



Department of European Public Law
University of Zagreb Faculty of Law

Croatian Yearbook of European Law and Policy

ISSN 1848-9958 (Online) | ISSN 1845-5662 (Print)

Journal webpage: <https://www.cyelp.com>

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Suggested citation: S Novak, 'Can the EU Make Member States Recognise Kosovo?' (2023) 19 CYELP 299.

DOI: 10.3935/cyelp.19.2023.526

 <https://www.cyelp.com/index.php/cyelp/article/view/526>

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 Published by University of Zagreb

 Published online: 12 December 2023

OPEN ACCESS

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CAN THE EU MAKE MEMBER STATES RECOGNISE KOSOVO?

Stjepan Novak*

Abstract: Because of their internal situations, Cyprus, Greece, Romania, Slovakia and Spain do not recognise Kosovo. Aware of its inability to create a common view, as in other cases, the European Council has noted that 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo' on a sui generis basis. Nevertheless, the EU has engaged in de facto recognition of Kosovo by treating it as an independent State. Their obligations rooted in a duty of sincere cooperation and mutual solidarity mean that the five Member States that do not recognise Kosovo may not obstruct the EU's 'engagement without recognition' policy and, in this way, participate in de facto recognition of Kosovo. After some introductory remarks, the specific nature of recognition of States from the perspective of EU law will be explored. The section after that will deal with Member States' obligations regarding recognition when the EU has adhered to a certain recognition policy. The fourth section will investigate the sui generis case of Kosovo in specific circumstances defined by EU law. The paper concludes with some final remarks.

Keywords: recognition of States, de jure and de facto recognition, duty of sincere cooperation, duty of mutual solidarity, Kosovo.

1 Introduction

According to the Institute of International Law Resolution, the recognition of a new State is a free act by which countries acknowledge the existence of a politically organised society on a defined territory, independent of any other State, which is capable of entering into relations with other States, and which expresses a desire to be accepted as a member of the international community.¹ These conditions coincide with the Montevideo Convention criteria for statehood: (a) a permanent population; (b) a defined territory; (c) a government; (d) the capacity to enter into relations with other States.² In the last century, new conditions were created by the

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¹ Justitia et Pace Institut de Droit International, Session de Bruxelles – 1936, 'La reconnaissance des nouveaux Etats et des nouveaux gouvernements' <https://www.idi-ii.org/app/uploads/2017/06/1936_bru_x_01_fr.pdf> accessed 12 June 2023.

² Montevideo Convention on the Rights and Duties of States <<https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>> accessed 12 June 2023. See James R Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 45.

international community and particularly the European Communities, such as respect for human rights, democracy and minority rights.³

This can be seen in the Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'⁴ and the 'Declaration on Yugoslavia',⁵ which intrinsically link recognition with a respect for human rights in the broadest sense, as well as respect for the UN Charter and other international law acts that ensure respect for human rights.⁶

Furthermore, these conditions are in accordance with Article 41 of the Responsibility of States for Internationally Wrongful Acts, according to which 'no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'.⁷ Article 40 refers to an 'obligation arising under a peremptory norm of general international law'. This means that not only is respect for human rights a *conditio sine qua non* for recognition, but that recognition of a State that does not respect human rights or that has been created as a result of or in connection with such a violation would itself be violation of international law.⁸

From the point of view of international law, Kosovo should be recognised as an independent country. Not only are all the Montevideo criteria for statehood satisfied, but the International Court of Justice (ICJ) has declared that the Unilateral Declaration of Independence of Koso-

³ Edward Newman and Gëzim Visoka, 'The European Union's Practice of State Recognition: Between Norms and Interests' (2018) 44(1) Review of International Studies 1, 3 <<https://eprints.whiterose.ac.uk/129089/1/Newman%20and%20Visoka%20-%20EU%20Practice%20of%20State%20Recognition.pdf>> accessed 12 June 2023; James Ker-Lindsay 'Engagement without Recognition: The Limits of Diplomatic Interaction with Contested States' (2014) 91(2), International Affairs, 1, 5 <http://eprints.lse.ac.uk/60177/1/Ker-Lindsay_Engagement%20without%20recognition.pdf> accessed 12 June 2023.

⁴ Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991) <<https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/>> accessed 12 June 2023.

⁵ Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) <<https://www.dipublico.org/100637/declaration-on-yugoslavia-extraordinary-epc-ministerial-meeting-brussels-16-december-1991/>> accessed 12 June 2023.

⁶ Matthew CR Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66(1) British Yearbook of International Law, 333, 372.

⁷ Cedric Ryngaert and Sven Sobrie 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24(2) Leiden Journal of International Law 468, 473 <<https://dspace.library.uu.nl/handle/1874/241831>> accessed 12 June 2023; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 12 June 2023.

⁸ Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Brill 1990) 273; Jure Vidmar, 'Crimea's Referendum and Secession: Why it Resembles Northern Cyprus more than Kosovo' (EJIL Talk! Blog of the European Journal of International Law, 20 March 2014) <<https://www.ejiltalk.org/crimea-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/>> accessed 12 June 2023.

vo did not violate international law.⁹ The European Parliament has on multiple occasions encouraged those EU Member States which have not already done so to recognise the independence of Kosovo.¹⁰ Those States are Cyprus, Greece, Slovakia, Spain and Romania. The Commission has concluded various agreements with Kosovo, and the Court of Justice of the European Union (CJEU) has made moves in the same direction.¹¹ However, there is no doubt that the EU cannot recognise Kosovo on behalf of its Member States, and nor can it oblige its Member States to do so. Nevertheless, the question arises as to whether it is able to do so indirectly or, to be more precise, can it make its Member States recognise Kosovo de facto without de jure recognition?¹² The paper tackles this question. For this purpose, after some introductory remarks, the specific nature of the recognition of States from the perspective of EU law will be explored. The chapter after that will deal with Member States' obligations regarding recognition when the EU has adopted a certain policy. The fourth section will investigate the sui generis case of Kosovo¹³ in specific circumstances defined by EU law. The paper concludes with some final remarks.

This paper will not consider the legality of Kosovo's independence or its recognition. The paper tackles the issue of the recognition of Kosovo and the specific situation arising from the lack of unanimity among EU Member States on the question.

2 Recognition of States from the EU law perspective

'The EU itself, does not have the competency to recognise states, only individual member states do.'¹⁴ This quote from the answer given by High Representative / Vice-President Ashton on behalf of the Commission confirms the fact that the recognition of other States is the exclusive right of each State and that participation in any international organisation cannot result in the deprivation of this right for Member States of that organ-

⁹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, 403 <<https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>> accessed 12 June 2023.

¹⁰ European Parliament resolution of 5 February 2009 on Kosovo and the role of the EU <https://www.europarl.europa.eu/doceo/document/TA-6-2009-0052_EN.html> accessed 12 June 2023; European Parliament resolution of 6 July 2022 on the 2021 Commission Report on Kosovo (2021/2246(INI)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0285_EN.html> accessed 12 June 2023.

¹¹ Case C632/20 P *Kingdom of Spain v Commission* ECLI:EU:C:2023:28.

¹² Juraj Andrassy, Božidar Bakotić, Maja Seršić and Budislav Vukas, *Međunarodno pravo I. dio*, (Školska knjiga 2010) 92.

¹³ European Commission, General Affairs and External Relations, press release 2851st Council meeting <https://ec.europa.eu/commission/presscorner/detail/en/PRES_08_41> accessed 12 June 2023.

¹⁴ European Parliament, Parliamentary Question No E-0006540/2014, Answer given by High Representative/Vice-President Ashton on behalf of the Commission 24 October 2014 <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-006540&language=EN>> accessed 12 June 2023.

isation. This is in line with Article 4(1) of the Treaty on European Union (TEU), according to which competences not conferred upon the EU in the Treaties remain with the Member States, and the right of recognition of new States is in no way conferred upon the EU.

Furthermore, recognition is a completely voluntary act and the discretionary right of each State.¹⁵ An obligation to recognise a State which has met all the criteria for recognition under international law does not exist.¹⁶ Were this the case, as Andrassy claims, a situation would result in which every State that did not recognise that State would be violating international law.¹⁷

However, although the EU, from a legal point of view cannot recognise States or oblige its Member States to do so, it can undertake actions equivalent to recognition. This is a fact which is demonstrated not only by EU collective recognition policies in the cases of the former Soviet Union and Yugoslavia but also in its non-recognition policies. This demonstrates that the EU can influence its Member States concerning their recognition policies.¹⁸ For example, the Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' explicitly states that the 'Community and its Member States will not recognize entities which are the result of aggression', and the commitment to these principles opens the way to recognition by the Community and its Member States.¹⁹ Moreover, the Declaration on Yugoslavia sets out that 'the Community and its Member States agree to recognise the independence of all the Yugoslav Republics fulfilling all the conditions set out below'.²⁰ In 2008, the EU Council called on Member States not to recognise the proclaimed independence of Abkhazia and South Ossetia following Russia's unilateral decision to recognise their independence.²¹ This is a clear signal that the EU can influence the recognition policy of its Member States by creating for them quasi-obligations to recognise or

¹⁵ Ker-Lindsay (n 3) 6.

¹⁶ See Crawford (n 2) 22; a different claim is made in Hersch Lauterpacht, 'Recognition of States International Law' (1944) 53 (3) *The Yale Law Journal* 385.

¹⁷ Andrassy (n 12) 91.

¹⁸ Newman and Visoka (n 3) 8.

¹⁹ Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991) <<https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/>> accessed 12 June 2023. For more, see Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4(1) *European Journal of International Law*, 36 <<http://www.ejil.org/pdfs/4/1/1207.pdf>> accessed 13 June 2023.

²⁰ Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) <<https://www.dipublico.org/100637/declaration-on-yugoslavia-extraordinary-epc-ministerial-meeting-brussels-16-december-1991/>> accessed 12 June 2023; Vidi and Andrassy (n 12) 95.

²¹ Extraordinary European Council, Brussels 1 September 2008 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/102545.pdf> accessed 12 June 2023.

not to recognise new States.²²

The EU has dealt with various situations regarding the recognition of countries.

In the case of South Sudan, the Declaration by the EU and its Member States on the Republic of South Sudan's independence does not mention 'recognition', but states that the EU and its Member States 'warmly congratulate the people of South Sudan on their independence' and 'look forward to further developing a close and long-term partnership with the Republic of South Sudan and its people'.²³

In its resolution of 17 December 2014 on the recognition of Palestine statehood, the European Parliament does not recognise Palestine but 'supports in principle recognition of Palestinian statehood', since 'the recognition of the State of Palestine falls in the competence of the Member States'.²⁴

In an answer to a parliamentary question given by Mr Rehn on behalf of the Commission, it is emphasised that the so-called 'Turkish Republic of Northern Cyprus' is recognised neither by the European Union nor by any of its Member States.²⁵

In its document 'Visa liberalisation for Taiwanese', the EU Council emphasises that the EU does not recognise Taiwan as a sovereign State.²⁶ For the EU, 'Taiwan is a reliable and valued like-minded partner in Asia. The EU and Taiwan share common values, such as democracy, the rule of law and human rights'.²⁷ In addition, the EU develops 'regular contacts and cooperation in economic, trade, research, science and technology, education and culture as well as environmental issues with the Taiwanese authorities'.²⁸ Nevertheless, since no EU Member State rec-

²² Newman and Visoka (n 3) 6.

²³ Declaration by the EU and its Member States on the Republic of South Sudan's independence, 9 July 2011 <https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/123591.pdf> accessed 12 June 2023.

²⁴ European Parliament resolution of 17 December 2014 on recognition of Palestine statehood (2014/2964(RSP)) <https://www.europarl.europa.eu/doceo/document/TA-8-2014-0103_EN.html> accessed 13 June 2023; Jessica Almqvist, 'EU and Recognition of New States' (2017) Euborders Working Paper 12, 11 <https://www.researchgate.net/publication/319903887_EU_and_the_Recognition_of_New_States> accessed 13 June 2023.

²⁵ Parliamentary question - E-5542/2007(ASW), answer given by Mr Rehn on behalf of the Commission, 19 December 2007 <https://www.europarl.europa.eu/doceo/document/E-6-2007-5542-ASW_EN.html?redirect> accessed 12 June 2023.

²⁶ Council of the European Union, Visa liberalisation for Taiwanese, Brussels, 25 November 2010 16851/10 PRESSE 31 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/118011.pdf> accessed 13 June 2023.

²⁷ European Economic and Trade Office in Taiwan, The European Union and Taiwan <https://www.eetas.europa.eu/delegations/taiwan/european-union-and-taiwan_en> accessed 30 October 2023.

²⁸ Council of the European Union, Visa liberalisation for Taiwanese, Brussels, 25 November 2010 16851/10 PRESSE 31 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/118011.pdf> accessed 13 June 2023.

ognises Taiwan, despite fostering strong economic relationships with it, the EU cannot do so itself, not even de facto as in some of the abovementioned cases.

The EU has issued a document entitled 'The EU's non-recognition and engagement policy towards Abkhazia and South Ossetia'.²⁹ In addition, in its document 'Declaration by the High Representative on behalf of the EU on Crimea', the EU Council stated that 'the European Union remains committed to fully implementing its non-recognition policy'.³⁰ These examples are in line with the 'general international law duty of non-recognition of situations brought about through the illegal use of force'³¹ or other violations of international law.³²

Table 1: Recognition of Palestine, Kosovo, South Sudan, East Timor, Eritrea and Taiwan by EU Member States:

STATE	EU MEMBER STATES THAT RECOGNISE IT
KOSOVO	All but Cyprus, Greece, Romania, Slovakia and Spain
PALESTINE	Bulgaria, Cyprus, Greece, Hungary, Malta, Poland, Romania, Slovakia and Sweden ³³
SOUTH SUDAN	All
EAST TIMOR	All
ERITREA	All
TAIWAN	None ³⁴

Unlike the recognition of new States after the dissolution of the Soviet Union and Yugoslavia, including Montenegro, which were more or less normative based,³⁵ by simply following the UN approaches in the cases of, for example South Sudan, East Timor, Eritrea and Taiwan, the EU waived

²⁹ Sabine Fischer, 'The EU's non-recognition and engagement policy towards Abkhazia and South Ossetia' (2010) European Union Institute for Security Studies Seminar Reports <https://www.iss.europa.eu/sites/default/files/EUISSFiles/NREP_report.pdf> accessed 12 June 2023; see also Newman and Visoka (n 3) 20.

³⁰ European Council, Declaration by the High Representative on behalf of the EU on Crimea <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/hr-eu-crimea/>> accessed 12 June 2023; see also Newman and Visoka (n 3) 22.

³¹ Gowlland-Debbas (n 8) 282.

³² See also Crawford (n 2) 173.

³³ Permanent Observer Mission of the State of Palestine to the United Nations <<http://palestineun.org/about-palestine/diplomatic-relations/>> accessed 31 October 2023.

³⁴ Newman and Visoka (n 3) 12.

³⁵ However, even these examples of recognition were the result of political consensus, since Germany's pressure played a crucial role. Newman and Visoka (n 3) 12.

the normative bases of its recognition policy.³⁶

This means that EU recognition policy is precisely that: a policy.³⁷ The lack of influence of international law in recognition policy in general is probably the main reason for the inconsistency³⁸ and limited capability³⁹ of the EU's recognition policy as part of the Common Foreign and Security Policy (CFSP),⁴⁰ and countries like Kosovo are getting the short end of the stick.

This politicisation⁴¹ of the recognition of States has rendered out of date Lauterpacht's statement that 'the only difference between *de jure* and *de facto* recognition is that the latter is provisional in the sense that its eventual finality is dependent upon the stabilization of the as yet precarious factual conditions of statehood'.⁴² De facto recognition does not represent a temporary status until the conditions for recognition are fulfilled. It is a recognition when de jure recognition is not politically acceptable but is practical and desirable. De facto recognition is a compromise between legal conditions, political influences and economic needs. In some circumstances, it could even be considered 'extorted' recognition when States do not want to recognise but are practically or indirectly obliged to do so due to their other obligations rooted in international law. This would be the case with the recognition of Kosovo. De facto recognition by Member States that have not de jure recognised Kosovo form a part of the EU 'engagement without recognition' policy, a policy in which the EU has to maintain its neutral status regarding the recognition of certain States due to divisions on the question among Member States.⁴³ This is done in order to maintain the appearance of CFSP coherence. This policy sends a clear signal that the EU is more inclined to actual recognition⁴⁴ but withholds recognition due to internal inconsistencies. For example, the Greek Foreign Ministry routinely referring to Mr Hoxhaj as Foreign Minister of Kosovo could be considered as 'engagement without recognition' and even as a sign of de facto recognition.⁴⁵

³⁶ Newman and Visoka (n 3) 17.

³⁷ See Ryngaert and Sobrie (n 7) 478.

³⁸ For example, see also Ryngaert and Sobrie (n 7) 477.

³⁹ Newman and Visoka (n 3) 25.

⁴⁰ Paul James Cardwell 'On "ring-fencing" the Common Foreign and Security Policy in the Legal Order of the European Union' (2013) 64 (4) Northern Ireland Legal Quarterly 443, 460 <<https://nilq.qub.ac.uk/index.php/nilq/article/view/366/260> > accessed 13 June 2023.

⁴¹ Almqvist even calls it 'the failure of international law to govern in difficult situations' in Jessica Almqvist, 'The Politics of Recognition, Kosovo and International Law' (2009) Elcano Newsletter 54, 2 <<https://www.realinstitutoelcano.org/en/work-document/the-politics-of-recognition-kosovo-and-international-law-wp/>> accessed 12 June 2023.

⁴² Lauterpacht (n 16) 418.

⁴³ Bruno Coppieters, 'Engagement without Recognition' in Gëzim Visoka, John Doyle and Edward Newman (eds) *Routledge Handbook of State Recognition* (Routledge 2019) 242.

⁴⁴ Coppieters (n 44) 244.

⁴⁵ Ker-Lindsay (n 3) 13.

3 Recognition of States and EU Member States' obligations

As stated above, the EU can shape the recognition policies of its Member States and create a quasi-obligation for them, including making them de facto recognise a certain State. The legal or, to be more precise, normative basis for this EU power is the CFSP and the relevant provisions of the TEU and Treaty on the Functioning of the European Union (TFEU), as well as the duty of sincere cooperation.

As Article 24 TEU states, 'the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions'. The same Article imposes an obligation on Member States to 'support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and to comply with the Union's action in this area'.

Further grounds for the EU's power to pressure its Member States into recognising or not recognising countries can be found in the duty of sincere cooperation and its derivation from Article 32 TEU. The duty of sincere cooperation requires Member States to abstain from 'any measure which could jeopardize the attainment of the Union's objectives.' This principle is line with today's Article 4(3) TEU which states that 'Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' The CJEU more than fifty years ago determined that this principle 'lays down a general duty for the member states, the actual tenor of which depends in each individual case on the provisions of the Treaty, or the rules derived from its general scheme'.⁴⁶ This duty extends to all Union policies, and its breach cannot be excused by the fact that it occurred within the field of the CFSP. Thus, in a case where this obligation is not respected, the Commission could resort to Article 258 of the TFEU. This would not be because of the Member State failing to comply with the CFSP but because of a failure to respect the duty of the sincere cooperation.⁴⁷ As the CJEU has reiterated on various occasions, the 'duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any

⁴⁶ Case C-78/70 *Deutsche Grammophon* ECLI:EU:C:1971:59, para 5.

⁴⁷ Peter Van Elsuwege, 'The Duty of Sincere Cooperation and its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law' in Marton Varju (ed), *Between Compliance and Particularism* (Springer 2019) 283, 288 <https://www.researchgate.net/publication/330961755_The_Duty_of_Sincere_Cooperation_and_Its_Implications_for_Autonomous_Member_State_Action_in_the_Field_of_External_Relations_Member_State_Interests_and_European_Union_Law> accessed 12 June 2023; Christophe Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in Marise Cremona and Anne Thies (eds) *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 47, 67; Andres Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 (49) *European Law Review* 522.

right of the Member States to enter into obligations towards non-member countries'.⁴⁸

According to Article 32 TEU, Member States are obliged to consult each other before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests. They also have to ensure 'that the Union is able to assert its interests and values on the international scene', and at the same time show mutual solidarity.

When read together, Articles 24(3), 4(3) and 32(1) send a clear signal to the Member States that they are under an obligation to adapt their recognition policies to the Union's recognition policy despite the fact that recognition is de jure an internal question of every State. This means that if a certain Member State persists in its policy of non-recognition of a State whose recognition is incorporated in the EU's objectives, the EU can tolerate this as long as it does not jeopardise the same objective. On the other hand, if recognition or non-recognition of a certain State is especially important from the point of view of the Union's foreign policy, each Member State should subject its internal political interests to that goal.

A Member State can circumvent this obligation by referring to Article 4(2) TEU. It should be noted that the Treaties do not provide for the exclusive jurisdiction of Member States regarding recognition issues. Nevertheless, Member States could claim that a certain recognition question is connected with its vital interests. This could be the case if the recognition of a certain State conflicted with a Member State's national identity, inherent in its fundamental structures, either political or constitutional, inclusive of regional and local self-government, or with essential State functions, including ensuring the territorial integrity of that Member State, maintaining law and order, and in particular, safeguarding national security.⁴⁹ While referring to this Article would be plausible in cases where the State that is being recognised is the result of secession from a Member State, it is hard to imagine any other scenario in which the recognition of a State would be covered by Article 4(2) TEU. When a 'parent State' is a Member State, that Member State referring to the national identity clause would not only be understandable but could definitely be considered a significant national identity issue.⁵⁰ Of course, justification for that reference would depend on whether the secession itself was justified, in other words was it a remedial secession or an unlawful one.

It could be concluded that if recognition of a certain country as a sovereign State is a question of general interest, it represents a CFSP

⁴⁸ Case C-246/07 *Commission v Sweden* ECLI:EU:C:2010:203, para 71; Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxembourg* ECLI:EU:C:2005:341, para 58; Case C-433/03 *Commission of the European Communities v Federal Republic of Germany* ECLI:EU:C:2005:462, para 64.

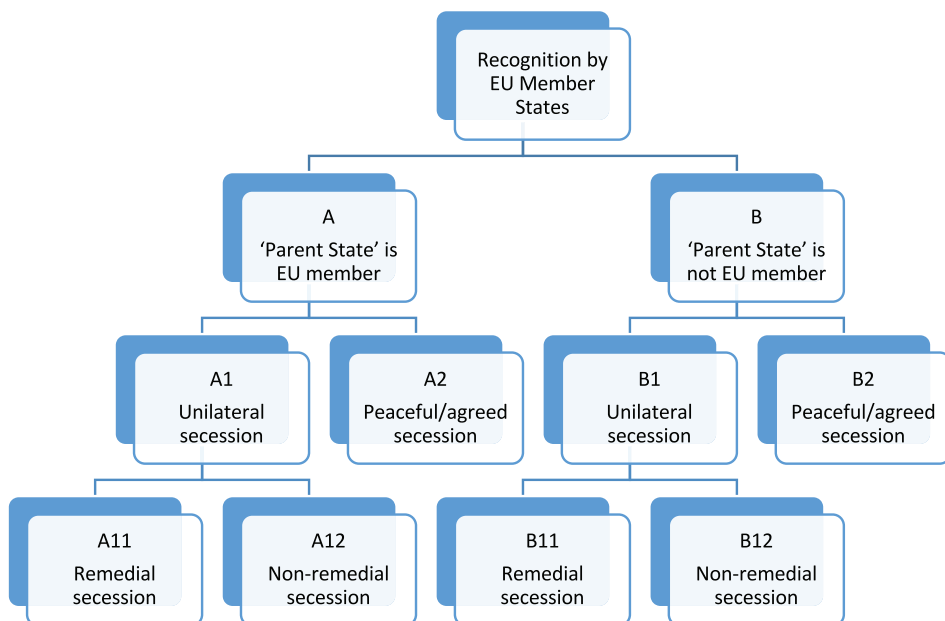
⁴⁹ Article 4(2) TEU.

⁵⁰ Siniša Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7(1) *Croatian Yearbook of European Law and Policy*, 11.

matter which all Member States must support in a spirit of loyalty and mutual solidarity. Of course, this does not result in Member States' *de jure* obligation to recognise a country. The use of constructive abstention would easily represent a sufficient compromise.

From the legal point of view, the scope of the rights and obligations of EU Member States differs depending on whether the new State is seceding from an EU Member State or the 'parent State' is a third country.

Table 2: Recognition of new States depending on membership of the EU



In the case of a peaceful secession as a result of an agreement between a Member State and its part that is becoming a new State (A2), other Member States and the EU itself should respect the existence of the new State on the basis of EU law, more precisely Article 32(1) and the duty of sincere cooperation, but also on the basis of international law, providing all the necessary criteria have been met. Recognition in this case would not include membership of the Union. When the referendum on independence for Scotland was being held, it was concluded that Scotland would have to apply to become a member of the Union as provided for by Article 49 TEU.⁵¹

If a particular secession is a unilateral but not a remedial act, the recognition of the new State would be contrary to EU and international

⁵¹ Stephen Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland' (2013) 9(3) *European Constitutional Law Review* 359, 379.

law.⁵² It would be a political but also legal paradox, although not a theoretical impossibility,⁵³ if an EU Member State were to recognise the Turkish Republic of Northern Cyprus (A12),⁵⁴ regardless of the fact that its secession occurred before Cyprus became a Member State. Even if secession were legally acceptable from an international point of view but not from the constitutional point of view of the 'parent State',⁵⁵ other Member States should refrain from giving recognition due to their obligation of mutual solidarity.

However, in the case of remedial secession which derives from the illegitimate governing regime of the 'parent State',⁵⁶ the situation is somewhat different (A11). Of course, it is hardly plausible that an EU Member State would not be 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.⁵⁷ Or to put it more bluntly, it would be very hard to imagine that an EU Member State would violate the human rights of a part of its population to such a degree that secession would be justified.⁵⁸ If this were, nonetheless, the case, the EU and the Member States themselves could turn to the mechanisms provided by the Treaties, incorporated in Articles 258, 259 and 260, as well as Article 7 TEU. Member States would be bound by the duty of sincere cooperation and mutual solidarity referred to in Article 32(1) TEU to a lesser extent, since the respect for the human rights of the abused people of the new State take precedence over the aforementioned principles. Respect for human rights is not just an obligation for all Member States but a fundamental value upon which the EU

⁵² For example, in its document of October 2008, the Council stated that 'a peaceful and lasting solution to the conflict in Georgia must be based on full respect for the principles of independence, sovereignty and territorial integrity recognised by international law, the Final Act of the Helsinki Conference on Security and Cooperation in Europe and United Nations Security Council resolutions'. Extraordinary European Council, Brussels, 1 September 2008 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/102545.pdf> accessed 12 June 2023; see also Vidmar (n 8).

⁵³ Ker-Lindsay (n 3) 6.

⁵⁴ Newman and Visoka (n 3) 17; UN Security Council Resolution 541 (1983) <<https://digitallibrary.un.org/record/58970>> accessed 12 June 2023; Parliamentary question - E-5542/2007(ASW), answer given by Mr Rehn on behalf of the Commission, 19 December 2007 <https://www.europarl.europa.eu/doceo/document/E-6-2007-5542-ASW_EN.html?redirect> accessed 12 June 2023.

⁵⁵ Vidmar (n 8); Judgement of the Supreme Court of Canada, Reference re Secession of Quebec [1998] 2 SCR 217 <<https://web.archive.org/web/20110506041859/http://scc.lexum.org/en/1998/1998scr2-217/1998scr2-217.html>> accessed 13 June 2023.

⁵⁶ Ryngaert and Sobrie (n 7).

⁵⁷ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations <<https://digitallibrary.un.org/record/202170>> accessed 13 June 2023.

⁵⁸ Tierney (n 51) 14; Accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo (request for an advisory opinion), Written Statement of the Kingdom of The Netherlands, ICJ Report (2009) <<https://www.icj-cij.org/sites/default/files/case-related/141/15652.pdf>> accessed 13 June 2023. See also Almqvist (n 24) 15.

is based.⁵⁹

In the case of peaceful secession, when a 'parent State' is not a Member State of the Union, the recognition of a new State should not be a problematic issue for an EU Member State from an international point of view or from the point of view of EU law (B2). This was the case, for example, with South Sudan or East Timor. However, it could be problematic, as has been explained, from a political point of view.

If secession is unilateral, then the main question again is whether it is justified by the illegitimate governing regime of the 'parent State' (B11) or not (B12), as in the cases of Crimea or Abkhazia and South Ossetia. The main condition, of course, is that it does not represent the violation of a peremptory norm of international law. The influence of EU law in these situations is much weaker but far from non-existent. As has been argued above, the EU can shape the recognition policy of its Member States and create quasi-obligations for them, including making them *de facto* recognise a certain State.

4 Kosovo and the recognition policy of the EU

On 17 February 2008, the Assembly of Kosovo adopted the Declaration of Independence, which proclaimed the Republic of Kosovo an independent State. The very next day, Kosovo was recognised by France, followed by 21 Member States the same year. Recognition of Kosovo could be considered as a B11 situation from Table 2.⁶⁰ It could be claimed that it was a remedial secession due to the systematic violations of the human rights of its people⁶¹ by a non-EU member 'parent State'. In its Advisory Opinion, the ICJ explicitly stated that 'it considers that it is not necessary to resolve these questions in the present case'.⁶² It also decided that Kosovo's declaration of independence was not incompatible with international law, but emphasised that 'it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise

⁵⁹ Article 2 TEU.

⁶⁰ Ruth Ferrero-Turrión 'The Consequences of State Non-recognition: The Cases of Spain and Kosovo' (2021) 22(3) *European Politics and Society* 3 <https://www.researchgate.net/publication/341330616_The_consequences_of_state_non-recognition_the_cases_of_Spain_and_Kosovo> accessed 13 June 2023.

⁶¹ Tierney (n 51) 14; Accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo (request for an advisory opinion)), Written Statement of the Kingdom of The Netherlands, ICJ Report (2009) <<https://www.icj-cij.org/sites/default/files/case-related/141/15652.pdf>> accessed 13 June 2023. See also Almqvist (n 24) 15.

⁶² Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Report (2010) para 83 <<https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>> accessed 13 June 2023.

of a right conferred by it'.⁶³ Although, disappointingly,⁶⁴ the ICJ did not tackle the most important questions,⁶⁵ it did give the 'green light' to the international recognition of Kosovo. Consequently, the General Assembly welcomed 'the readiness of the European Union to facilitate a process of dialogue' between Serbia and Kosovo which would allow progress on their paths to the European Union to be achieved.⁶⁶ Since only sovereign States can join the EU, the General Assembly's message was a straightforward one.⁶⁷

The EU found itself in the 'engagement without recognition' situation explained above because of the different stances of certain Member States on the issue, and as another consequence of the deterioration of the influence of international law in the recognition process.⁶⁸ Cyprus, Greece, Romania, Slovakia and Spain opposed and still oppose recognition of Kosovo due to their own internal situations.⁶⁹ Aware of its inability to create a common view, as in other cases, the European Council noted that 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo' on a *sui generis* basis.⁷⁰

In 2008, 'following Kosovo's declaration of independence and the transfer of responsibilities in the areas of policing, justice and customs from the United Nations Interim Administration Mission in Kosovo to EULEX',⁷¹ EULEX was launched and Kosovo's 'European path' began. EULEX is 'the largest civilian mission under the Common Security and Defence Policy of the European Union'.⁷² Its mission is 'to support relevant rule of law institutions in Kosovo on their path towards increased

⁶³ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Report (2010) para 56 <<https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>> accessed 13 June 2023; Ryngaert and Sobrie (n 7) 479.

⁶⁴ Almqvist (n 24) 9; Marc Weller, 'The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 187.

⁶⁵ Daniel Müller, 'The Question Question' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 118.

⁶⁶ General Assembly Resolution A/RES/64/298 <<https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20A%20RES64%20298.pdf>> accessed 6 November 2023.

⁶⁷ Volker Röben, 'The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or Principles?' (2010) 2(3) Goettingen Journal of International Law, 1065, 1084.

⁶⁸ Ryngaert and Sobrie (n 7).

⁶⁹ Newman and Visoka (n 3) 24; Almqvist (n 24) 10.

⁷⁰ Council of the European Union, press release 2851st Council meeting, General Affairs and External Relations, Doc no 6496/08 (Presse 41), 18 February 2008, 7 <<https://data.consilium.europa.eu/doc/document/ST-6496-2008-INIT/en/pdf>> accessed 13 June 2023; Newman and Visoka (n 3) 24; Ryngaert and Sobrie (n 7) 480.

⁷¹ EULEX Kosovo: European Union Rule of Law Mission in Kosovo - Civilian Mission <https://www.eas.europa.eu/eulex-kosovo/eulex-kosovo-european-union-rule-law-mission-kosovo-civilian-mission_und_en> accessed 6 November 2023.

⁷² EULEX <<https://www.eulex-kosovo.eu/?page=2,16>> accessed 13 June 2023.

effectiveness, sustainability, multi-ethnicity and accountability, free from political interference and in full compliance with international human rights standards and best European practices'.⁷³ In effect, the establishment of EULEX can be considered to be part of *de facto* recognition.⁷⁴ According to the Mission Statement of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo 'shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service'.⁷⁵ According to Article 3 of the same document, one of EULEX's main tasks is to 'monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law'.⁷⁶ The breadth of this approach clearly demonstrates that the EULEX mission is to prepare Kosovo for its journey to the EU by transforming it into an entity that fully adheres to international human rights standards and best European practices. This, consequently, amounts to the perception of Kosovo as a sovereign country, although words like 'recognition', 'sovereign' or 'country' are skilfully avoided.

In addition, the EU signed a Stabilisation and Association Agreement (SAA) with Kosovo in 2015, 'which signifies political, economic, and legal engagement between the EU and states that seek membership'⁷⁷ indicating, though very diplomatically, that the SAA itself is 'without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence'.⁷⁸ Nevertheless, it is a fact that 'the Stabilisation and Association Process (SAP) is the European policy framework for relations between the EU and the Western Balkan countries, all the way to their eventual accession to the Union'.⁷⁹ The final goal of the Kosovo SAA is the promotion of peace, stability, freedom, security and justice, prosperity and quality of life, as well as Kosovo's

⁷³ *ibid.*

⁷⁴ Alexander Orakherashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12(1) in the Max Planck Yearbook of United Nations Law, 29.

⁷⁵ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo <https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf> accessed 7 November 2023.

⁷⁶ *ibid.*

⁷⁷ *ibid.*, 25.

⁷⁸ Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22016A0316%2801%29>> accessed 13 June 2023; Kushtrim Istrefi, 'Kosovo is a Country, and a Country Means a State, Rules the Court of Justice of the European Union' (EJIL Talk! Blog of the European Journal of International Law, 20 March 2014) <<https://www.ejiltalk.org/kosovo-is-a-country-and-a-country-means-a-state-rules-the-court-of-justice-of-the-european-union/>> accessed 13 June 2023.

⁷⁹ EEAS, 'The European Union and Kosovo' <https://www.eeas.europa.eu/kosovo/eu-and-kosovo_en?s=321> accessed 6 November 2023.

transition to a market economy, regional cooperation and preparation for EU accession.⁸⁰ Since only independent countries can join the EU, the preparation of Kosovo for EU accession is *de facto* recognition of it as a country.

In May of the same year, the Commission proposed visa-free travel for citizens of Kosovo,⁸¹ and in July 2018 Kosovo fulfilled all requirements for this. In April 2023, the Commission announced that from January 2024 'citizens of Kosovo will be allowed to travel to the EU – and EU citizens to go to Kosovo – without requesting a visa, for periods of up to 90 days in any 180-day period'.⁸² Furthermore, although Commission staff working documents repeat the phrase that 'this designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence',⁸³ it is treating Kosovo as any other country engaged in accession negotiations,⁸⁴ continuously emphasising Kosovo's 'European path' or its 'path towards the EU'.

Another example is the European Parliament resolution of 6 July 2022 on the 2021 Commission Report on Kosovo⁸⁵ (2021/2246(INI)) in which the Parliament 'regrets, however, the fact that five EU Member States have not yet recognised Kosovo and reiterates its call for them to do so immediately and reaffirm Kosovo's EU perspective'.⁸⁶ In its report on the 2022 Commission Report on Kosovo, the Parliament 'urges the Member States that have not yet recognised Kosovo as a sovereign state, notably Spain, Slovakia, Cyprus, Romania and Greece, to do so without further delay and thus allow it to progress on its European path on an

⁸⁰ *ibid.*

⁸¹ 'Kosovo on its European Path' <https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-10/Kosovo_Oct2023.pdf> accessed 6 November 2023.

⁸² European Commission, Migration and Home Affairs, 'Kosovo visa liberalisation signed for entry in early 2024' <https://home-affairs.ec.europa.eu/news/kosovo-visa-liberalisation-signed-entry-early-2024-2023-04-21_en> accessed 6 November 2023.

⁸³ Commission Staff Working Document Kosovo 2020 Report <https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-10/kosovo_report_2020.pdf> accessed 7 November 2023; Commission Staff Working Document Kosovo 2021 Report <<https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Kosovo%202021%20report.PDF>> 7 November 2023; Commission Staff Working Document Kosovo 2022 Report <<https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Kosovo%20Report%202022.pdf>> accessed 7 November 2023.

⁸⁴ For example, Commission Staff Working Document Serbia 2018 Report <<https://neighbourhood-enlargement.ec.europa.eu/system/files/2019-05/20180417-serbia-report.pdf>> accessed 7 November 2023.

⁸⁵ Commission Staff Working Document Kosovo 2021 Report <<https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Kosovo%202021%20report.PDF>> accessed 7 November 2023.

⁸⁶ European Parliament resolution of 6 July 2022 on the 2021 Commission Report on Kosovo (2021/2246(INI)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0285_EN.html> accessed 13 June 2023.

equal footing with candidate countries'.⁸⁷

In its judgement C-632/20 P, the CJEU concluded that Kosovo can be considered a 'third country' in the light of EU law, since the 'European Union has entered into several agreements with Kosovo, thus recognising its capacity to conclude such agreements'.⁸⁸ Of course, the CJEU has separated the questions of recognition of States by EU Member States and the admission of those States to the EU,⁸⁹ and the Commission's adoption of the Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications cannot be interpreted as entailing the implicit recognition by the European Union of Kosovo's status as an independent State.⁹⁰ It is questionable whether this reference was even necessary, since the EU does not have the power to recognise a State or to make its Members do so. However, despite this 'safety net', the CJEU stance regarding Kosovo and its recognition is obvious.

In these circumstances, the EU has engaged in implied, *de facto* recognition of Kosovo by treating it as an independent State⁹¹ through Kosovo's integration process into the EU. In considering Kosovo's application for EU membership of December 2022, it can be expected that the 'light' pressure on the five Member States that do not recognise Kosovo will continue to grow. As far as these five Member States are concerned, when a decision concerning Kosovo is being adopted by EU institutions, each of them can abstain in a vote and qualify its abstention by making a formal declaration. These Member States 'shall not be obliged to apply the decision, but shall accept that the decision commits the Union'. In a spirit of mutual solidarity, those Member States 'shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position'.⁹²

Indeed, this institute was employed for the first time in 2008 by Cyprus in the context of Kosovo with regard to the European Union Rule of Law Mission in Kosovo (EULEX). Cyprus explicitly invoked this provision emphasising three points: its respect for the wish of Member States for an active engagement of the EU in Kosovo, and its decision not to hinder the decision of the Council; its firm views regarding the legal basis for EU involvement in Kosovo, which are not compatible the Council's view; its adherence to the spirit of mutual solidarity.⁹³ There is no reason for this

⁸⁷ Report on the 2022 Commission Report on Kosovo <https://www.europarl.europa.eu/doceo/document/A-9-2023-0174_EN.html#_section1> accessed 7 November 2023.

⁸⁸ Case C632/20 P *Kingdom of Spain v Commission* ECLI:EU:C:2023:28, para 55.

⁸⁹ *Istrefi* (n 7).

⁹⁰ Case C632/20 P *Kingdom of Spain v Commission* ECLI:EU:C:2023:28, para 72.

⁹¹ Newman and Visoka (n 3) 24.

⁹² Article 31(2) TFEU.

⁹³ Marise Cremona, 'Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU' (2009) EUI Working Papers 21, 15 <https://cadmus.eui.eu/bitstream/handle/1814/13002/LAW_2009_21.pdf> accessed 13 June 2023.

institute to be used more frequently⁹⁴ by Member States which do not recognise Kosovo in EU-Kosovo relations. Nevertheless, the EULEX website claims that EULEX is supported by all 27 European Union Member States.⁹⁵ This statement is very important, since it demonstrates that a compromise can be found between the Union's objectives and concerned Member States' political interests.

5 Conclusion

The EU does not have the competence to recognise States, but it can shape the recognition policies of its Member States and create a quasi-obligation for them, including making them *de facto* recognise certain States. The normative basis for this EU power is the CFSP and the relevant provisions of the TEU and TFEU, as well as the duty of sincere cooperation. Member States are under an obligation to adapt their recognition policies to the Union's recognition policy despite the fact that recognition is *de jure* an internal matter for every State. This means that if a certain Member State persists in its non-recognition policy of a State whose recognition is incorporated as an EU objective, the EU can tolerate this as long as it does not jeopardise the same objective. On the other hand, if recognition or non-recognition of a certain State is especially important from a Union foreign policy point of view, each Member State should subject its internal political interests to that goal.

As far as Kosovo is concerned, Cyprus, Greece, Romania, Slovakia and Spain do not recognise it due to their own internal situations. Aware of its inability to create a common view, as in other cases, the European Council has noted that 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo' on a *sui generis* basis.⁹⁶ Nevertheless, the EU has engaged in *de facto* recognition of Kosovo by treating it as an independent State and entered into several agreements with it.

⁹⁴ After this, constructive abstention has played a relatively minor role. Austria, Ireland and Malta used it regarding Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, and Hungary regarding the Military Assistance Mission in support of Ukraine (EUMAM Ukraine); see European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs Study Requested by the AFCO committee, 'The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting', 61 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/739139/IPOL_STU\(2022\)739139_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/739139/IPOL_STU(2022)739139_EN.pdf)> accessed 13 June 2023; Giovanna Maletta and Lauriane Héau 'Funding Arms Transfers through the European Peace Facility: Preventing Risks of Diversion and Misuse' (2022) Stockholm International Peace Research Institute, 5 fn 30 <https://www.sipri.org/sites/default/files/2022-06/2206_supplying_weapons_through_the_epf_1.pdf> accessed 13 June 2023.

⁹⁵ EULEX <<https://www.eulex-kosovo.eu/?page=2,16>> accessed 13 June 2023.

⁹⁶ Council of the European Union, press release 2851st Council meeting, General Affairs and External Relations, Doc no 6496/08 (Presse 41), 18 February 2008, 7 <<https://data.consilium.europa.eu/doc/document/ST-6496-2008-INIT/en/pdf>> accessed 13 June 2023; Newman and Visoka (n 3) 24; Ryngaert and Sobrie (n 7) 480.

Because of their obligations rooted in a duty of sincere cooperation and mutual solidarity, the five Member States that do not recognise Kosovo may not obstruct the EU's 'engagement without recognition' policy and may have recourse to the institute of constructive abstention. In this way, these States maintain a certain status quo between their internal policies and EU policy. However, considering Kosovo's application for EU membership of December 2022, it can be expected that the 'light' pressure on the five Member States will continue to grow. This means that while the EU cannot make its Member States de jure recognise Kosovo, it can certainly force them into various situations where their de facto recognition is inevitable.



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Suggested citation: S Novak, 'Can the EU Make Member States Recognise Kosovo?' (2023) 19 CYELP 299.