was a part of Serbia, which was a part of S.F.R Yugoslavia that was already in the process of

⁴⁷¹ Ibid.

⁴⁷² see super note 84ibid.

⁴⁷³ Worster, "Law, Politics, and the Conception of the State in State Recognition Theory," 117.

dissolution. It declared its independence in February, 2008. The ICJ ruled on the legality of Kosovo's independence⁴⁷⁴ in October, 2008. Both were have a unique ethnic adenitises⁴⁷⁵. Both have enjoyed a large degree of autonomy since the dissolution of the S.F.R Yugoslavia. Note that, Montenegro was a republic in the S.F.R Yugoslavia, while Kosovo was a part of Serbia in that time. So, why has Montenegro gained international recognition while Kosovo has not? The international recognition is always the answer and it is always about politics.

a. International Organizations and Kosovo Recognition

Responding to Kosovo's declaration of independence, the UN General Assembly requested the ICJ to give an advisory opinion; 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with International Law?'⁴⁷⁶. The court ruled that the declaration was not incompatible with the UN Security Council Resolution 1244 (1999), with the Constitutional framework of Kosovo (2001), or with general international law⁴⁷⁷. While the ICJ did not take a position on Kosovo's recognition merely because this would fall outside the scope of the narrow question posed by UN General Assembly, it emphasized that the international law contains no prohibition on declarations of independence, which as one analyst claimed "creat[es] the impression that the international law remains silent in the face of State creation and its consequence including recognition"⁴⁷⁸. So, even if the declaration was lawful (according to the court ruling), does this mean that the recognition of Kosovo as a State is lawful or not⁴⁷⁹? In any event, under the recognition

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ See online: <http://www.icj-cij.org/docket/files/141/15987.pdf>, International Court of Justice advisory opinion of "THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO"

⁴⁷⁷ Ryngaert and Sobrie, "Recognition of States," 479.

⁴⁷⁸ Ibid., 468.

⁴⁷⁹ Ibid., 379.

framework, as discussed above, international law only prohibits recognition as “lawful of a situation created by serious breach of an obligation arising under a peremptory norm of general international law”⁴⁸⁰. However, it is difficult to say whether secession from a parent State is breach of the international law, since the international law does not permit secession, nor does it prohibit it⁴⁸¹. Also, the ICJ advisory opinion did not consider secession as an illegal means of creation of a State⁴⁸². Therefore, we can conclude that the creation of Kosovo State did not breach international law, but the question remains on why Kosovo is not a member of the UN or at least in the EC. After Kosovo’s declaration of independence, the EC Council noted “that member States will decide, in accordance with national practice and international law, on their relations with Kosovo”⁴⁸³, and as it was explained that

In reality, ‘national practice’ – this is diplomatic parlance for political expediency – has sidelined the role of international law in the recognition process. This made a uniform EC recognition practice a non-starter. An exhaustive and elaborate normative framework, as used by the European Community to deal with the dissolution of Yugoslavia a decade ago, was nowhere to be seen⁴⁸⁴.

Next, we will look at the international reaction to Kosovo’s Independence, who recognized Kosovo, who did not and why.

b. The Unilateral Recognition of Kosovo

Theoretically, the act of recognition is based on two elements, the political element where the State has the discretion to decide whether or not to recognize a new entity, and the legal element, where the traditional, and additional Statehood criteria have the final word on determining whether the entity is a State or not. This means the recognition of Kosovo had two

⁴⁸⁰ Ibid., 479.

⁴⁸¹ William R. Slomanson, “Palestinian Statehood: A Secessionist Dialogue,” *SSRN eLibrary*, accessed March 5, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729425.

⁴⁸² Ryngaert and Sobrie, “Recognition of States,” 479.

⁴⁸³ Ibid., 480.

⁴⁸⁴ Ibid.

elements; while in Chapter One, we examined the legal element, here we will look at the political component of the recognition. When Kosovo declared its independence from Serbia, in 2008, the international community responded to this declaration in different ways.

- States Recognition of Kosovo as State

Following the Declaration, eighty-eight States, including the USA, a majority of the European Union, majority of NATO members and approximately a third of the UN members⁴⁸⁵ recognized Kosovo as a State. These countries believe that even if 1244 resolution does not explicitly recognize Kosovo's independence, we can find the legality of the declaration in a wider general international law rules, such as the right of self-determination⁴⁸⁶. Additionally, resolution 1244 does not limit Kosovo's final status, the sovereignty and territorial integrity guarantee for the Federal Republic of Yugoslavia as "non-binding preambular affirmation of a general principle"⁴⁸⁷. However, I think even if these States reacted according to the recognition based on the legal framework, or even on moral consideration, it is merely a political consideration, where these States refer to "the need for stability, peace, and security in the region, and the positive effect recognition would have on these parameters" as political justifications for their recognition⁴⁸⁸.

- States that Do Not Recognize Kosovo as State

If States which recognized Kosovo as State reacted from a political position, the unrecognizing states also depended on political considerations. However, they used the international law to justify their arguments. Serbia for instance, insisted that the declaration was a

⁴⁸⁵ Nevo and Megiddo, "Lessons from Kosovo"; Wilson, "Self-determination, Recognition and the Problem of Kosovo."

⁴⁸⁶ Robert Muharremi, "Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited," *Review of Central and East European Law* 33, no. 4 (2008): 401–435.

⁴⁸⁷ *Ibid.*, 403.

⁴⁸⁸ Ryngaert and Sobrie, "Recognition of States," 480.

“forceful and unilateral secession of part of its territory, in violation of Security Council Resolution 1244”⁴⁸⁹. For that reason, the UN resolution 1244 does not provide “a legal basis for Kosovo’s independence and that Serbia, as the presumed sovereign power, must consent to independence for it to be legal”⁴⁹⁰. Other international disapprovals came from the Russian Federation, the People’s Republic of China, and other EU states, such as Spain and Cyprus⁴⁹¹. Briefly, they provoked the “notions of state sovereignty and territorial integrity” as reasons to not recognize Kosovo⁴⁹². Some scholars have argued that the reason behind this disapproval stems from domestic concerns of these States⁴⁹³, where substantial numbers of these States have to deal with minorities and secession claims themselves⁴⁹⁴. They add that the Kosovo case could be ‘a dangerous precedent’ for other entities around the world, for example, Georgia and entities of Abkhazia and South Ossetia⁴⁹⁵.

Additionally, an awkward statement of February 2008 by the Council of the European Union emphasized Serbia’s territorial integrity and sovereignty, and at the same time argued that these principles would not fully apply to the *sui generis* case of Kosovo:

The Council reiterates the EU’s adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions⁴⁹⁶

⁴⁸⁹ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence.”

⁴⁹⁰ Muharremi, “Kosovo’s Declaration of Independence,” 403.

⁴⁹¹ Ibid

⁴⁹² Ryngaert and Sobrie, “Recognition of States,” 480.

⁴⁹³ Nevo and Megiddo, “Lessons From Kosovo The Law of Statehood and Palestinian Unilateral Independence,” 6.

⁴⁹⁴ Ryngaert and Sobrie, “Recognition of States,” 480.

⁴⁹⁵ Frederic P. Miller, Agnes F. Vandome, and John McBrewster, *International Recognition of Abkhazia and South Ossetia* (Alphascript Publishing, 2010), 5.

⁴⁹⁶ Ryngaert and Sobrie, “Recognition of States,” 481.

In summary, we can say reaction to either recognition or non-recognition is based on purely political considerations, where given reasons by the existing States “are often limited to a mere mentioning of ‘international law’, ‘the rule of law’, or a vague reference to the right to self-determination or the protection of minorities”⁴⁹⁷. And as the US representative stated, “[a]s a practical matter, Kosovo’s independence is irreversible”⁴⁹⁸.

So as we argued, recognition is mainly a political act therefore, non-recognition does not affect the Statehood of Kosovo, and should not seek international recognition because it is a State.

3.5.2 The State of Palestine and International Recognition

As stated in the previous chapter, the international law norms such as self-determination, territorial integrity and the legality of State creation, are all legal foundations required to recognize Palestine as State. Combined with political considerations such as the international stability, the long history of human rights violation and the 64 years of occupation, we must argue that Palestine is a State, also because more than 120 states have recognized it.

a. International Organizations and Palestine Recognition

The ‘question of Palestine’ has a long history and has been placed on the United Nations agenda, and on the UN General Assembly Resolution 181. Also, in the UN Partition Plan to the holy land of ‘Palestine’ into Jewish and Arab States, where the UN recognized the Palestinians’ right of Self-determination, some legal writers have argued that it could be the main principle of Palestine’s admission to the UN⁴⁹⁹.

⁴⁹⁷ Ibid., 480.

⁴⁹⁸ Wilson, “Self-determination, Recognition and the Problem of Kosovo,” 462.

⁴⁹⁹ Crawford, *The Creation of States in International Law*, 426.

- Palestine as a UN Observer

Palestine is not a member of UN. However, in 1974, the Palestinian Liberation Organization was invited 'to participate in the sessions and the work of the General Assembly in the capacity of observer'⁵⁰⁰. Later, in 1988 the General Assembly authorized the Secretariat to circulate documents submitted by the PLO directly to member States, which meant that the PLO does not need another member to act as intermediary⁵⁰¹. In the same year, the Assembly changed the designation of the PLO to 'Palestine'⁵⁰². However, as Crawford argues;

it is too prescriptive to say that observer status is necessarily a step on the way to statehood. Rather it is a form of remedial action in certain cases where a group with legitimate grievances lacks recourse to appropriate forums elsewhere, the move towards greater international status is a possible but by no means inevitable outcome⁵⁰³

- Palestine Full membership admission Vs. non-member State Status

In 2011, Palestinian President Mahmoud Abbas sought UN recognition of a Palestinian State based on the 1967 borders, which included the West bank, Gaza Strip and East Jerusalem. Due to political pressure, Palestinians moved from requesting for a 'full state member' to 'non-member state' rather than its current observer status, which mainly needs the Security Council approval⁵⁰⁴.

There is a difference between Full UN membership and State non-members. Articles 32, 35 and 93 of the UN Charter, stipulate State statuses. For political and economic problems, it

⁵⁰⁰ "Permanent Observer Mission of Palestine to the United Nations - Background Paper Related to Palestine Status."

⁵⁰¹ GA res 43/160 December 1988 Crawford, *The Creation of States in International Law*, 194.

⁵⁰² GA res 43/177, December 1988 *ibid*.

⁵⁰³ *Ibid.*, 195.

⁵⁰⁴ Vatican is a Non-member State having received a standing invitation to participate as observer in the sessions and the work of the General Assembly and is maintaining a permanent observer mission at Headquarters. see "Q&A"; "The Permanent Observer Mission of the Holy See to the United Nations," accessed October 17, 2012, <http://www.holyseemission.org/>.

suggests the provision of a “non-member status” as a solution to entities that do not have full membership, which prevents them from, for instance, accessing the ICJ and membership to the relevant UN regional economic commission. By this solution, these entities are not excluded from the family of nations, since they are helped to develop until they reach the level of States and get full membership⁵⁰⁵.

Many objections were provoked on Palestine’s request to the UN General Assembly. Firstly, the United States argued that such recognition will violate the Oslo agreement⁵⁰⁶. However, this argument goes against the argument that recognition is a ‘unilateral act’ and has its legal consequences among the newly-recognized States and the recognizing State/States. For example, even if Palestine was admitted to the UN that does not mean all the UN members should recognize it. Therefore, the Palestinian admission to any Intergovernmental Organization would affect the peaceful negotiations just as it would change the same rules where Palestine will become a State.

b. The Unilateral Recognition of Palestine

- States Recognized Palestine as State

Almost over 130, States including 110 UN members, recognized Palestine as a free, independent and sovereign State within its full pre-1967 borders⁵⁰⁷. The main argument for such recognition is the stalled peace talks since 2008 due to the Israeli government’s intransigence and the continued building of settlements. Actually it could be a step forward when, as an agreement between Israel and Palestine since 1993, the latter could be acknowledged as a State”⁵⁰⁸.

⁵⁰⁵ Crawford, *The Creation of States in International Law*, 183.

⁵⁰⁶ See super note; 240,241

⁵⁰⁷ “Palestinian Statehood Recognized by over 100 Countries, Iceland Most Recent in Europe to Do so | News | National Post.”

- States That Do Not Recognize Palestine as State

United States and Israel strongly oppose the Palestinian Statehood claim, where they argue that the Statehood should be achieved through negotiations⁵⁰⁹. Another reason given by opponents to Palestine's recognition is that it would send a "clear message to all ethnic communities with claims for independence that they can accomplish their goals by unilateral measures without the need for genuine negotiations, which could harm regional and the international stability"⁵¹⁰. Others say that giving such recognition to Palestine would be against the Declaratory Theory, which recognizes an entity without fulfilling the Traditional Statehood Criteria, and that it could cause serious harm to the peace process⁵¹¹. According to Professor De Waart "Palestine has been recognized as a state by a great majority of members of the United Nations. Western states, however, are still conspicuous by their absence under the pretext of legal or political arguments."⁵¹² Therefore,

We can only wait and observe the way the international political system, but more particularly the West, adapt to a rearrangement of national dominance with the U.N. and a shift in the emphasis of supporting norms and values⁵¹³.

The above conclusion was an observation made in 1977, and I think it has not change but I hope that this will change in the coming months.

3.6 Conclusion

International recognition is a complicated issue under international law, where the spheres of law and politics are the basis for consideration outside the realm of the objective.

⁵⁰⁸ Crawford, *The Creation of States in International Law*, 435.

⁵⁰⁹ Helene Cooper, "Obama Explains Opposition to Palestinian Statehood Bid," *The New York Times*, September 21, 2011, sec. World, <http://www.nytimes.com/2011/09/22/world/obama-united-nations-speech.html>.

⁵¹⁰ Becker, *International Recognition of a Unilaterally Declared Palestinian State*.

⁵¹¹ Ibid.

⁵¹² quoted from; Paul De Waart "The legal status of Palestine under international law" 1996 [Birzeit University Law Center Encounters] Silverberg, "Diplomatic Recognition of States in Statu Nascendi," 6.

⁵¹³ Silverburg, "Palestine Liberation Organization in the United Nations," 392.

Some argue that this dual feature of recognition seem to be reasonable, because States play two roles in the international system, i.e., protecting their own interest and acting in the favor of the international system.

We can conclude that recognition does not create the State or the government, but it is good evidence of its existence. New States do not require recognition. Recognition of a new foreign entity has both international and domestic ramifications, where countries use it to further their foreign and domestic policy goals. Some legal scholars have argued that this is mainly because the international system “lacks a central authority, and an entity can only fully enter it by explicit or tacit consent of other system participants: States, The UN could be the ‘central authority, however, in practice, we examined that the UN emphasizes “the political or honorific element of statehood”⁵¹⁴, i.e., UN application criteria had non-objective practice, where it admitted many States in violation of the principle of Statehood, and where the P5 control the admission procedures.

International law is made by States and breached by States. Arguing that an entity’s existence should be dependent on recognition by other States brings a risk of abuse of this power because we cannot guarantee the objectivity of the States since each works for its own political interests. I think it is important to form a legal rule to govern recognition cases, for more stability in the international community. The possibility of changing the UN admission procedures, or at least opening membership to its General Assembly to every State that possess significant level of independence, should be explored. This can lead to international stability and could solve the controversy surrounding the State recognition issue.

⁵¹⁴ Crawford, *The Creation of States in International Law*, 175.

Conclusion

This thesis has traced the notion of Statehood, its traditional and additional criteria, and the *de facto* States notion under international law. We dealt with international recognition, where we argued that recognition should not be a criterion for Statehood.

As we saw earlier, theoretically, Statehood is based on the principal of effectiveness, where an entity becomes a State after the fulfilment of the traditional criteria such as a permanent population, a defined territory, an effective government, and capacity to enter into relations with other States. Two hypotheses could happen under this principle, either the entity will fulfil the criteria and become a State, or it will fail to fulfil these criteria. Many legal scholars have argued that additional criteria, such as self-determination, could balance such failure of the fulfilment of the Statehood criteria. This approach dominated the creation of new states in the decolonization process, e.g.; the Congo, which failed to meet the effective governmental criterion, but was recognized as State.

However, in many cases, the entity can fulfil the Statehood criteria and yet its claim will be rejected. Our explanation of such case is that the political State practice interferes in the legal assumption and causes chaos in the international system. For example, Kosovo and Palestine, as explained earlier, are States with effective government control over their population, a defined territory, and the capacity to enter into relations with other States. However, Kosovo and Palestine have not yet attained full State personality and thus have limited capacity to be a part of international organization such as the UN and EU, or to enter into multilateral treaties, where statehood is a precondition to such agreement. The reason is that the political element of recognition interferes with a shift from the principle of effectiveness of Statehood to the legitimacy principle, where recognition creates a 'State'. For instance, as long as Russia and

China do not have the political interest to recognize Kosovo as state, it will remain a *de facto* State with limited ILP. The same applies to the United States and Israel's recognition of Palestine.

Thus, no matter how much Kosovo and Palestine appears to be States in practice, their birth cannot be achieved until this political discretion of State recognition is balanced. Some legal writers argue that the solution is to have a central organization that would rule on Statehood on a legal basis, by changing the UN admission procedures, where decision of statehood would be a mandate of the General Assembly, where State are represented on equal basis. By this approach, we could balance between the two recognition theories, where the entity would become a State with its fulfilment of objective criteria (Declaratory Theory), while the recognition act, mainly a collective recognition by the UN General assembly, would be a political unilateral act of the State, yet it would block the right to be State. This means that States still free to recognize or not to recognize an entity accept the legal consequences of recognition. In this way, the principle of equality among States still be guaranteed by accept obligations on their free will. As we mentioned before, admission to UN does not mean that the entity would be recognized by the States that rejected its recognition. For instance, Arab states and Israel are full sovereign States; however, they do not recognize each other, but that does not mean that Arab States cannot claimed violation of international norms by Israel.

Finally, international law is the State law that are made by States and breached by them since political interests is crucial in the Statehood of Kosovo and Palestine.

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