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Routledge Handbook of State Recognition

Edited by Gözim Visoka, John Doyle
and Edward Newman

‘The most comprehensive review of the highly relevant and contested doctrine and practice on recognition – a magnificent resource for years to come.’

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‘The *Routledge Handbook of State Recognition* offers a unique and valuable collection of contributions to the study of the theory and practice state of recognition that ventures far beyond the traditional concerns of international law. A truly interdisciplinary work that integrates a wide range of theoretical and empirical perspectives on recognition, this handbook should be of great value to scholars and advanced students of international relations, political theory and international law.’

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‘The politics of recognition form the core of the state-based international order and its evolution. In this volume, Visoka, Doyle and Newman assemble a top-notch group of scholars with diverse theoretical perspectives and expertise. The resulting conversation, and the handbook, is more than the sum of its parts. It is perhaps even more important, however, for its timeliness as conflicts on the mend are newly raw, cold conflicts are becoming more violent and ever more discontents consider demanding unilateral independence.’

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ROUTLEDGE HANDBOOK OF STATE RECOGNITION

This new handbook provides a comprehensive and multidisciplinary overview of the theoretical and empirical aspects of state recognition in international politics.

Although the recognition of states plays a central role in shaping global politics, it remains an under-researched and widely dispersed subject. Coherently and innovatively structured, the handbook brings together a group of international scholars who examine the most important theoretical and comparative perspectives on state recognition, including debates about pathways to secession and self-determination, the broad range of actors and strategies that shape the recognition of states and a significant number of contemporary case studies.

The handbook is organised into four key sections:

- Theoretical and normative perspectives
- Pathways to independent statehood
- Actors, forms, and the process of state recognition
- Case studies of contemporary state recognition

This handbook will be of great interest to students of foreign policy, international relations, international law, comparative politics and area studies.

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Editors

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1

INTRODUCTION

Statehood and recognition in world politics

Gëzim Visoka, Edward Newman and John Doyle

Introduction

The creation of new states and their subsequent recognition remain among the most problematic, yet important, aspects of international politics. The privileges that come from independent statehood, including the sole authority within a territory as well as rights and protection in international affairs, have attracted many groups to seek the creation of separate states (Crawford 2007). Historically, the emergence of new states has been met with considerable resistance because any attempt to redraw the cartography of states not only affects the territorial integrity of existing states but can also have destabilising systemic consequences in international politics. Yet, the 20th century saw the emergence of over 150 new states that emerged as a result of tectonic changes in world politics caused by major world wars, the decolonisation process, the dissolution of large federal states, and the escalation of protracted ethnic and civil wars (Coggins 2014). Despite the fact that many ethnic groups, movements, and regions have sought to create their own sovereign statehood, only a very small fraction of ethnic groups seeking independence have managed to become recognised states (Griffiths 2016: 5). Recognition of states plays a vital role in their ability to function as a sovereign and independent state and have relatively equal access, rights and obligations in the international system.

The political tapestry of the world is primarily organised around states that are members of the United Nations organisations (UN), which have different degrees of bilateral recognition. This international ‘society’ of states overshadows many other state-like entities, partially independent territories, and non-self-governing territories, which enjoy different degrees and forms of political autonomy, effective authority, and de facto international recognition. The number of sovereign states has come to be associated with the number of UN member states, which is 193 (as of August 2019). Palestine has the status of UN observer state while enjoying wide international recognition. Six ‘states’ are neither UN member states nor UN observers, widely labelled as unrecognised or partially recognised states. In this category there are Kosovo, Western Sahara, Taiwan, Abkhazia, South Ossetia, and the Turkish Republic of Northern Cyprus. There are two states, namely Nagorno-Karabakh and Transdniestria, that are only recognised by a handful of other non-UN member states, as well as states – such as Somaliland – that are not recognised by any other state. There are also 47 partially

independent territories, which have not proclaimed independence yet but enjoy autonomous status and often act like states (Rezvani 2014). In addition, the UN registers 17 non-self-governing territories which remain to be decolonised and are potential candidates for independent statehood. Thus, the politics of international recognition presents a picture far more complex than a simple distinction between UN member states and non-member states would convey, and millions of people live in independent societies which are not formally recognised as sovereign states.

Nevertheless, recognition of states is fundamentally important. It has become a core criterion for determining matters concerning statehood, sovereignty, subjectivity in international law, and membership in multilateral bodies. International recognition plays a vital role in the political, security, legal, economic, and sociocultural development of states. It enables states protection under international law, access to multilateral bodies, and the possibility to develop diplomatic and trade relations with other states. It enhances human mobility, cultural exchange, and social development. Most importantly, it nourishes state identity, self-regard, and ontological security, which are crucial for the normal functioning of society. While international recognition might not guarantee successful statehood, its absence certainly poses many challenges for surviving an inhospitable international environment. States which lack full international recognition are more likely to become the subject of foreign military occupation and hybrid wars. Limited diplomatic relations – an inherent condition of unrecognised states – undermines the capacity of these entities to enhance their political, security, and trade relations with other recognised states, leading to economic stagnation, poverty, and social isolation. Limited recognition obstructs democratic development, the consolidation of human rights and freedoms, and the legitimate control of national resources, because these states are often beyond the reach of contemporary international norms and regulatory networks.

The term ‘recognition’ has three different meanings in social sciences broadly defined (see also Bartelson 2016). In philosophy and political theory, recognition is associated with Hegel’s work on the constitution of human agency, relationality, and status (Williams 2000). Recognition is also a prominent subject in social and normative theory associated with multiculturalism, identity, freedom, rights, justice, and equality (Taylor 1994; Honneth 1995). These accounts situate recognition at the heart of social justice and in the fulfilment of human needs for liveable existence. Drawing on this work, we have recently seen growing research on the second meaning of recognition, focusing mainly on state status and subjectivity, identification, and labels, as well as ontological (in)security in world politics (see Agné 2013; Lindemann and Ringmar 2014; Daase et al. 2015; Epstein, Lindemann and Sending 2018). The concept of recognition has recently been extended also in the field of gender studies, as well as postcolonial and indigenous politics to account for the restitution and distribution for past injustices (see McQueen 2015). The third meaning of the concept of recognition, which is the focus of this volume, is the recognition of states, which is associated with sovereignty, self-determination, legal entitlement within the international system, and diplomatic relations. While the first two meanings of recognition have more metatheoretical and universal application, the third meaning of recognition is much narrower and concerns the practice of states conferring recognition upon newcomers, which is considered to be an important element of independent statehood and a crucial blessing for admission to the international community of sovereign states. In order to delineate the specific meaning of recognition used in this volume, we use the notions of state recognition, diplomatic recognition, and international recognition interchangeably.

State recognition is a double-edged phenomenon in world politics. It can be a cause of state death, state resurrection, and state birth. It can be a source of war and peace. It can be a source of justice, but also of discrimination and subordination. It can be a safeguard to state expansion and international order, but also can be a source of collective self-determination and liberation. It can reproduce the existing state system but also open up space for normative change and emancipation. The recognition of states has played and continues to play a crucial role in shaping world politics. The independence of Kosovo and its struggle for diplomatic recognition since 2008 has strained relations between the West and Russia and other emerging powers. The contested status of breakaway territories, such as Abkhazia and South Ossetia, and their inability to secure diplomatic recognition have deepened further the diplomatic hostility between the US, the EU, and Russia. The violent annexation of Crimea by Russia and its collective non-recognition by the rest of the international society is another illustrative case of the significant role that state recognition plays in world politics. Ongoing debates on the independence of Scotland, Catalonia, and Kurdistan, and their prospects for diplomatic recognition are gradually reshaping the political cartography and normative order in Europe.

Although the recognition of states plays a central role in shaping global politics and the cartography of states, it remains an under-researched, but also widely contested subject. The recognition of states is generally examined as a part of broader debates on self-determination, secession, and conflict resolution, which tend to instrumentalise it heuristically to examine questions of power, security, territorial integrity, and order in world politics. Notably, state recognition has been widely studied from the international law perspective, which usually offers a narrow and dogmatic understanding of statehood and recognition and is deeply influenced by state policies and legal and institutional practices (Lauterpacht 1947; Chen 1951; Talmon 1997; Raić 2002; Crawford 2007). State practices are mainly examined through institutional lenses and as such have remained state-centric, contributing to simultaneously codifying and reproducing practices of state recognition. In international relations and diplomatic studies, state recognition mainly seeks to reproduce existing state-centric orthodoxies regarding power politics, stability, order, and rules governing state recognition, while demonstrating a preference for understanding the status quo rather than opening up spaces for normative and political change in the international arena (see Caspersen and Stansfield 2011). Peace and conflict studies tend to approach the subject of state recognition from the perspective of how to prevent and manage secessionist conflicts (see Wolff and Yakinthou 2011).

Yet, decades of debate have not resolved deep divisions between scholars, practitioners, and lawyers on who has the right to recognise newcomers to the international society and under what circumstances new states gain diplomatic recognition. This is because state recognition remains unregulated in international law and there is no institutional mechanism to regulate this practice in world politics. As a discretionary state practice, it has been invoked and revoked by states in varied ways and for different purposes. Although the core requirements of sovereign statehood have, in principle, reflected general agreement since the first half of the 20th century, the practice of international recognition has often been ad hoc, sui generis, and highly political. In particular, where legal sovereignty is contested, the politics of international recognition are controversial and can have far-reaching implications for peace and security. In practice, the international recognition of new states is loaded with political and legal controversies, which can affect international stability, normative and legal order, and reshuffle geopolitical relations between states and alliances. As a result of these onto-political anomalies, there is still ambiguity on the quintessential question of who has the right to independent statehood and under what circumstances a distinct group can proclaim independence and secure recognition.

While there is fragmented research on the politics, legality and ethics of supporting or opposing state recognition, so far there is no single, wide-ranging scholarly companion on the broad theoretical, conceptual, and empirical aspects related to state recognition in world politics. There are many ambiguities, tensions, and dilemmas surrounding state recognition, which primarily deal with core questions: whether recognition contributes to peace, justice, and security or promotes global disorder and intrastate conflict; whether state recognition is constitutive – or rather an expression – of statehood; whether states should recognise unilateral secession or not; whether international and regional organisations can recognise states; whether recognition should be explicit or not; whether certain claimant groups or territories are entitled to independent statehood or not; whether great powers and the diplomatic agency of claimant states play a central role in securing recognition or not; whether the international recognition of remedial secession is strengthening as a norm; whether *de facto* recognition is a rigorous concept; and many other intriguing questions.

Notably, there are several good monographs and collections on various dimensions of state recognition (for example, Dugard 1987; Grant 1999; Crawford 2007; Coggins 2014; Lindemann and Ringmar 2014; Visoka 2018) – and many of their authors are the contributors to this volume. But there is no single volume that brings together, in an interdisciplinary and comprehensive fashion, the theoretical, conceptual, thematic, and empirical dimensions of state recognition. Accordingly, this handbook is the first of its kind, offering a comprehensive analysis of theoretical and comparative debates, as well as empirical aspects underpinning state recognition in international politics. While we seek to develop a more consolidated, yet comprehensive, understanding of state recognition in world politics, we do not intend to develop a unified account of this deeply contested practice and concept. In pursuit of this commitment, this volume brings together various aspects of state recognition that have so far been discussed separately in different disciplinary debates, ranging from international law and political theory to diplomacy and area studies. This handbook is truly interdisciplinary and multidisciplinary. It contains contributions spanning different political science, international relations, and political theory debates, as well as works which blend together different disciplines, written from scholars coming from different parts of the world, which is crucial to develop critical accounts of complex entanglements underlining state recognition. In addition to bringing together a wide array of disciplines and perspectives, the handbook examines for the first time a number of topics only marginally studied in the past, such as the derecognition of states, parliamentary practices of state recognition, the everyday politics of state recognition, and the role of regional organisations in the recognition of states. In this regard, the handbook is the first effort to try to encourage epistemic dialogue and break the disciplinary boundaries in order to rethink state recognition and search for new research avenues that would offer a deeper understanding of this contested practice in world politics. Although the handbook examines a wide range of state policies and approaches, it is not intended to prescribe policymaking – and even less so to pursue a political agenda – but instead to serve as an introductory and essential companion that can be used by both the academic community and foreign policy practitioners to enhance their knowledge on the theory and practice of state recognition.

This handbook is divided into four parts and contains 36 chapters. Part I, ‘Theoretical and normative perspectives’, explores core theoretical, normative, and conceptual knowledge on state recognition. Part II, ‘Pathways to independent statehood’, looks at the main pathways through which new states come to existence, including deliberative, consensual, unilateral, and remedial modes of secession. Part III, ‘Actors, forms and the process of state recognition’, seeks to open up our perspectives on who can recognise states

and how states can be recognised. This section explores a broad range of diplomatic actors and forms of recognition, including bilateral recognition, collective recognition and non-recognition, and the derecognition of states, as well as new practices of state recognition by parliaments, international and regional organisations, and global judicial institutions. This section accounts for the diplomatic practices of claimant states and their tactics and strategies for securing international recognition. Part IV, 'Case studies of contemporary state recognition', looks at a number of contemporary cases of state recognition which have secured different degrees and forms of international recognition as well as invoked different discourses and strategies for securing international affirmation, acceptance, and recognition (such as Palestine, Taiwan, Kosovo, South Sudan, Somaliland, Abkhazia, South Ossetia, Transnistria, and Nagorno-Karabakh). The remainder of this introductory chapter outlines the core contributions of each chapter, which examine theoretical perspectives, conceptual approaches, diplomatic practices and actors, and contemporary cases of state recognition in world politics.

Theoretical and normative perspectives

While state recognition has been widely studied as a part of different bodies of knowledge, it lacks consensus and clarity on a number of crucial conceptual and definitional segments. Notably, there is no single and unitary definition of state recognition, precisely because there is wide epistemic dissent on what actually recognition means, who is entitled to it, and how it can be practised. The first part of this handbook seeks to shed light on the theoretical and conceptual perspectives on state recognition.

Rowan Nicholson and Thomas D. Grant's chapter ('Theories of state recognition') offers an overview of the main legal theories on state recognition, namely the traditional declaratory and constitutive theories, as well as more recent hybrid approaches. From the outset, they stress that, although recognition is not regulated in international law, the sum of state practices accompanied by the opinions of jurists has set customary rules on the function of recognition in international affairs. According to them, the declaratory theory is not primarily a theory of state recognition; it is rather a theory outlining the criteria of independent statehood, where the criterion of effective authority plays a more decisive role than international recognition, which is not considered to be an essential criterion for state emergence and endurance. In their examination, Nicholson and Grant trace legal thinking and adjudication of state practices to ascertain the merits and limits of declaratory theory. In turn, they explore constitutive theory, which holds that recognition is a necessary condition for enacting sovereign statehood internationally. Here they tease out the main propositions of and tensions within constitutive theory to highlight some of its problematic claims. In the third and final part, they explore the hybrid approaches to state recognition, highlighting the complementarity between both declarative and constitutive theories to show that recognition and criteria of effectiveness both play necessary roles in the normal functioning of states. Even if it may not always be necessary, recognition plays an important role in the exercise of sovereignty. Yet, Nicholson and Grant maintain that, although scholars continue to diverge radically about the legal significance of recognition, in certain circumstances non-recognition is considered a necessary and compulsory measure, especially when a new state is unable to exercise effective authority over the claimed territory and it has emerged from unlawful intervention. In conclusion, they stipulate that as long as recognition remains unregulated in international law there will be significant disagreement on the legal significance of recognition.

Central to understanding state recognition is to trace its historical origins and evolution over time. The origins of state recognition can be traced back to the early days of modern states whereby mutual recognition among European powers emerged as a crucial mainstay of international order and peace among competing regional powers. Mikulas Fabry's chapter ('The evolution of state recognition') offers a detailed overview of the evaluation of state recognition since the birth of modern state system. It charts the changing norms, politics, and practices of state recognition, ranging from mutual recognition between states to collective recognition and non-recognition by states and international organisations. Fabry highlights that state recognition has emerged as an institutionalised practice which has been dominated by great powers to control the expansion of the society of states and maintain international order. Fabry suggests that, although historically recognition has not played a major role in the birth of states, over time it has preceded new emerging states and thus become a significant criterion for certifying sovereign statehood. By tracing different historical and normative practices of state recognition since 1815, he demonstrates the changing nature and contingent meaning of state recognition in world politics. Fabry concludes that the lack of political consensus among powerful states on self-determination and state recognition continuously undermines international order and the norms and laws associated with it.

Although state recognition is a fundamental feature of the state-based international system, there is no universal legal and institutional regime that can objectively rule on the criteria for the recognition, non-recognition, or derecognition of newly proclaimed states. The law of state recognition is characterised as the weakest link in the international legal system and is deeply influenced by political arbitrariness. Peter Radan's chapter ('Recognition of states in international law') offers an authoritative account of the international law of recognition. He argues that when we refer to the international law of recognition we generally talk about a number of principles, comprised of domestic legislation, legal opinions, and customary norms governing the case-by-case conduct of state and international organisations' policy on recognition. Radan shows that, although the fulfilment of objective and subjective criteria of statehood could play a role in guiding states' legal stance on recognition, in practice international law does not oblige states to recognise any other state. There is an exception, however, when states are required not to recognise those states that emerge through acts of aggression and the use of force. In turn, as a discretionary diplomatic tool, states tend to grant recognition more easily to cases of consensual secession and dissolution as opposed to unilateral acts of secession. Moreover, widespread recognition by the community of sovereign states and admission to international bodies are vital for the survival and eventual recognition of emerging states. Accordingly, Radan shows that the international law of recognition can be better understood as a conglomeration of legal and political norms, practices, and rules, which are at the discretion of states to apply according to their own interests. Once a state is recognised as an independent and sovereign member of the international community, it becomes subject to the rights and obligations of international law. This obviously does not make international law an instrument for global conflict resolution, but a platform for justifying and battling conflicting and complementing interests and norms between and among the existing sovereign states and the newcomers.

State recognition is closely related to the self-determination of peoples. Who has the right to collective self-determination and under what conditions remain contested issues in scholarly and policy communities. Far from any consensus, titular ethnic and religious communities tend to have a higher likelihood for realising their right to self-determination than minority groups who are often not treated as a 'people' (see Musgrave 1997). This hierarchical order, guided by colonial logics of governance, has led to multiple secessionist conflicts

and the emergence of contested states with different degrees of international recognition. Costas Laoutides's chapter ('Self-determination and the recognition of states') examines the transformation of self-determination as a collective norm for facilitating state creation and legitimising state recognition. Laoutides shows that, prior to 1945, self-determination of peoples was mainly concerned with the construction of political communities along ethnic and national ascriptions in order to create compliant subjects and cohesive political orders. This practice of state creation suppressed ethnic diversity and led to the denial of the right to self-determination of peoples who were unable to forcefully assemble the sociopolitical and territorial attributes of sovereign states. Despite the emergence of international bodies, such as the League of Nations and subsequently the United Nations, which have tried to legislate the normative entitlements for collective self-determination, the right to self-determination has continued to be extended conservatively to groups who either resembled territorial nation states or have been subject to colonialism and foreign occupation, excluding and suppressing many nationalities that later have become epicentres of civil wars and unrecognised statehood. However, Laoutides shows that, despite uneven application of the principle of self-determination in practice, when the particular form of self-determination has complied with the internationally accepted norms, it has a higher likelihood for recognition and admission in the club of sovereign states. This has particularly been the case with the internationally mediated dissolution of empires and conglomerated states – ranging from the death of 19th- and 20th-century empires to the UN-administered decolonisation process, and the dissolution of federal states in the wake of the end of the Cold War. Following the same logic, after the end of the Cold War, the conservative understanding of the right to self-determination has continued, inhibiting to many sub-national groups the right to independent statehood, and the tendency has been instead to promote different modalities of internal self-determination.

While we know much more about the legal and political aspects of state recognition, we have a far narrower understanding of the ethics of state recognition, namely what moral predicaments ought to guide our judgement of state recognition. Chris Naticchia's chapter ('The ethics of state recognition') explores the main ethical dilemmas underpinning the recognition of states in normative theory and state practice. Naticchia argues that the ethics of international recognition can be best understood around three sceptical positions, ranging from strong scepticism, which holds that there are no moral principles to bind states' past and future decisions whether to recognise other states, and moderate scepticism, which holds that past decisions cannot be judged (yet there is scope to judge future decisions), to weak or instrumental scepticism, which holds that recognition is justified either prospectively or retrospectively to achieve a strategic goal. In an attempt to reform the practices of justification of recognition, Naticchia proposes the principle of critical mass, which seeks to make recognition conditional upon committing and making progress towards achieving a global ideal, such as peace and justice. Through this principle Naticchia makes the case for the emergence of a duty to recognition, non-recognition, and derecognition of states depending in their ability to fulfil a global social contract for achieving the commonly set ideals and moral progress. Accordingly, Naticchia's chapter makes a compelling proposal to provoke much-needed debate on the regulation of state recognition in international politics.

Despite the strong resonance of normative and legal perspectives on state recognition, power politics play a defining role in state recognition. In this context, recognition by major powers carries more diplomatic weight than recognition by other states (Fabry 2010). The support of great powers is therefore the most significant international determinant of the acceptance of an emerging state (Coggins 2014). Milena Sterio's chapter ('Power politics and state recognition')

examines the role of major international powers in the recognition of states. It argues that major international powers have predominantly exercised their influence to push for the recognition of state-like entities in their sphere of geopolitical interests, often influencing the decisions of other sovereign states as well as adding additional subjective and self-interested conditions in exchange for recognition. The practices and rationale of major international powers regarding state recognition and non-recognition vary. While the United States has a more stability-seeking approach to secession and state recognition, Russia tends to use movements for independence and recognition as strategic asset to weaken Western powers and expand its sphere of ideological and geopolitical influence. China, on the other hand, tends to have a less interventionist approach, though still its practices are intrinsically linked to its own regional and global economic and political interests. Other powers such as the UK, France, and Japan tend to link their state recognition policy with the fulfilment of broader foreign policy goals for a rule-based international order which preserves the status quo and their traditional interests. In this regard, although major international powers are vested with special responsibilities to maintain international stability and order, they can be the main protagonists for breaking the rules and norms governing state creation and recognition in world politics. Accordingly, Sterio's analysis and empirical illustrations shed light on the unequal state sovereignty, the dominance of power-based hierarchical orders in world politics, and the discrepancies between the rhetoric of rule-based international order and self-interested and prudent practices.

Between power politics and discorded state practices, normative considerations play an important role in shaping contemporary politics and practices of state recognition. Ralph Wilde's chapter ('International recognition and human rights treaties') explores the presence and influence of human rights considerations in the existing legal and normative regimes of state recognition. Wilde argues that human rights abuses play a vital role in shaping the position of states and international organisations with regard to the legitimacy and entitlement of claimant entities for external self-determination and subsequent international recognition, but also shape the *erga omnes* obligations of states not to recognise states, governments, and situations in breach of fundamental principles of international law, including basic human rights of affected subjects. Combining legal and empirical analysis, this chapter looks at a broad range of cases and contexts, as well as normative standards where human rights considerations play a role in the recognition and non-recognition of claims to statehood, title over territory, and exercise of control over non-sovereign territories, including the normative entitlement of claimant entities to external self-determination and recognition after undergoing a popular consultation process. By looking at the interplay of legal and normative regimes, and state practice, this chapter demonstrates the significance of human rights as a complex hallmark between law and politics of state recognition. It shows how the rights-based approaches, broadly defined, set the contours of the international customary law of state recognition, as well as the fact that human rights are a mandatory rather than discretionary consideration when it comes to the recognition or non-recognition of states and situations in world politics.

The international politics and regimes of recognition are profoundly shaped by the nature of prevalent world order. Edward Newman's chapter ('State recognition in a transitional international order') explores how the transitional international order, driven by shifts in great power influence, is shaping the evolving international politics of state recognition. Important recent cases – such as Kosovo – have been particularly divisive in the context of global rivalries and raise questions about the impact of unilateral recognition by powerful states and a shift away from international consensus for the recognition of new states. In this context the chapter considers whether the politics and practice of international

recognition are facing an upheaval as a result of renewed great power friction. This is explored through three scenarios. First, the chapter considers patterns of practices among ‘rising’ and ‘status quo’ powers in terms of international recognition. Is there a distinct split, in key cases – such as Kosovo or Palestine – between status quo and rising powers in terms of recognition? Second, the chapter explores if and how the rivalries and tensions associated with the transitional international order play a role in multilateral debates and decisions about recognition. Finally, the chapter explores if normative contestation associated with the transitional international order – with opposing liberal and conservative worldviews – is relevant to evolving international recognition politics and norms. While this chapter presents a number of links between the transitional international order and the evolving politics of international recognition, it concludes that there has arguably not been an upheaval or transformation of international recognition practices or norms, because international society remains essentially conservative in nature and reluctant to accept new states. States – whether ‘status quo’ or ‘resurgent’ – generally remain united in opposing a loosening of norms or practices of international recognition.

Pathways to independent statehood

Throughout history we have seen different routes through which states have become sovereign and recognised entities in world politics. Although it is difficult to precisely delineate the patterns of state creation, in the literature it has become a normal practice to relate the prospects of recognition to whether the aspiring state emerged through consensual, unilateral, or remedial routes. This volume examines in detail major pathways to secession and independent statehood to order to shed light on the varieties of state birth and the international responses.

Central to the prospects for international recognition is the pathway to independent statehood, namely how legitimate and consensual is considered the process of proclaiming independence. James Summers’s chapter (‘Pathways to independence and recognition’) examines three dominant pathways to independent statehood which can lead to eventual recognition or non-recognition. The first route is via the collective right to self-determination, which is often conditioned by external actors and factors such as the consent of the base state – that is, the state from which the new, aspiring state wishes to secede – as well as global norms in relation to decolonisation, and powerful states. Yet, Summers shows that the right to self-determination does not ultimately lead to international recognition. States have no duty to recognise the right of other groups to self-determination. The most relevant example is Palestine and Western Sahara, which are entitled to the right of self-determination but receive only partial international recognition. The second pathway to independent statehood concerns the exploitation of international legal and institutional vacuums with regard to state creation and recognition. Summers argues that international law only regulates the relationship between recognised states, hence it is silent on the process and politics of state creation. Yet, despite the neutrality argument, consensual secession as opposed to unilateral secession tends to enjoy greater international legitimacy and thus better chance of recognition. However, in exceptional circumstances arguments in favour of remedial secession tend to shift the international acceptance of entities proclaiming independence as a measure of last resort after enduring systematic human rights abuses and a failure of international efforts for conflict settlement without requiring border changes. The third pathway to independent statehood involves creation despite legal and political restrictions, which leads to limited or no international recognition. Summers examines the duty of non-recognition arising from state creation which breaches peremptory norms of international

law, such as proclaiming independence as a result of wars of aggression or unjustifiable use of force. This pathway, Summers argues, most often results in the creation of frozen and protracted conflicts that challenge international security and rule-based order.

Although the dynamics of state recognition are deeply contextual, understanding the wider trends is also crucial to trace the macro-politics undermining this practice in the international system. Ryan Griffiths's chapter ('Dynamics of secession and state birth') looks at the dynamics of secession and state birth and their impact on the recognition of aspiring states. Griffiths shows that, between 1816 and 2016, over 400 distinct groups demanded independence. However, only a very small fraction of ethnic groups seeking independence managed to become sovereign and recognised states. Griffiths argues that in the long run the norms, rules, and practices guiding state recognition regime evolve as the international system evolves. The dynamics of secession and recognition play out according to the changing rules of the game in world politics. Griffiths disentangles the contemporary dynamics of secession by looking at strategies employed by secessionist movements to convince their base state to permit independence and to convince the international community to grant recognition to them, using both peaceful and democratic tactics as well as coercive and violent methods. In response to this secession strategy, Griffiths argues, the base state reaction depends on the character of the political system, whereby democratic states tend to challenge secession through diplomatic, institutional, and constitutional methods, and more authoritarian states often resort to violent methods for suppressing secessionist claims. The response of the wider international community is often a balance between the tactics used by the secessionist movements and the reaction of the base state. Although there is variation on the response of the international community, fear of precedence and self-interest tend to guide the hesitancy to recognise the aspirant state.

Most of the groups seeking independence manifest their desire for collective self-determination through referendums. Yet, we know little about the politics and practices of state-becoming through referendums. Matt Qvortrup's chapter ('Referendums on independence and secession') looks at the prospects for state creation and eventual recognition through democratic deliberation. Qvortrup argues that referendums are not neutral democratic instruments of self-determination; they are a strategic tactic in a long struggle to generate domestic and international legitimacy for independent and recognisable statehood. In particular, questions of the legality and constitutionality of independence referendums are highly controversial, which often fragments societies and radicalises the tactics of secessionist groups. Looking at three types of independence referendums, namely ad hoc referendums, initiatives, and constitutional referendums, Qvortrup finds that referendums rarely result in immediate independent statehood. As nearly half of referendums for independence are unilateral, they often fail to achieve their desired outcome immediately. However, when referendums are held with the consent of the base state and are supervised by the international community, there is greater likelihood of achieving independence and universal recognition. Using original statistical data, Qvortrup finds that, in addition to the consent of the base state and affirmative popular support, the support of major international powers plays a key role in the success of independence referendums. Accordingly, Qvortrup concludes that there is a discrepancy between democratic self-determination and the prospects for state creation and recognition in contemporary world politics.

The current international hostility towards state creation has pushed many state-like entities to proclaim independent statehood and push for international recognition without the consent of the base state and the general support of the international community. Aleksandar Pavković's chapter ('Recognition of unilateral secession') explores the recognition of

unilateral secession in world politics. Unilateral secession is considered a state birth in breach of the territorial integrity and political unity of the base state. Drawing on relevant case studies, Pavković shows that states emerging from unilateral secession may result in securing limited bilateral recognition by other states but not the host states; non-recognition by UN member states; reintegration into the host state by armed force; or achieving universal recognition with the consent of the base state. Pavković shows that unilateral secession is not entirely unilateral as there is some degree of coordination with external and regional actors who support or sponsor this controversial mode of secession. While consensual secession tends to receive universal recognition, the opposite can be assumed in the cases of unilateral secession who are often not subjected to collective non-recognition. This does not rule out the possibility of unilateral secession without external sponsorship, which often leads to failed secession or complete international isolation. What drives external states to recognise states emerging from unilateral secession is their desire to enhance their geopolitical interests. Unilateral secession may lead to *de facto* statehood, but with limited international legitimacy. Pavković shows that states emerging from unilateral secession will be contested not only internationally but also internally by segments of population who may seek recursive secession as a dissatisfactory measure with their imposed containment in the new state. This reaction not only undermines the sovereignty of the new states, but also becomes a source of regional instability. The transformation of unilateral secession into recognised states seems to be the most optimal outcome; however, resistance by the base state and the reluctance of the international community to legitimate such a practice has resulted in the creation of unrecognised or partially recognised states, which constantly challenge international order.

The final pathway to independent statehood examined in this handbook is the remedial claim for self-determination as a last resort after persistent and serious violations of human rights. Michel Seymour's chapter ('Remedial secession') offers a critical overview of the remedial theory of secession, looking at the main conceptual contours and key proponents of this justice-based theory. The remedial right to self-determination holds that independent statehood claims may be legitimate when a people undergoes major injustice, including large-scale and persistent violations of basic individual human rights; unjust annexation of a legitimate state's territory; and/or the state's persistent violations of arrangements for internal autonomy. Short of a clear global regulatory mechanism, remedial secession theory has emerged as a pragmatic and responsive approach to permit secession only in extreme circumstances, which does not entirely undermine the existing international order. Despite its moral resonance, the remedial secession argument continues to remain contested both in theory and practice. Notably, existing scholars and state actors fear that remedial secession can be used as a prescriptive approach to create the conditions for earned statehood. Yet, as the chapter illustrates, remedial right to statehood has solid grounds on the existing normative framework guiding the relations between states and societies in world politics. However, in this chapter, Seymour takes stock of the work of proponents of the remedial right to statehood (especially the work of Allen Buchanan), discussing the merits and limits of this theory. Most notably, Seymour argues that the implications of remedial secession theory for state creation are significant as it ultimately limits the right to external self-determination based on the premise of the primary right theory of secession, and instead encourages complex political and normative processes to precede secession. He maintains that a people may not need to experience oppression and earn moral justification for secession; they should be entitled to sovereign statehood even in absence of any injustice. Accordingly, Seymour's chapter offers a timely contribution which not only helps reinterpret previous cases of remedial secession but also offers provocative thought for contemporary cases and those that may arise in the future.

Actors, forms and the process of state recognition

A major feature of scholarly debates on state recognition concerns the actors and forms of recognition. The second section of this volume both covers the traditional actors and forms of recognition, namely bilateral and collective recognition and non-recognition of states, and provides new and original insights of alternative forms of recognition both by national, supranational, and transnational actors. As recognition is a discretionary political act with legal consequences, the oldest and most common form of recognition is bilateral recognition. Bilateral recognition signifies formal or implied recognition of independence and sovereign statehood, along with the legal personality to share benefits and obligations of international law. Brad Roth's chapter ('Bilateral recognition of states') explores the legal and political predicaments behind the bilateral recognition of states. Roth shows that states have a wide range of options in terms of how they can respond to the existence of new states, articulated through overt and express forms of recognition. Roth argues that bilateral recognition is crucial for securing collective recognition as the very act of recognition is embedded in a legal judgement about the fulfilment of statehood criteria and the possession of the capacity to take obligations under international law. While admission to the UN has become associated with collective recognition, bilateral recognition remains a vital practice for conferring upon and acknowledging the sovereign statehood of a claimant entity. Although bilateral recognition is a discretionary right of states, it is considered a wrongful act when it is conferred prematurely or in breach of peremptory norms of international law. The semantical boundaries of prematurity are often unclear both in terms of the satisfaction of objective criteria of statehood and the legitimacy of claims for non-recognition by the base state and other states. The situation is much clearer in cases of state birth through aggression and the use of force. States are obliged to not recognise such wrongful situations. Yet, in practice, Roth shows that states have failed to respect the principle of state maturing and legality of secession when conferring or withholding the recognition of states.

Parallel to the recognition of states, the recognition of governments historically has featured as an important diplomatic practice. M.J. Peterson's chapter ('Recognition of governments') explores the connection between the state and government and the significance of recognition for both segments of statehood, as well as looking at a variety of rationales for recognising one or the other. The chapter also examines the legal and political effects of according or denying recognition to governments. Peterson offers an account of situations where the international community needs to decide if it recognises governments, belligerent groups, and liberation movements. Peterson argues that recognition of governments is quintessential for the political and legal performance of states in international system, as the state can exercise its sovereignty as long as the government as the authoritative agent is capable of doing so. While in the past recognition of government has regularly been reviewed, the recognition of states is considered a single act, reversible in only very rare circumstances. Peterson shows that a central dilemma in the recognition of government is when the new government comes to power through a military coup or when there are rival claimants to government status. Under such situation, states risk granting premature recognition to one of the factions, which has happened several times throughout history. Yet, it is not uncommon for the international community to extend recognition to a belligerent authority which has claimed effective control and capacity to govern. Nowadays, it is a common practice for a change of government not to affect the state's existence and its rights and responsibilities under international law. Yet, other states still can decide if they want to recognise or not the new government, a dilemma which rests upon the contention between the recognition

of democratic legitimacy or effective control. In most of the cases such government non-recognition might have only bilateral consequences, but there are cases when such a decision, taken by a powerful state as a form of section, might influence the response of the wider international community. Peterson concludes that, as long as recognition remains an unregulated domain in international law and politics, it will be followed by uneven and arbitrary practices far from any normative consistency.

Despite the fact that we are currently experiencing a transitional international order, collective recognition remains one of the most effective method for entering into international society as it reduces the burden of bilateral recognition as well as enhancing the international legitimacy of the new state. Collective recognition, in other words, is considered an optimal solution because it does not destabilise the international order and yet permits the expansion of the society of states. Jure Vidmar's chapter ('Statehood and collective recognition: practice of states and UN organs') revisits the debate on whether recognition is a declaratory or a constitutive legal act, and finds limitations with both theoretical positions. He observes that under some circumstances recognition can be constitutive, and this is particularly the case where recognition is granted collectively, which is a consequence of UN membership. In this sense, most contemporary writers have thus adopted the view that recognition is declaratory: it only *acknowledges* that a certain state exists; it does not create it. However, in a decentralised system of international law and in the absence of a public international authority for identifying states, there is no collective mechanism for coordinating and validating this. The UN comes close to performing such a role – since membership is generally assumed to reflect international recognition – but there are functioning states which have wide recognition, but which are not members of the UN. The chapter illustrates a range of inconsistencies in the declaratory vs. constitutive debate, in which collective recognition plays a defining role.

While collective recognition of states is not regulated in international law, there are stronger normative and legal provisions which require non-recognition of states and situations in specific circumstances. Nina Caspersen's chapter ('Collective non-recognition of states') focuses upon territorial entities which have not received international recognition despite, in some cases, having long-term territorial control, state-like institutions, and democratic governance. The international system is inherently conservative and thus resistant to separatism, and so collective non-recognition is a firmly established practice to deny legal statehood to unregulated attempts to establish statehood, and deter other territories from pursuing secession. In this context Caspersen's chapter explores collective non-recognition in the context of secessionist conflicts and debates about the potential tension between individual and collective state interests, the human costs of non-recognition, and the implications and impacts of collective non-recognition. She considers, for example, whether collective non-recognition affects the dynamics of conflict, the significance of patron states, and domestic developments in the resulting unrecognised (or *de facto*) states. The chapter examines the normative, legal and pragmatic reasoning behind collective non-recognition, and considers what forms of interactions are prohibited in cases of collective non-recognition. As the chapter observes, collective non-recognition has not stopped some entities from achieving a condition of *de facto* statehood, with a broad range of interaction with other states and with international organisations. As Caspersen notes, the obligations that follow from collective non-recognition lack clarity, but tend to be interpreted restrictively, in order to uphold the norm of territorial integrity and avoid the creation of dangerous precedents. Yet there are variations in the degree of international links available to *de facto* states that point to inconsistencies in the idea of collective non-recognition, and collective non-recognition does not always promote conflict resolution.

Although the international community continues to withhold the formal recognition of a good number of state-like entities, new forms of diplomatic engagement are emerging which seek to challenge the conventional assumptions and practices on state recognition. Bruno Coppieter's chapter ('Engagement without recognition') explores a widespread practice whereby states and non-state actors interact with entities that they do not formally recognise as states. It gives particular attention to the EU's 'non-recognition and engagement' with Abkhazia and South Ossetia, a policy which has framed the EU's continued support for communities in these regions, and which is aimed at conflict resolution while maintaining the opposition of EU members to the secession of these territories from Georgia. More broadly, this practice reflects the commitment – shared by most major stakeholders in international politics – to the stability of the international order and respect for existing borders, even when there is interest in engagement with communities. As the chapter describes, the objectives of this policy include the implementation of humanitarian programmes, mediation and confidence-building between conflicting parties, and the establishment of trade links with the EU. This may help to build trust between the parties, and gradually may help to transform the conflict towards resolution. The chapter considers the impact of this formula, and the risks which this entails, including the danger of providing indirect acknowledgement of separatism in these cases, and the risk of antagonising Georgia, which is very sensitive to any endorsement of the secession of these territories. The chapter concludes that the EU's policy of 'non-recognition and engagement' towards Abkhazia and South Ossetia lacks clarity, and there is a need for a distinction between a 'policy of non-recognition and engagement' and a 'policy of engagement without recognition'.

While governments and heads of state continue to play the most important role in conferring or withholding the recognition of states, other national and supranational bodies are increasingly playing an important role in shaping the politics of state recognition. The chapter by Chiara Loda and John Doyle ('Parliamentary recognition') analyses the relatively unexplored topic of the roles of national and supranational parliaments in the processes of state recognition. They do not challenge the dominant view in academic analysis that executives dominate the state recognition and non-recognition processes, as part of their wider dominant role in diplomacy more generally, but they do argue that the more limited role of parliaments is important. They argue that it is not always accurate to portray this role as a challenge by activist parliaments seeking to exert authority over their governments. Activism can be seen on Palestine in particular, where in cases of governments without firm majorities in the national parliament or reliant on governing deals that do not exclude free votes on such issues, parliaments have acted as a conduit for pro-Palestinian public opinion and/or such support among the grassroots of political parties. Loda and Doyle argue that, in cases such as Greece on the Palestinian question and in the Russia Federation on Abkhazia and South Ossetia, the parliamentary 'activism' was clearly prompted by the government itself as an interim step or in Russia's case to try to build legitimacy for a controversial action. Supranational assemblies and parliaments have also broadened recognition in cases where the formal rules of the UNSC prevent UN membership being used to resolve the question.

Diplomatic recognition of new states is granted by existing sovereign states, but with the rise of regional organisations and supranational bodies, new practices of state recognition are emerging. Gëzim Visoka and Edward Newman's chapter ('Recognition of states by regional organisations: the European Union's contested experience') explores the European Union's (EU) practices of international state recognition in a transitional international order. Through tracing the EU's policy discourse, this chapter illustrates the difficulties that the EU has encountered in attempting to reach a collective position on sensitive cases of

recognition – through a complex balance of internal and external considerations – at a time when the norms regarding recognition are increasingly under challenge. Whether the organisation takes a collective European position on recognition or allows its members to adopt individual national positions, Newman and Visoka show that acute inconsistencies and tensions have been exposed, with implications for the EU's standing in the world. Through this, the chapter identifies a key tension between the EU's normative commitments and its geopolitical interests. While a uniform EU policy on recognition may not be feasible and case-by-case pragmatism will likely continue, a more coherent approach and greater understanding of the impact of the EU's position on recognition are necessary.

Although state recognition is not formally regulated by international law, the legal opinion of international courts plays an important role in shaping state practices. Gentian Zyberi's chapter ('The International Court of Justice and the recognition of states') looks at the key rulings and advisory opinions of the ICJ on matters concerning statehood, sovereignty, and state recognition. Zyberi argues that the most significant contribution of the world court has been in clarifying the criteria for admission to the UN, facilitating the decolonisation process, reinforcing the peremptory norms of international law (including the collective non-recognition of state emergence through aggression and use of force), and revealing the discretionary character of the declaration of independence. Zyberi also sheds light on the role of ICJ's adjudicating practices in granting access to partially recognised states in the international community, thus demonstrating that the absence of universal recognition should not exclude UN non-member states and other contested entities from seeking peaceful settlement of sovereignty disputes through legal means. Zyberi's analysis reveals that the ICJ has the potential to set the conditions for the recognition of states similar to its deliberation on the conditions of admission to the UN in 1949. Similarly, as it has ruled on the collective non-recognition of internationally wrongful acts, the ICJ could set the legal contours of a duty to recognise states once they have achieved the necessary threshold and criteria for recognition. However, as it is a world court deeply interlinked with existing states, it is difficult to deliberate independently from power politics and vested interests on the existing international order.

Central to understanding the dynamics and politics of state recognition is exploring the diplomatic role and efforts of the base state to prevent recognition of the breakaway entities. James Ker-Lindsay's chapter ('The counter-diplomacy of state recognition') deals with the ways in which base states and other states try to prevent secessionist territories from gaining broad international recognition. As he notes, the growth in the number of secessionist entities vying for statehood means that the response of states to acts of separatism and how they formulate their diplomatic strategies to counter recognition is an important subject. This chapter explores this in relation to the cases of Cyprus, Serbia and Kosovo, and Georgia's response to the secession of Abkhazia and South Ossetia, and it identifies four main elements for a counter-recognition strategy: states continue to claim sovereignty over the seceding territory; formal diplomatic efforts to prevent the territory from being recognised bilaterally by other states and preventing the territory from joining regional and international organisations are pursued; even if the seceding territory does not receive widespread recognition, or join various international organisations, 'creeping' legitimisation on the international stage can occur, and the base state therefore needs to ensure that the territory does not gradually gain acceptance; and there are a range of legal steps that can be taken to shore up a claim to a sovereignty over a breakaway territory. The chapter observes that counter-recognition strategies evolve over time. Moreover, efforts to prevent the recognition of a secessionist territory need to be formulated and implemented according to a wider strategy regarding the conflict as a whole.

The question of the viability of new states increasingly becoming an important factor behind the decision of granting or withholding recognition of newcomers. Nicolas Lemay-Hébert's chapter ('State fragility and international recognition') considers how the evolving norms and practices of international recognition relate to the 'state fragility' policy agenda. The conventional criteria for statehood do not include standards relating to the capacity of state institutions and there are no formal provisions for withdrawing statehood in the event of failure to meet objective standards of state capacity or performance. Nevertheless, there have been academic debates about the possibility of the 'decertification' of statehood when states do not meet normative standards set by the 'international community'. The chapter thus explores how the understanding of state fragility and benchmarks around statehood provides the cornerstone to understand the contemporary normative evolution of state recognition. The chapter concludes that we are far from achieving a process of 'decertification' for collapsed states, as advocated in the literature prior to World War II and revisited by others at times since then.

The creation of new states and their subsequent recognition by other states play an enormous role in world politics. Although there is extensive research on the politics, legality, and ethics of state recognition, there has been little attention to its revocability or withdrawal. The derecognition of states – defined as a political decision to withdraw recognition of the legal sovereignty of a state or government – plays a far more significant role in world politics than is often assumed. Gëzim Visoka's chapter ('The derecognition of states') offers a comprehensive assessment of legal, normative, and political theories and surveys practices of state derecognition in world politics. Visoka shows that, in the absence of legal and institutional regulatory mechanisms, derecognition – like recognition – remains a highly controversial matter, and, in practice, something that is at the discretion of states. In theory, the revocation of recognition is seen as impossible unless recognition is reassigned or extended to another entity, the original conditions for recognition no longer exist, or the claimant state emerges through aggression or loses the core attributes of statehood. However, when tracing contemporary examples of state derecognition, this chapter argues that derecognising states is not entirely about asserting that a state does not fulfil the core criteria of statehood, nor is it merely an instrument for upholding international institutions and norms on sovereignty and territorial integrity. Rather, derecognition has emerged as a foreign policy instrument for advancing the domestic and international self-interest of the derecognising states and their international allies. Economic benefits, domestic political dynamics, and geopolitical interests play a far more significant role in the derecognition of states than the statehood capacity of claimant states, commitment to conflict resolution, or other normative factors. Beyond these rationales, the withdrawal of recognition has far-reaching consequences, not only for the derecognised states but also for those derecognising them. For the claimant state, derecognition can lead to diplomatic isolation, domestic political turmoil, limited access to international bodies, and exposure to external interference and collective insecurity. However, derecognition is often guided by controversial economic and geopolitical interests; it can undermine democratic processes, nurture corruption, and promote the hostile conduct of foreign policy among those states who are implicated in the business of withdrawing the recognition of other states.

Scholarly debates on state recognition have not explored sufficiently the everyday micro-politics and foreign policy aspects of contested states. Dimitris Bouris and Irene Fernández-Molina's chapter ('Contested states and their everyday quest for recognition') offers a new conceptual framework to make sense of the forms of state recognition in world politics. It proposes the concept of transnational recognition to better explain the

contemporary nature of state recognition, namely showing the hybridisation of domestic and international politics as well as the role of state and non-state actors, and official and unofficial diplomacies that underpin the agency and practices of contested states for surviving in international system. Trying to overcome the existing epistemic limitation for studying state recognition, Bouris and Fernández-Molina argue that it is more important to make sense of what contested states do rather than focus on what they are. Drawing on the everyday diplomatic activities of Western Sahara and Palestine, this chapter offers fresh analysis on the performative nature of state recognition in contemporary world politics, calling for much-needed expansion of the conceptual tools and approach for studying the interaction of states with different degrees of external acceptance and contestation.

Case studies of contemporary state recognition

Despite the epistemic value of theoretical, conceptual, and comparative studies, extended case study research remains one of the most reliable forms of understanding the historical peculiarities and contextual nuances of state recognition. Studying individual recognition-seeking states on their own helps not only to show that the birth, consolidation, and transformation of states undergo unique trajectories but also to avoid conceptual overstretching, generalisation, and comparison, which can often become the source of epistemic injustice and exclusionary practices in the real world. The final part of this handbook explores a number of typical and atypical cases of contemporary state recognition and non-recognition. Yaser Alashqar's chapter ('Palestine') looks at Palestine's struggle for recognition under the conditions of military occupation and hollow international support. Alashqar first looks at the historical stages which led to the formation of Palestinian state, including failed peacemaking efforts, varied international support, and the challenges for establishing political authority and building state institutions under the conditions of the Israeli occupation of most of Palestine's populated areas. The chapter demonstrates the uneven moral, legal, and political recognition of Palestine's struggle for self-determination and statehood and the promise and limits of international law and organisations in resolving this protracted dispute. Alashqar's chapter demonstrates that, although Palestine enjoys wide international bilateral recognition, it was only when its status was upgraded to a non-member observer state that its international standing enhanced, which also affected the dynamics of the stalled peace process with Israel. In addition to showing the benefits of upgraded UN status, Alashqar shows the domestic ramifications and political discourse among the main Palestinian political groups to illustrate the role of recognition in state-building and peacemaking processes. Accordingly, this chapter offers valuable insights on the limit of wide international recognition short of effective control of territory and functioning political authority inhibited by occupation and reoccurring deadly episodes of violence and destruction.

Timothy S. Rich and Andi Dahmer's chapter ('Taiwan') looks at Taiwan's international recognition. The chapter unpacks the contextual peculiarities of Taiwan, especially the contested claims over the territory and the ambiguous and multi-layered international response. Rich and Dahmer offer a compelling analysis of Taiwan's historical battle for recognition, looking at the rationales and politics of recognition as well as the implications of China's robust counter-recognition campaign. The chapter demonstrates that Taiwan, in order to survive in the international system, has had to democratise and liberalise at home and appeal to other democracies abroad, as well as deploy a nuanced economic diplomacy to sustain its diplomatic relations with other states. As many states have switched their recognition from

Taiwan to China, Rich and Dahmer offer valuable insights on the geopolitical and economic factors behind the ‘dollar diplomacy’ and the rivalry for international support between both sides of the strait. In particular, the global rise of China has demonstratively weakened Taiwan’s diplomatic affairs, which has recently dramatised cross-strait relations.

One of the most atypical cases of state recognition is Western Sahara, a region currently categorised as a non-self-governing territory occupied by Morocco in contradiction of international law and the norms of decolonisation. Irene Fernández-Molina and Matthew Porges’s chapter (‘Western Sahara’) provides a comprehensive overview of the only incomplete case of decolonisation in Africa, which enjoys partial international recognition and has a government which exercises most of its powers in exile and a large population displaced in neighbouring Algeria. In this chapter, Fernández-Molina and Porges first trace the historical struggle of Western Sahara for independent statehood, highlighting the key events which have prevented the organisation of the UN-sanctioned referendum for self-determination. The disorderly withdrawal of the former colonial power and the territorial occupation by neighbouring states, along with the insufficient political commitment of the UN and the international community, have been the core factors which have inhibited the self-determination of the Sahrawi people. As a result of occupation and protracted conflict, the Sahrawi Arab Democratic Republic (SADR), run by the Polisario Front, has mainly operated as a hybrid state in exile, with partial international recognition and limited effective authority over the territory of Western Sahara. This constrained exercise of international and domestic sovereignty has resulted in weakening SADR’s international statehood and even exposed it to a derecognition and marginalisation campaign led by Morocco and its Western allies. The international community remains also divided on the question of Western Sahara, formally not recognising Morocco’s control of most of the Western Sahara territory, yet widely benefiting from resource extraction, and only partially recognising Polisario Front as a national liberation movement and the SADR as a sovereign state.

Another important case of secession, and subsequently of collective recognition, outside the decolonisation process in Africa is South Sudan. Walt Kilroy’s chapter (‘South Sudan’) discusses the pathway of South Sudan to independent statehood. Kilroy’s analysis traces South Sudan’s long struggle to secede from Sudan and decades of war, which eventually led to an internationally supported peace process, with backing from both regional and Western powers. A series of incremental deals culminated in the Comprehensive Peace Agreement, signed in 2005. This led to a six-year interim period with greater autonomy for the South, and a referendum there in January 2011, in which an overwhelming majority voted for full independence. The country became independent in July 2011, by which time Sudan acquiesced in the move to self-determination, having fought against it for so long. The newly formed state was recognised by a number of countries on the day it was established, and became a member of the United Nations and the African Union within weeks. However, state failure and a collapse into civil war within South Sudan just over two years after independence have marred what could have been a success story of negotiated secession, with more than a third of the population displaced by fighting and half of its people ending up facing food shortages.

Gëzim Visoka’s chapter (‘Kosovo’) explores the struggle of Europe’s youngest state to declare independent statehood and obtain international recognition. Existing debates on state recognition tend to privilege systemic factors, normative institutions, and the preferences of great powers, thus ignoring the everyday agency of new states in world politics. Understanding the everyday making of statehood requires looking at how the different discourses are invoked to give meaning to sovereign statehood, how different diplomatic performances are

deployed to make sovereignty statehood internationally recognisable, and how entangled relations, events, narratives, and assemblages of actors can facilitate or impede the processes of securing recognition and membership of international organisations. Drawing on ethnographic research, Visoka argues that Kosovo's diplomatic success in consolidating its sovereign statehood – namely obtaining bilateral recognition and securing membership of international organisations – has been the situational assemblage of multiple discourses, practised through a broad variety of performative actions, and shaped by a complex entanglement within global assemblages of norms, actors, relations, and events. Although Western states have played an important role in strengthening Kosovo's international standing, Kosovo's own diplomatic efforts have shaped the dynamics and outcomes of its campaign for international legitimisation.

Scott Pegg's chapter ('Somaliland') looks at the politics behind the failure of international community to extend diplomatic recognition to Somaliland, which fulfils the modern criteria of statehood, including democratic legitimacy. In the first part of the chapter, Pegg discusses Somaliland's case for recognition, which is multifaceted and grounded both on legal and normative arguments and on empirical or performance-based arguments, which should provide strong evidence for international recognition. However, Pegg shows that a combination of geopolitical factors along with politicised work of regional and international organisations have played a major role in obstructing Somaliland's desire for recognised statehood. In unpacking the case for recognition, Pegg shows that Somaliland has demonstrated not only that it has a strong historical case in favour of recognition but also that it has also earned sovereignty by performing much better than its surrounding neighbours in terms of democracy and stability. In the second part of the chapter, Pegg explores Somaliland's diplomatic efforts to understand how this unrecognised state engages with the rest of the world. He shows that a wide range of forms of engagement with Britain as its former colonial power, other regional actors, and international organisations have played an important role in maintaining Somaliland's commitment to democracy and stability as well as keeping the hope alive for eventual recognition. In the final section, Pegg explores alternative futures for Somaliland, arguing that the likelihood for overcome existing contestation inevitably involves some form of consent from Somalia and requires the support of regional powers.

Donnacha Ó Beacháin's chapter ('Abkhazia and South Ossetia') looks at the struggle of Georgia's breakaway territories for international recognition. The chapter examines the vital role of Russia, unquestionably Abkhazia's and South Ossetia's most important partner, and how the extreme asymmetry of these relations has fostered a very high level of dependence on Moscow's goodwill, which extends to efforts to secure international recognition. As this chapter highlights, Abkhazia and South Ossetia's status as partially recognised states is less the result of pursuing a particular foreign policy and a merit of their own diplomatic agency, and much more the product of great power rivalry and international events, that the Abkhazians or Ossetians were unable to control or direct. While formal recognition by Russia has facilitated an unprecedented level of support for Abkhazia and South Ossetia, the recognition by a handful of Latin American states and Pacific islands has brought no direct benefit expect symbolically easing their international standing. As the merits for the limited recognition of Abkhazia and South Ossetia belong to Russia and its foreign aid packages, the chapter concludes that eventual regime change in these recognising states – some of which are known for switching recognition of states – will result in reducing the diplomatic relations of these breakaway territories to Russia, their only reliable patron state.

Daria Isachenko's chapter ('Transnistria and Northern Cyprus') examines two entities in the Eurasian space that act as *de facto* states but lack international recognition. This chapter highlights the enduring nature of *de facto* states and their capacity to survive through

informal networks of relations with their respective patron states. Isachenko examines the foreign policy and diplomatic efforts of these two de facto states to gain international affirmation and integration in the international community. Short of full diplomatic recognition, both Northern Cyprus and Transdniestria seek to build relations and survive political and economically. Isachenko's chapter shows how Northern Cyprus uses its religious identity to align and establish a network of unofficial diplomatic representations with the Arab world and Middle Eastern countries in an effort to demonstrate resilient statehood. Similarly, Transdniestria exploits the evolving norms and practice of regional cooperation in wider Europe to interact both with Russia, as a main supporting state, as well as other unrecognised states in the region. Isachenko's chapter also sheds light on the counter-recognition efforts of Moldova and the Republic of Cyprus, which aim to limit the international access of these breakaway regions. Accordingly, this chapter demonstrates that de facto states tend to survive even without recognition thanks to a complex entanglement between domestic political structures and strategic relations with a patron state, thus highlighting the geopolitics of recognition in contemporary world politics.

Concluding the case study section, Eileen Connolly and John Doyle's chapter ('Brexit and the question of Irish unity') explores the implications of Brexit for the question of Irish unity. They argue that the 1998 Good Friday Agreement was premised on key assumptions, including an open land border on the island of Ireland and a gradual process of both integration and reform that leaves open the ultimate constitutional end point. This allowed Irish nationalists, seeking a united Ireland, and supporters of continued British rule to accept the Agreement. Brexit, Connolly and Doyle argue, represents a fundamental challenge to the peace, as the frontier could once again become a customs, regulatory, and security border, where installations are targets for armed attacks, and security forces on the border are symbols of reversal. The UK 'post Brexit' will be increasingly detached from the rest of Europe and pro-Brexit unionists are seeking to stop or slow the process of neo-functional integration on the island. Connolly and Doyle point out that opinion polls in the post-referendum period indicate that Irish nationalists are abandoning their previous strong support for a gradual process of change and may instead mobilise for a referendum on Irish unity. While Irish nationalists on their own represent only 42% of the electorate, the EU has already agreed that Northern Ireland, in the event of Irish unity, would automatically become part of the EU, following the German precedent. The polls in Northern Ireland suggest that the political centre ground, which has traditionally favoured the status quo, may use the option of an Irish unity to 'rejoin' the EU when faced with a so-called 'hard Brexit' outside the EU market and with securitised border installations. These dynamics have both increased the likelihood of Irish unity in the short term but also the possibility of a return to deep political division and armed conflict.

Finally, Gëzim Visoka's concluding chapter ('Towards a critical agenda on state recognition') offers a critical outlook of state recognition studies and proposes new directions for future research. Visoka argues that the domination of Western-centric conception of the norms, politics, and practices of statehood and recognition has encapsulated the prospects for overcoming the contemporary anomalies with regard to state recognition and overshadowed a broad range of other alternative practices that have significant political and normative ramifications. In this concluding chapter Visoka proposes that future research on state recognition should problematise and decolonise the established discourses, norms, and practices, as well as expand our conceptual and praxiological scope for understanding pluriversal regimes of recognition in theory in hope of regulating this controversial and contested diplomatic practice in world politics.

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PART I

Theoretical and normative perspectives

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2

THEORIES OF STATE RECOGNITION

Rowan Nicholson and Thomas D. Grant

Introduction

No ‘country on earth’, the Security Council was told in 1948, ‘can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the *de facto* status of a State’, nor is there ‘a tribunal of justice or of any other kind, anywhere, that can pass judgment upon the legality or the validity of that act’ (UN Security Council 1948: 16).¹ Yet, rightfully or not, every aspect of state recognition has been questioned, debated, and theorized in international law, and some tribunals and other decision makers have expressed views about it. This chapter will provide an overview of the main competing theories. The first two theories to be discussed will be the two that have traditionally dominated the debate: ‘declaratorism’ and ‘constitutivism’. That discussion will be followed by a survey of approaches that take elements from both of the traditional theories and, finally, by some observations about collective non-recognition.

The debate is not merely a matter of nuance; the theories disagree radically about the legal significance of recognition. Since definitions of the term *recognition* tend to contain assumptions about what that significance is,² there can be no precise definition of the term that applies to all of the theories alike. But roughly, in this context, the term refers to an acknowledgement by a state that another entity is also a state (see Grant 1999b: xix). This chapter will not deal with recognition in other international legal contexts, such as the recognition of governments.

The traditional declaratory theory

The declaratory theory – certainly in its traditional form – is not primarily a theory of recognition at all. It is a theory of how states come into being that denies that recognition is the decisive factor. It claims that there is a general rule of international law under which an entity becomes a state (with the rights and other legal attributes that statehood entails) by meeting criteria of effectiveness. In the absence of an authoritative attempt to codify the criteria, the formulation that is seen the most often is from the Montevideo Convention, a treaty of 1933 between a number of states in the Americas:

- a a permanent population;
- b a defined territory;
- c government;
- d capacity to enter into relations with the other states.

(Montevideo Convention 1933: art. 1)

But this formulation is by no means binding on all states (only a handful were parties to the Montevideo Convention) and is not universally accepted among scholars as the last word.³ The somewhat abstruse criterion of ‘capacity to enter into relations with the other states’ is often replaced with – or interpreted as being equivalent to – a criterion of ‘independence’ from other states (Crawford 2006: 62–89).⁴ In recent decades, certain additional factors have been identified that may also affect whether states emerge in particular circumstances, notably the prohibition of the use of force and the principle of self-determination (Crawford 2006: 96–148; Nicholson 2019: pts 4.1–4.2).

The relevant point for the purposes of this discussion is that, whatever the precise criteria may be and whatever exceptions to them may exist, the criteria do not include recognition.⁵ The Montevideo Convention emphasizes this: the ‘political existence of a state is independent of recognition by the other states’, with the result that a state that has not yet been recognized has certain rights in international law already, including ‘the right to defend its integrity and independence’ (Montevideo Convention 1933: art. 3).⁶ One authority is the 1929 decision of the arbitral tribunal in *Deutsche Continental Gas-Gesellschaft v Polish State*, which concerned the re-created state of Poland that emerged around the end of World War I. After affirming that statehood depended on criteria of territory, population, and ‘a public power’, the tribunal said:

according to the opinion rightly admitted by the great majority of writers on international law, the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognised by the States from which it emanates.

(Deutsche Continental Gas-Gesellschaft v Polish State 1929: 336, 344)

This idea, which is reflected in the name of the declaratory theory, was lent further support in the 1990s by the Badinter Commission, a body created by the European Community to provide advice about the new states that emerged from the collapse of Yugoslavia: statehood ‘is a question of fact’ and ‘the effects of recognition by other States are purely declaratory’ (Badinter Commission 1991: Opinion No. 1, 162, 164–5).

The Badinter Commission, voicing the traditional view, added on another occasion that recognition is ‘a discretionary act that other States may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law’ (Badinter Commission 1992: Opinion No. 10, 206, para. 4). The US *Restatement* concurs that granting recognition ‘is not required’; what is legally required is that in practice other states ‘treat as a state’ an entity meeting the criteria, regardless of ‘formal recognition’ (American Law Institute 1987: pt. 202). If recognition is neither decisive of statehood nor required by international law, it may seem more like a pure political act than a legal one. This, however, does not mean that acts that are described as acts of recognition lack any legal significance at all. Recognition may be seen to have significance in several respects.

First, recognition may be a prelude to establishing optional international legal relations with the recognized state, including treaty relations and admission to international organizations

(Grant 1999b: 24). It may also have consequences in the domestic law of the recognizing state, such as allowing the recognized state to own property or giving effect to judgments of its courts.

Second, in some circumstances, recognition amounts to an internationally unlawful act. The proposition that it is declaratory of statehood can be true only where the entity being recognized actually *has* statehood. If an entity unilaterally tries to secede from its parent state, if the parent state resists, and if that prevents the entity from consolidating its independence or control of territory to the extent required by the criteria, then the entity is not yet a state on the declaratory theory. Recognition of the entity is premature. There is a long line of opinion that such premature recognition is unlawful. In 1861, while the Confederacy was trying to secede, the US secretary of state warned that a nation that recognizes a secessionist entity ‘commits a great wrong against the nation whose integrity is thus invaded, and makes itself responsible for a just and ample redress’ (Seward 1861: 71, 77). Christian Tomuschat (2012: 31, 35) calls premature recognition ‘a head-on attack on the sovereign powers of the parent State which seeks to preserve its territorial integrity ... a case of unlawful intervention’. Another circumstance in which recognition is unlawful, to be discussed later in this chapter, is where it breaches a duty of collective non-recognition.

Third, acts of recognition may have evidentiary value. If there is a rule setting out criteria for statehood, then, on an orthodox view of what types of rules exist in international law,⁷ it must be a customary rule. A customary rule exists where it is evidenced by state practice accompanied by *opinio iuris* – ‘a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’ (ICJ 1969: 3, para. 77; see ICJ 1986: 14, para. 207). The practice must be ‘of such a character as to make it possible to discern a constant and uniform usage’ (International Law Commission 2016: commentary to conclusion 8, para. 2). A pattern of acts of recognition, especially if the recognizing states explicitly invoke the criteria, may function as practice and *opinio iuris* evidencing the parameters of the customary rule setting out the criteria – and perhaps even how the rule is to be applied in a particular situation. Thus, recognition can operate to create states indirectly rather than directly: it shapes a general rule; that general rule is then the basis for statehood.

The notion that statehood depends on a general rule with a degree of predictability and consistency, rather than on ad hoc decisions based on a narrowly defined self-interest, is one reason for the popularity of the declaratory theory among international lawyers. The theory is associated with the rule of law – with the lengthening reach of international law into areas of global life that might otherwise be the preserve of untamed power politics (Grant 1999b: 1).

Even insofar as its ideological attractions can be ignored and the theory can be assessed clinically, it has much in its favour. It has been endorsed not only by international tribunals such as that in *Deutsche Continental Gas* but also by domestic courts dealing with questions of international law (see Grant 1999b: 47–67). These include the Constitutional Court of West Germany in 1973 with reference to the two Germanies, which did not recognize each other (Federal Constitutional Court 1973: 149, 165–6),⁸ and the Supreme Court of Canada in 1998 with reference to the potential secession of Quebec (Supreme Court of Canada 1998: 536, para. 42). Moreover, instances can be cited in which an entity has been treated as a state in practice even by states that do not recognize it. In 1968, for example, the United States accused North Korea of breaching international law by attacking a US vessel, implying that it had the duties incumbent on states despite lacking US recognition (UNSC Verbatim Record 1968: para. 85; see U.S. Department of State Bulletin 1968: vol. 58, 188). The declaratory theory can explain practice such as this.

The theory, however, also has explanatory weaknesses (at least in its traditional form, in which recognition does not play any of the supplementary roles to be surveyed later in this chapter). The notion that there is a general rule with a degree of predictability and consistency comes under strain when it is applied to an idiosyncratic entity such as the Vatican City. Although recognized and treated as a state, it has a minuscule territory in the middle of Rome, its population of Catholic Church functionaries does not increase naturally, and it is dependent on Italy for basic services. James Crawford observes that ‘the criteria for statehood in its case are only marginally (if at all) complied with’ (Crawford 2006: 223; see Martens 2006: 729; Cismas 2014). Another problematic case is Somalia. For a period beginning in the 1990s, it collapsed into such anarchy that it effectively ceased to have a government – one of the criteria for statehood – and yet no other state ceased to recognize it (‘Government Recognition in Somalia’ 2002: 247).⁹ Attempts have been made to explain cases such as these consistently with declaratorism. One explanation of Somalia, for instance, may be that the test for the *continuing* legal existence of a state that collapses into anarchy is more lenient than the test for the creation of a new state: Vaughan Lowe writes that the ‘road to Statehood is a one-way street’ (Lowe 2007: 165).¹⁰ But other scholars have been tempted by cases such as Somalia, which has been described as ‘a nail in the coffin of the declaratory theory’ (Kreijen 2004: 355), to reconsider the role of recognition.

The traditional constitutive theory

More than one approach to recognition might loosely be called ‘constitutivist’. For the constitutive theory in its strongest or purest form one can turn to Lassa Oppenheim, who wrote in 1905 that a ‘State is and becomes an International Person through recognition only and exclusively’ (Oppenheim 1905–6: 71). On this view, criteria such as territory, population, and government have no necessary relevance to the creation of a new state; recognizing states *may* choose to take them into account but are at liberty to ignore them. As James Lorimer put it in the 1880s, each recognizing ‘State is to say, not only whether or not a given community fulfils the requirements of international existence, but is, moreover, left to determine what these requirements are’ (Lorimer 1883–4: 107). On the face of it, explaining anomalies such as the Vatican City and Somalia now becomes trivial: they are states for purposes of international law because other states recognize them.

Constitutivism enjoyed a phase of popularity among international lawyers in the nineteenth century. It appealed to legal positivists who – departing from an earlier tradition in which natural law had played a prominent role – emphasized that international law must be underpinned by the free will of entities that voluntarily consented to it (see Neff 2014).

A remarkable implication of the pure constitutive theory is that recognition is constitutive not only of statehood but also, in effect, of the *entirety of international law* as a system of rules applying between states. This is because recognition is the original exercise of free will by which a state agrees to be bound by rules in its interaction with the recognized entity. Dionisio Anzilotti, for instance, described recognition as ‘constitutive’ in the sense that it is ‘a pact concluded on the basis of the rule *pacta sunt servanda*’ (agreements must be kept); it ‘is purely and simply the initial agreement to which attaches the birth of legal norms for the subjects in question and therefore their personality relative to each other’ (Anzilotti 1929: 161).¹¹ Others have explicitly called recognition ‘contractual’.¹² The parties, before they make this agreement, must already exist in some political or factual sense – and might already be described as ‘states’ in that extralegal sense – but they acquire their *legal* existence only as a result of the agreement. Against this view is the evidence

(already noted) that states can exist legally even in the absence of recognition. What tends to evoke the sternest criticism, however, is not the countervailing evidence but the theoretical implication that international law is ultimately contractual.

One criticism is that this makes international law too relativistic. The term *international law*, on a constitutive view, describes not a single, universally applicable system of rules but the overlapping content of numerous bilateral agreements, each applicable between a specific pair of entities. It cannot be said that an entity is a state ‘objectively’, because an entity may be a state relative to recognizing states and yet have no rights at all relative to other states. Stefan Talmon calls this relativism the ‘most compelling argument against the constitutive theory’ (Talmon 2005: 101–2).¹³ Hersch Lauterpacht observed that it is ‘a negation of the unity of international law’; it entails the ‘grotesque spectacle of a community being a State in relation to some but not to other States’ (Lauterpacht 1947: 78). A state that does not wish to be bound by duties towards its neighbours need only deny them recognition; even an act of blatant aggression towards them will then not be unlawful. Constitutivism has, for this reason, been condemned as an intellectual prop for *Realpolitik*.

Another criticism is as follows. Whereas the declaratory theory subjects recognition to legal regulation only for limited purposes, on the pure constitutive theory the law can *never* regulate recognition as a matter of principle, because it is what brings the law into force in the first place. That sits uneasily with the notion that states sometimes have duties of non-recognition.¹⁴ Additionally, if recognition is a contract that is not subject to legal regulation, then it is hard to see what space is left for peremptory norms of international law (*ius cogens*): norms ‘from which no derogation is permitted’ – that cannot be contracted out of – ‘and which can be modified only by a subsequent norm of general international law having the same character’ (Vienna Convention on the Law of Treaties 1969: art. 53).

Hybrid approaches to recognition

Adherents of the traditional or pure constitutive theory have declined almost to extinction. Some approaches espoused today that are labelled ‘constitutivist’ in truth take elements from both of the traditional theories. These approaches often begin with an analysis of the evidence – including state practice that conflicts with one or other traditional theory – rather than with a priori assumptions about international law, such as an assumption that it must be ‘objective’ or must be contractual. Perhaps consistent with an inductive approach generally, they take a less doctrinaire approach to recognition, in that they reject a dichotomy in which recognition means either everything or else nothing at all. These approaches can be classified into two broad families: those in which recognition and the criteria for statehood both play necessary roles in constituting statehood, and those in which the criteria suffice on their own but, in particular circumstances, recognition may also suffice.

Recognition and criteria of effectiveness both play necessary roles

One view is associated with Paul Guggenheim and Hans Kelsen. They acknowledged the existence of criteria for statehood such as those listed in the Montevideo Convention. They argued, however, that there must also exist some authority to determine which entities meet the criteria and which do not: ‘*authoritative certification* is indispensable’ (Guggenheim 1953: 190–1).¹⁵ In the absence of a central institution that can give this certification, Kelsen argued

that states ‘alone are the authorities empowered by general international law to decide’ which entities are states (Kelsen 1941: 605, 607). Recognition is the means by which existing states make decisions of this kind. This approach manages to give a role to recognition without allowing international law to collapse into a jumble of bilateral relationships. In granting recognition, existing states are acting not solely on their own behalf but, in Guggenheim’s phrase, as organs ‘of the decentralized international community’ (Guggenheim 1953: 191).¹⁶

This is, however, an uneasy compromise. Krystyna Marek wonders what happens when states make a decision to recognize an entity that obviously does not meet the criteria. If that decision prevails, even though it is ‘incorrect’, then this theory collapses into constitutivism; if the decision is ineffectual, then the theory collapses into declaratorism (Marek 1968: 137–8: see Crawford 2006: 20). A further question raised by the Guggenheim–Kelsen theory is precisely *how many* acts of recognition are necessary in order for an entity to be constituted as a state ‘objectively’ relative to the entire international community, including any states that still do not recognize it. There may be no inconsistency in a view that holds recognition to be a decentralized response to questions of the existence of a state and the observation that that response contains no formalized procedure or very precise substantive rules, but to say that the view is internally consistent does not address the wider problems it entails.

Lauterpacht similarly thought that, since legal personality ‘requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform that task’ and, in the absence of a central organ, it was performed by states. His approach is more remarkable for another feature: it attempts to restrain the *Realpolitik* that is enabled – perhaps even validated – by putting the power to say what other entities are states in the hands of states. Lauterpacht postulated that existing states ‘are not entitled to serve exclusively the interests of their national policy and convenience’ regardless of the established criteria for statehood; states have a *duty* to recognize an entity that meets the criteria (Lauterpacht 1947: 6, 55). One difficulty with this approach is that it contradicts the one proposition on which both of the traditional theories agree: that recognition is generally not legally required but is a matter of discretion – in the words quoted at the start of this chapter, a ‘high political act’ (UN Security Council 1948: 16). Still, even if Lauterpacht’s view was at odds with the practice of his own time, more recent practice has displayed signs of a shift towards a collective or multilateral process in which states exercise less discretion. One of the present authors, Thomas Grant, has drawn attention to the practice of Western European states during the collapse of the Soviet Union and Yugoslavia as evidence for this (Grant 1999b: 197, 218). Those states adopted ‘guidelines’ on recognition by which they collectively declared:

their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new States which ... have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

(*European Commission 1991: 559*)

A practice of placing recognition under such a collective declaration, however, has not been followed since then in any general way; the European example in regard to the successor states in Yugoslavia must be seen as chiefly a localized one. Practice in regard to recognition thus has not evolved to a point at which it can confidently be said that states have a general duty to grant recognition such as that postulated by Lauterpacht.

Recognition is not always necessary but may suffice in some cases

Other approaches accept the traditional declaratorist view that meeting criteria of effectiveness is generally sufficient for statehood. In most circumstances, recognition plays no direct role in constituting an entity as a state (though it may still have legal significance in the other respects highlighted earlier: as a prelude to optional international legal relations, as an unlawful act, or as evidence of the parameters or applicability of the customary rule setting out the criteria). But there may be *particular circumstances* in which recognition plays a more direct role. A notable jurist who has made observations in this direction, while retaining the view that recognition is ‘in principle declaratory’, is Crawford (2006: 93). He observes that if an entity is recognized despite failing the criteria then that ‘recognition may be constitutive of legal obligation for the recognizing or acquiescing State’ and ‘may also tend to consolidate a general legal status at that time precarious or in the process of being constituted’ (Crawford 2006: 93; see also 223, 293, 501).¹⁷

This line of thought has been pursued by one of the present authors, Rowan Nicholson. Recognition can create or preserve the rights and other attributes of statehood as between the recognizer and the recognized, with the result that a universally recognized entity such as Somalia may for virtually all purposes be as much a ‘state’ as if it clearly met the criteria (Nicholson 2019: pts 3.4–3.5).¹⁸ There are limits to this possibility. It might not apply where recognition is unlawful, including where a secessionist entity is recognized prematurely in derogation from a state’s territorial integrity (Nicholson 2019: pt. 4.1). And, since states cannot generally impose duties on other states, recognition binds recognizing states alone; thus an entity that is recognized less than universally, such as Palestine, cannot be a state in the full sense on this basis (Nicholson 2019: pts 3.4–3.5).

Collective non-recognition

International lawyers continue to diverge radically about the legal significance of recognition. So it may be surprising that one point on which they have come close to agreement is on the existence of duties of collective *non-recognition*. These duties can arise in two ways. One way is under a rule of customary international law. The International Law Commission attempted to codify this rule in the Articles on the Responsibility of States for Internationally Wrongful Acts. Article 40 of the Articles contains a definition of ‘a serious breach by a State of an obligation arising under a peremptory norm of general international law’ (ILC 2001: art. 40), such as an unlawful use of force against another state or the commission of genocide. Article 41(2) then provides:

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.

(ILC 2001: art. 41(2))

The other way a duty may arise is under a binding decision of the Security Council. In 1970, the Council declared that ‘the continued presence of the South African authorities in Namibia’ after the termination of South Africa’s mandate to govern the territory was ‘illegal’ and consequently that acts by South Africa on Namibia’s behalf were ‘illegal and invalid’; it called on ‘all States ... to refrain from any dealings’ with South Africa that were inconsistent with this (UN Security Council 1970: paras 2, 5). The International Court of Justice held that decisions of this kind could be binding on member states of the

United Nations under article 25 of the Charter (ICJ 1971: paras 111–16). It is possible for a duty of collective non-recognition to arise in both ways. The International Law Commission has commented that the Security Council's decision about Namibia reflected the customary duty of non-recognition, because South Africa's presence breached the peremptory norm of self-determination (ILC 2001: art. 40, para. 8).

The term *recognition*, as used in this context, has a wide meaning. It is not limited to the recognition of an entity as a state: the Namibia episode concerned the lawfulness and validity of activities by South Africa rather than statehood. But duties of non-recognition undoubtedly apply to the recognition of an entity as a state where the basis on which it might have statehood is 'a situation created by a serious breach' of a peremptory norm. For instance, after the Turkish Republic of Northern Cyprus declared independence in 1983 with the support of Turkey, which had unlawfully occupied that part of Cyprus a few years earlier, the Security Council called upon 'all States not to recognize any Cypriot State other than the Republic of Cyprus' (UN Security Council 1983: para. 7). The International Court alluded to this practice in *Kosovo*. It observed that in cases such as Northern Cyprus:

the Security Council [made] a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed ... from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).

(ICJ 2010: para. 81)¹⁹

The Court distinguished cases of this sort from cases such as *Kosovo*, in which the Security Council had not made a comparable determination. The particular peremptory norm that is the most frequently invoked in this context is the prohibition on the use of force. But other peremptory norms are sometimes invoked, too; for example, in the 1990s Bosnia-Herzegovina argued that the ostensible statehood of Republika Srpska 'came about as a result ... of the genocidal practice of ethnic cleansing' during the collapse of Yugoslavia (ICJ 1994: para. 6.3.2.8).

Collective non-recognition raises several theoretical questions. In many cases there is doubt about whether a non-recognized entity meets the criteria for statehood anyway, especially if, as with Northern Cyprus, it is not clearly independent of an external supporter that has occupied the territory.²⁰ Does non-recognition make any difference in those cases? If the entity *does* meet the criteria, is it nonetheless precluded from acquiring statehood? Or is the result that the entity has statehood in some sense and yet other states are obliged to ignore or deny that fact? To an extent the answers to these questions depend on what approach is taken to recognition generally: declaratory, constitutive, or hybrid. But theories have also emerged dealing specifically with non-recognition. Talmon, for instance, argues that collective non-recognition does not have 'a status-destroying effect' on statehood, meaning that an entity may bear international responsibility, but that it has a 'status-denying' effect, in that other states can 'withhold the rights inherent in statehood from a new State' (Talmon 2005: 180).²¹ Despite these complications, collective non-recognition is firmly established in international law and plays a role in resolving situations in practice. In the case of Rhodesia, which was denied recognition because of its racist minority regime, non-recognition contributed to pressure that eventually caused the regime to abandon its unilateral claim of statehood.²²

Conclusion

The theories discussed in this chapter concern the direct consequences of recognition within the internal framework of international law. International lawyers have also produced a wealth of further theoretical literature tracing the intellectual history of theories of recognition (see, for example, Njiman 2004)²³ and analysing them from postcolonial, feminist, or other critical perspectives.²⁴ One reason for the profusion of theories and literature is that recognition is intertwined with basic or philosophical questions about international law: what states are and how they come into being, whether international law is an ‘objective’ system, and whose will or values it is designed to serve. So long as those larger questions continue to excite interest and divide opinion, international lawyers are likely to continue to disagree about the legal significance of recognition.

Notes

- 1 The comments were made with reference to the US recognition of the Provisional Government of Israel.
- 2 For example, a special rapporteur of the International Law Commission defined it as a ‘unilateral expression of will ... acknowledging the existence of a *de facto* or *de jure* situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability’ (Rodríguez Cedeño 2003: 63, para. 67). Inherent in this is a particular view of the legal significance of recognition. Compare the definition in American Law Institute (1987: pt. 202, comment a.).
- 3 Even between the parties the formulation of the criteria may have been at most ‘soft law’ (Grant 1999a: 403, 456).
- 4 Compare Chen (1951: 58–9).
- 5 Contrast the view that a ‘capacity to enter into relations with the other states’ necessitates recognition by at least some states (Dugard 2013: 9, 56–8). But this might be categorized alongside the other hybrid approaches, discussed later, in which both recognition and criteria of effectiveness play necessary roles in constituting statehood.
- 6 There have also been suggestions that rights may attach to entities that display some, but probably not all, attributes of statehood, in particular in regard to the prohibition against the use of force. See, for example, in regard to Nagorno-Karabakh, Luchterhandt (2017: 226, n.150).
- 7 Unorthodox possibilities might be that it is natural law or that it is part of an axiomatic rule such as the ‘basic norm’ of Kelsen (1949: 111) or the ‘rule of recognition’ of Hart (1961: 94).
- 8 See also Treaty on the Basis of Intra-German Relations (1973: art 6), under which West and East Germany agreed to ‘proceed on the principle that the sovereign jurisdiction of each of the two States is confined to its own territory’ and to ‘respect each other’s independence and autonomy’.
- 9 Compare *Somalia v Woodhouse Drake and Carey (Suisse) SA* (1992).
- 10 Lowe’s observation may, perhaps, say more about the presumed stability of jural relations at the international level in general than about a particular approach to recognition.
- 11 Translation by the authors.
- 12 For example, international law is ‘contractual’, and recognition is ‘a fundamental pact that puts into force’ that contractual system of law (Redslob 1934: 429, 431–2). Translation by the authors.
- 13 Other critics of the theory are cited in Grant (1999b: 2–4).
- 14 Crawford (2006: 21): ‘it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void’. As this suggests, the problem of invalidity is harder to overcome than the problem of unlawfulness. Imagine that an entity purports to secede unilaterally from its parent state. Another state, which already recognizes and is recognized by the parent state, proceeds to recognize the entity. Recognizing the entity may be an unlawful act relative to the parent state (under rules applicable bilaterally between the recognizing state and the parent state). But that can have no consequences for the validity of the recognition (which amounts to a free-standing bilateral agreement between the recognizing state and the entity).
- 15 Translation by the authors. The term in French is ‘une constatation autoritative’.
- 16 Translation by the authors.
- 17 See also remarks by Crawford (2006) at 223 (the Vatican City), 293 (Monaco), and 501 (‘collective’ recognition).

- 18 For a different approach in which statehood may depend either on the criteria or on recognition, see Vidmar (2012: 361).
- 19 See further Milanović and Wood (2015).
- 20 There is a long-standing presumption in international law 'against the independence of entities created by the use of force or during a period of belligerent occupation' (Crawford 2006: 132–3).
- 21 Contrast Nicholson (2019: pts 4.1.2–4.2.1).
- 22 Rhodesia unilaterally declared independence in 1965 but was never recognized by any state. The Security Council called for its non-recognition multiple times, including in UN Security Council (1965). See further Gowlland-Debbas (1990). The situation was resolved under Agreements Concluded at Lancaster House Conference, September–December 1979.
- 23 For example, Njiman (2004).
- 24 For a survey of some of this literature see Parfitt (2016: 583, 593–8). A notable example is the criticism that nineteenth-century ideas such as the constitutive theory served to compel non-Western peoples to meet Western standards (Anghie 2004: 107–8).

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3

THE EVOLUTION OF STATE RECOGNITION

Mikulas Fabry

The historical character of state recognition

State recognition is an institutionalized practice of the modern society of states and its law. It arose historically to address a practical need. Any system of law requires designated procedures and organs to identify legal statuses within that system. In domestic law these identifications are made through legislated procedures and organs of a central authority. In the case of the international legal system without a central authority and new claimants of statehood that procedure came to be 'recognition of states,' carried out diffusely by the governments of existing states forming that legal system – in nearly all instances through their executive branch (Kelsen 1941: 607; Lauterpacht 1947: 6, 32, 55).

The modern era began with the emergence of multiple self-constituted and self-governing European territorial entities claiming and maintaining sovereign rule independent of external authorities. In the course of the 17th and 18th centuries, these *de facto* entities came to acknowledge each other as sovereign, independent 'states' and to conduct their relations on a basis of shared, international law. That law was predominantly natural law and it regulated mutual relations not only within Europe but also between European states and numerous non-European *de facto* independently governed territorial communities, which were, given these attributes, deemed natural 'states' entitled to equal rights and duties (Alexandrowicz 1969). With the decline of natural law and the ascent of positive law in the late 18th century, non-European, non-Christian territorial political communities failing to meet a new positive 'standard of civilization' came to be excluded from the full state rights and privileges by unequal international legal treatment¹ or outright colonial incorporation (Gong 1984). At roughly the same time, existing European-based states began to face proliferating new claims of statehood from within and therefore needed to ascertain whether the claimants qualified as 'states' for the purposes of international relations and law. The responses to this imperative developed into the distinct and recurrent activity of 'recognition of states.'

By 'recognition,' existing states would certify – bilaterally and, if followed by other existing states, cumulatively – that a new claimant was a 'state': that is, a bearer of the rights and obligations attached to this status in international relations and law. If attained, such cumulative recognition would extend statehood from the mere internal assertion to externally accepted status. Only if a new territorial entity had generally been 'recognized'

as a 'state' was it regarded and treated as such in international diplomacy and law. Over time, thus, the society of states came to ontologically precede any new state; the collectivity of states morphed from 'an aggregate of separate communities' into 'itself a community: a community of communities tied together by its constitutive practices, including those defining the attributes of statehood' (Nardin 1992: 26). In contrast to earlier 'separate communities' such as Austria, France, Spain, Denmark and Sweden which predated the modern era and were original members of the society of states, later-founded polities such as the United States of America, Chile, Brazil, Belgium and Liberia became constituted as 'states' internationally only after seeking and receiving foreign recognition. Recognition would not always be overt, but it would always be intentional, signaling a shift in the understanding by the recognizing state of the status of the recognized entity.

From the very beginning, state recognition has been a practice led and shaped by major powers, especially great or systemic powers. Claims of statehood have tended to get enmeshed with questions of wider international order, and questions of international order have in turn been a special domain of these powers (Bull 2012). Recognition by great and major regional powers has normally preceded, and carried far more weight than, recognition by other states. Indeed, the latter would usually look to the former for direction; where they did not, their decisions alone would have little impact on the international status of an entity. In general, where the key great and regional powers would agree on the acknowledgment of a particular state or group of states, smaller countries would follow with their recognition in a 'snowball effect' (Fawn and Mayall 1996: 206) or a 'cascade' (Coggins 2011: 449). The phenomenon of joint or coordinated recognition and nonrecognition, since the 20th century sometimes taking place within formal international organizations such as the League of Nations and the United Nations, would thus limit the haphazardness of a practice that rests with individual governments. On the other hand, the bigger the disagreements among the powers, the greater the precariousness of recognition. The practice exhibited the greatest volatility during general great power hostilities, especially the Napoleonic Wars and World Wars I and II, paralleling the volatility of the entire international order.

Although frequently highly political, recognition has not been a matter of unfettered discretion. As in the case of other institutionalized practices, it has been informed by a set of criteria or norms. At the same time, as with other international practices carried out by the executive branch, recognition decisions have been neither *pro forma* nor fixed: They entail an inescapable discretionary element as general norms have to be interpreted when applied to specific cases. That discretion is what has allowed for disagreements among recognizing governments but also for possible modification in the substance of norms when there is consensus among them (Sandholtz 2009). Although always containing permanent population, territory and government, 'states' have never been purely physical phenomena. Rather, they have been normative phenomena which combine physical attributes with sociopolitical conceptions of legitimacy. As the criteria of legitimate statehood have evolved with developments in international morality and law, so has the practice of recognition. This is not to deny that recognition decisions have been commonly influenced by political discretionary factors such as national interests, shared interstate interests and lobbying from domestic interest groups. They have repeatedly been timed or employed strategically – for instance, as part of larger external efforts to achieve resolution of conflicts arising out of competing claims. They have also been sometimes conditioned by demands that prospective states commit to vital international standards or objectives, historically ranging from ending the slave trade and protecting minority rights to undertaking nuclear disarmament.

However, none of this negates the fact that existing states have generally understood recognition of a new state to be an activity informed by criteria that are independent from these factors, strategies and conditions. Recognizing states have certainly sought to justify their decisions as reflecting, or at least not contravening, the prevailing criteria of statehood. Although outside of 19th-century Britain and the United States governments only rarely admitted a duty to recognize an entity meeting these criteria, one would be, at the same time, hard-pressed to find examples where claimants manifestly fulfilled the criteria prevailing at the time and yet remained generally unrecognized, or where they patently failed to satisfy the criteria and yet received general recognition.

If one can meaningfully talk about the criteria or norms of recognition, and if these mirror how legitimate statehood is conceived of internationally at any point in time, what have they been and what ideas have they reflected? In a monograph examining them in historical detail (Fabry 2010), I argued that, since the end of the French Revolutionary Wars the criteria have been, one way or another, linked to the evolving idea of self-determination of people. Recognition emerged as a full-fledged practice in response to its early 19th-century articulation and altered with the significant shift in its conception as self-determination became entrenched in positive international law in the course of post-1945 decolonization. Overall, recognition today still reflects the practice set by decolonization, though it has manifested more turbulence and uncertainty since 2008 than at any other moment after 1945.

State recognition practice 1815–1950: self-determination as a negative right

Prior to the 19th century recognition of new states arose only infrequently in international relations. While the mid-17th century saw the acknowledgment of Swiss, Dutch and Portuguese independence, the United States of America was the sole new generally recognized state in the 18th century. Unable to rely on an established practice or recent precedents for guidance, the overwhelming majority of existing states, most of which were hereditary absolutist monarchies, applied to the unilateral secession of the 13 British colonies the positivist criterion of dynastic rights. According to this criterion, the dominion of a legitimate monarchy was inalienable. The only valid method of change of title to sovereignty or territory, and hence the only way a new state could be recognized, was through the consent of the affected monarch. With the sole exception of France, which disputed the applicability of dynastic rights to the creation of new states and instead in 1778 recognized the United States on what it claimed was the proper naturalist basis of *de facto* or effective statehood going back to the 16th century, the existing states refused to acknowledge the US as an independent state until the British Crown indicated it would do so in peace talks with the US negotiators in 1782 (Fabry 2010: 26–36).

Dynastic legitimism as a recognition standard received a fatal blow in the Western Hemisphere. As Spanish American territories, starting with Venezuela in 1811, followed in the footsteps of the 13 British colonies and unilaterally seceded from the Spanish Crown, the major powers espousing it insisted on nonrecognition and some even threatened military intervention to help restore Spanish rule. These conservative powers, collectively assembled in the Holy Alliance, were, however, strongly opposed by Britain and the United States, the former having since the early 1790s undergone a series of monarchy-weakening, liberal constitutional reforms and the latter having established itself as a regional power.

As professed inheritors of the respective legacies of the Glorious and American Revolutions, early 19th-century British and American statespersons maintained that each people has a natural moral right to determine their political destiny, including a right to renounce the

sovereignty under which they live, and contended that, unless directly harmed, third parties have an obligation not to interfere in this process. They construed this right – the term ‘self-determination’ did not yet enter the vocabulary – negatively as ‘the right of a people “to become free by their own efforts” if they can, and non-intervention [was] the principle guaranteeing that their success will not be impeded or their failure prevented by the intrusion of an alien power’ (Walzer 2015: 88). Along with thinkers such as Immanuel Kant (1991: 96) and J.S. Mill (1962: 410–11), they insisted that only the self in question could achieve it. Nonetheless, the requirement that third parties abstain from intervening in the self-determination process also demanded that they respect the self-determination outcome. This is how Secretary of State John Quincy Adams (Manning 1925: 156–7) justified US acknowledgment of the first wave of new Spanish American states, without Spain’s prior consent, to the outraged parent government in 1822:

In every question relating to the independence of a nation, two principles are involved; one of *right*, and the other of *fact*; the former exclusively depending upon the determination of the nation itself, and the latter resulting from the successful execution of that determination. ... The United States ... yielded to an obligation of duty of the highest order by recognizing as independent states nations which, after deliberately asserting their right to that character, have maintained and established it against all the resistance which had been or could be brought to oppose it. ... This recognition ... is the mere acknowledgment of existing facts, with the view to the regular establishment, with the nations newly formed, of those relations, political and commercial, which it is the moral obligation of civilized and Christian nations to entertain reciprocally with one another. [*italics original*]

Adams’s statement is revealing on multiple levels. First, it suggests a positivist division into the ‘civilized’ and ‘noncivilized’ worlds. The pre-19th century naturalist standard of *de facto* or effective statehood now presupposed civilization. Second, Adams anchored *de facto* statehood in classical liberalism. A collectivity that had attained statehood in demonstrable fact was entitled to acknowledgment of that statehood in law due to the decisive normative meaning of the achievement: the formation of a stable, effective territorial entity in which the population habitually obeyed the new rulers was taken as an authoritative expression of the will of the people to constitute an independent state as neither the *de facto* state’s founding nor its continued existence could come to pass without at least tacit approval by its inhabitants. In the absence of international agreement as to what constitutes a valid method of verifying popular will, any foreign assessment thereof was necessarily presumptive: the *de facto* state was taken to embody, in his predecessor Thomas Jefferson’s words (Wharton 1887: 521), ‘the will of the nation substantially declared.’ It was this presumption of popular consent – and its moral eclipsing of the idea of dynastic consent – that in American and British eyes converted the fact of new independent states into the right to independent statehood and external recognition. And, third, the statement delineates the proper role of third states in contests over statehood. In his explanation of the relationship between the right of self-determination and recognition, Adams made clear that US deference toward the right of the Spanish Americans to change their government did not put an immediate end to US obligations toward Spain. As a third party, the United States had a duty to continue to respect Spain’s sovereignty and territorial integrity in the Americas. But this duty was not unlimited or infinite: it depended on Spanish America actually being in Spanish hands. The displacement of the parent country by a ‘self-determined’ *de facto* state extinguished that obligation.

Proclaimed to the world by the United States in a congressional address later known as the Monroe Doctrine (Manning 1925: 217) and by Britain in the much less known Polignac Memorandum (Webster 1938: 114–15), the criteria of *de facto* or effective statehood – a presumptively ‘civilized’ entity that was judged to be actually independent of all external authorities and to have an effective government that was, internally, in manifest control of the claimed territory and population and, externally, willing and able to fulfill international obligations of a state – were gradually incorporated into recognition policies of other powers in the course of the 19th century (Fabry 2010: chs. 2–3). Having also the practical advantage of investing new authorities with international responsibility for externally harmful acts emanating from their territories and territorial waters, the criteria became the undisputed standard of recognition in the Americas, and with the decline of the Holy Alliance and the rise of constitutional governments across Europe they displaced the criterion of dynastic rights. The criteria of *de facto* statehood were invoked not only in response to unilateral secessions such as Texas (1836), the ‘Confederate States of America’ (1861–65), Panama (1903) and the Baltic republics (1917–22) but also to other types of internally effected changes to existing statehood, such as the merger of several states into a Kingdom of Italy (1859–61), the dissolution of Austria-Hungary (1918), the decolonization of Iraq (1932) and the establishment of Israel in the wake of the British mandate (1948–49). Moreover, the criteria were applied in a wide range of contexts, including those involving ethnically defined peoples without prior juridical status or boundaries (e.g., the unilateral secession of Greece, 1821–32) and foreign military interventions in defense of third party rights (e.g., the unilateral secession of Belgium, 1830–39). Finally, the infringement of the criteria served as a basis for nonrecognition where new entities were declared not as the outcome of internal self-determination but external proclamation (e.g., the ‘Kingdom of Poland,’ 1916) or external force (e.g., the ‘State of Manchukuo,’ 1932–45).²

State recognition practice after 1950: self-determination as a positive right

As a number of studies (Myers 1961; O’Brien and Goebel 1965; Jackson and Rosberg 1982; Jackson 1990; Kreijen 2004; Fabry 2010) make clear, with post-1945 decolonization international society essentially abandoned the criteria of *de facto* statehood as the basis for recognizing indigenously founded new states. This does not mean that the countries recognized since then necessarily lacked effectiveness, only that it was not a prerequisite of their recognition. Since the late 1950s the determining factor in admission of new members into the society of states has been whether an entity is deemed to have a positive right of self-determination in international law. If an entity has been considered to have this right, a nominal rather than effective government has been sufficient for recognition of statehood. The notion that meeting the criteria of *de facto* statehood qualifies one for foreign acknowledgment as a state – and that falling short of them excludes one from such acknowledgment – has been effectively discarded.

The shift in the understanding of self-determination from the moral and negative right to seek independence by a self-identified political community to the legal and positive entitlement to independence allotted by international society to particular entities reflected the global political revolution, which took place in the course of the 1950s, that cast off the institution of colonialism and the underlying hierarchical division into ‘civilized’ peoples suitable for statehood and less than fully civilized ones excluded from it. Landmark UN General Assembly Resolution 1514 (1960) defined, for the first time, specific peoples *a priori* entitled to statehood – the populations of the colonial non-self-governing and trust territories – while stipulating that the lack of effectiveness should have no bearing on this entitlement. Whereas

in Resolution 1514 and other important political and legal documents decolonization was explicitly premised on the affirmation that all peoples had a right to self-determination, no text defined ‘peoples’ bearing the right outside the colonial context. The decolonization and postcolonial recognition practice clarified what the documents left obscure. After 1960 the legitimate candidates for recognition became restricted to non-self-governing and trust territories whose positive right to self-determination and independence was blocked, violated or not yet realized,³ to constituent units of consensually dissolved states (e.g., Senegal and Mali emerging from the Mali Federation), and to units arising out of consensual mergers (e.g., Yemen) and secessions (e.g., Singapore).

This practice has been the result of conscious and deliberate subordination of all noncolonial notions of self-determination to the principle of territorial integrity.⁴ A critical paragraph in Resolution 1514 postulated that ‘any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.’ That an ex-colony cannot lose territory against its will – not just from outside, by way of external aggression, outlawed since the adoption of the League of Nations Covenant in 1919, but also from inside, by way of internal secession – was later broadened to encompass all UN member states in another important UN General Assembly Resolution 2625 (1970). Whatever the right to self-determination meant outside the colonial context – it became typically interpreted as an ‘internal’ right consisting of the right to political participation and minority rights since the citizens of existing states came to be deemed to have had their ‘external’ right to independence already realized (Cassese 1995) – it excluded nonconsensual secession from the territory of a state.⁵

The beliefs underpinning the right to self-determination institutionalized during decolonization, especially its alignment with territorial integrity of existing sovereign states and its rejection of unilateral secession, were complex. They crystallized gradually in response to actual and potential secessionist cases, and in the course of the late 1960s their application broadened from the colonial to noncolonial settings. They came to include worries about the domino effect of endless secessionist bids given the sheer number and demographic diversity of ex-colonies; fear of violence and instability inherent in nonconsensual situations involving clashing claims of statehood; perceptions that past territorial partitions (e.g., Ireland; India and Palestine) had failed to resolve conflicts over statehood; and a marked global shift in the wake of the World War II experience with Axis rule in favor of an inclusive civic conception of peoplehood that represents all citizens within existing boundaries as opposed to an exclusive ethnic conception that represents only a particular group within them (Fabry 2010).

Whatever the actual external beliefs in any specific case, the independence claims other than those falling within the new self-determination paradigm were excluded from foreign recognition. Beginning with the watershed UNSC Resolution 169 (1961), which affirmed the Congo’s territorial integrity and rejected ‘completely’ Katanga’s claim that it was a ‘a sovereign independent nation’ – the first time an international body authoritatively rebuffed a secessionist attempt in an essentially domestic situation since the Holy Alliance conferences upholding dynastic legitimacy – each change in the international status of a territory had to be blessed by the central government in question. No postcolonial substate entity has been able to establish an internationally legitimate state without such consent except Bangladesh, which garnered widespread, if not universal, recognition thanks to the great power acquiescence to the disabling of Pakistani authority in East Pakistan by India’s military intervention in 1971. The global taboo against unilateral secession persisted irrespective of the reason given for, or the demonstrated ability to carry out, particular secessions. Some peoples managed to create *de facto* entities with effective control over the population and territory they claimed. Under the old criteria, the ‘Republic of Eritrea,’

the 'Republic of South Sudan',⁶ the 'Republic of Bougainville' or the 'Republic of Somaliland' could have at certain point of their existence qualified for foreign recognition, but under the new one they were condemned to languish in an international legal and political limbo. Indeed, the postcolonial era made the term '*de facto* state' a synonym for 'unrecognized state.'

In the post-Cold War period international society, buttressed by new global⁷ and regional documents such as the Charter of Paris (1990) and the Copenhagen Document (1990),⁸ solidified the recognition criteria settled in the wake of the largest wave of decolonization. It, in fact, extended them into new geographical areas. The breakups of the Soviet Union in 1991 and Czechoslovakia in 1992 might have commenced as separatist bids by some of their constituent units, but foreign recognition of the successor states came only once the respective central governments had agreed to the dissolution of the unions. Western countries waited for prior agreement of the central government even in the case of the Baltic republics, despite the fact that most considered them to be under illegal occupation by an external power rather than an integral part of the USSR (Fabry 2010: 182–4). Unilateral separatist drives from the newly independent states, whether it was the 'Nagorno-Karabakh Republic' (Azerbaijan), the 'Republic of Abkhazia,' the 'Republic of South Ossetia' (both Georgia), the 'Transnistrian Moldavian Republic' (Moldova) or the 'Chechen Republic of Ichkeria' (Russia), met with foreign nonrecognition in the 1990s.

The foreign response to the claims arising out of the breakup of the Socialist Federal Republic of Yugoslavia (SFRY) was consistent with this 'neo-decolonization territorial approach' (Hannum 1993: 38). During the initial phase of the Yugoslav collapse, which also started as a series of secessionist undertakings by its constituent republics, foreign authorities endorsed the territorial integrity of the SFRY. That position changed only after a majority of Yugoslav republics had ceased to be represented in the highest federal institution, the presidency, under highly contentious circumstances in early October 1991. The withdrawal of the majority of the population and territory from a federal state was a historically unprecedented occurrence, but one to which third states as well as relevant international organizations found a speedy solution that only Serbia and Montenegro, two Yugoslav republics, opposed: they came to regard what was occurring in the SFRY as a case of dissolution legally equivalent to the consensual dissolution of the USSR or Czechoslovakia (Fabry 2010: 192–3; 200). Only after this judgment did the individual republics become eligible for recognition.

As during post-1945 decolonization, the successor republics to the SFRY garnered recognition irrespective of whether they met the criteria of *de facto* statehood. They all became safeguarded, as a matter of international right, against external territorial designs as well as against unilateral secession. This was made evident in the consistent refusals to consider recognition of the entities challenging the territorial integrity of Croatia, Bosnia and Herzegovina and later the Federal Republic of Yugoslavia. The 1991–92 unilateral independence claims of the 'Republic of Serbian Krajina,' the 'Croat Community of Herzeg-Bosna,' the 'Bosnian Serb Republic' and the 'Republic of Kosova' were rebuffed internationally. As in the case of ex-colonial and ex-Soviet entities falling outside the ambit of the postcolonial right of self-determination, the formation of entities actually independent from their parent state within the territory of the former SFRY added to the global number of unrecognized communities. In the wake of the North Atlantic Treaty Organization humanitarian interventions in Bosnia and Herzegovina in 1994–95 and the FRY in 1999, the principal external actors went so far as to opt for interim international administration within their territories rather than to accede to the separation of their respective secessionist entities. There can be little doubt that in the post-Cold War period the right of self-determination of peoples continued to be circumscribed by the principle of territorial integrity of states,

which protected them normatively against involuntary territorial changes from inside as well as outside.⁹ The most recent negative global responses to Catalonia's unilateral declaration of independence and Iraqi Kurdistan's unilateral independence referendum in 2017 are part and parcel of this pattern.

Challenges to the postcolonial practice of state recognition since 2008

While decolonization and its aftermath established a robust recognition regime, and while the moral and political beliefs undergirding it have broadly endured, international society has had to deal with at least two major challenges to that regime. The first has been that, despite strong global opposition, unilateral claims to independence continue to arise in nearly all regions of the world and across a full spectrum of domestic political systems. With rare exceptions such as Czechoslovakia and Great Britain these claimants, even in liberal democracies like Spain, cannot agree with their parent governments, just as was the case in the 19th century, on who qualifies as a people entitled to independence and by what procedure can that entitlement be exercised.¹⁰ Nevertheless, substate groups that feel dissatisfied with the postcolonial and noncolonial states they find themselves in keep invoking the right of self-determination and demand independence regardless of actual recognition practice. The disputes stemming from unilateral claims continue to lead in many instances to violence, often with grave consequences for human rights and regional and international security that, in turn, elicit external involvement. That involvement gives rise to its own pressing normative and practical dilemmas, especially with respect to stopping human suffering and attaining conflict resolution. Despite more than half a century of effort, international society cannot tame claims of statehood that stand outside of the postcolonial consensus. Given that a key justification behind that consensus was that privileging territorial integrity of states over unilateral claims would foster peace and stability around the world, this is a sobering conclusion.

The second, related challenge has been that external actors, most importantly major powers, have, for one reason or another, proved unable to maintain perfect consistency in their approach to unilateral claims. This is not a matter of simple political preferences or national interests: contested claims often develop into highly complex conflicts where outsiders confront multiple, and sometimes mutually contradictory, considerations and imperatives. Still, when the key powers agree on a seeming inconsistency – such as when they accepted, or acquiesced to, the unilateral secession of Bangladesh in 1971–72 or when they eventually decided to regard the breakup of Yugoslavia as a case of ‘dissolution’ rather than a series of unilateral secessions in late 1991 – international order is maintained.

International order is, however, undermined when major powers vigorously disagree with one another and some nevertheless act unilaterally. In February 2008, the US-led coalition did not wish to abandon the postcolonial consensus by recognizing the unilateral secession of Kosovo. Indeed, having opposed the Balkan territory's first unilateral declaration of independence in 1991, the coalition insisted that Kosovo merited recognition only as a ‘special’ case in light of its unique post-1991 history and that it constituted an ‘exception’ that created no precedent for any other situation around the world. However, Russia strenuously opposed this argument and in August 2008, in line with its earlier public warnings that it would consider a unilateral recognition of Kosovo a precedent, invoked the February 2008 decision to recognize the unilateral secessions of South Ossetia and Abkhazia (Fabry 2012). In 2014, Russia again referenced the Kosovo precedent as it recognized the unilateral secession of the ‘Republic of Crimea’ and then, a day later, incorporated the entity on request of its putative authorities.¹¹ Prior to 2008, Russia, just as the Soviet Union

before it, had taken care to act consistently within the framework of the global postcolonial consensus on self-determination. While considerable opposition to Kosovo's recognition and overwhelming opposition to the unilateral secession of South Ossetia, Abkhazia and Crimea, along with more recent international antipathy to Catalonia's unilateral declaration of independence and Iraqi Kurdistan's unilateral independence referendum, point to the continuing persistence of that global consensus, state recognition is today at its most unsettled moment since 1945.

Kosovo, like Bangladesh in the early 1970s, has demonstrated that unilateral secession is difficult to oppose in every single case. But, if anything, the Balkan case also revealed the critical importance of a principled, as opposed to unilateral ad hoc, approach to recognition of unilateral secession and other categories of statehood claims. Acts of foreign policy, especially in regard to globally pervasive, inherently conflict-prone phenomena, need to be publicly justified by reference to clearly spelled-out, generally applicable norms. In an anarchic states system without a settled procedure of norm interpretation or change, the immediate risk of a contested unilateral exception to a norm is that other countries, especially major powers, may unilaterally invoke it as a precedent for themselves when their vital interests are involved. Such cycles erode the social underpinnings of international order, with the potential of making it little more than a function of great power reliance on hard power. If there is one thing that historically diverse thinkers on international relations, including realists and liberals of various stripes (Schroder 1994; Ikenberry 2001; Clark 2005; Bull 2012: 303; Kissinger 2014: 1–10), agree upon, it is that even the most powerful countries are better off in a socially legitimate order where their power is restrained by shared norms than in an environment where few such restraints exist.

Notes

- 1 Once, starting in the second half of the 19th century, entities such as the Ottoman Empire, Siam, Japan, Persia and China were deemed to have met the 'standard of civilization', formal inequality ended and they were admitted to international society as legally equal states.
- 2 It goes without saying that entities thus constituted lacked actual independence of all external authorities. The practice of nonrecognition of entities established as a result of outside force became legally buttressed by Article 10 of the League of Nations Covenant (1919), which obligated the League members to preserve the territorial integrity of all the League members against external aggression, by the Kellogg–Briand Pact (1928), which outlawed war among the ratifying parties, and after World War II by Article 2 (4) of the UN Charter (1945), which essentially reproduced Article 10 of the League Covenant.
- 3 This category included Rhodesia/Zimbabwe, Namibia, Angola, Mozambique, Cape Verde, Guinea-Bissau and East Timor. It still includes Western Sahara and the somewhat different pre-1960 case of the Palestinians.
- 4 In the case of the newly decolonized states the principle of territorial integrity was also referred to as the principle of *uti possidetis juris*.
- 5 The resolution contains the following clause: 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' Numerous international lawyers and several legal delegations during the ICJ *Kosovo* advisory opinion proceedings argued that this wording constitutes a 'safeguard clause' that entitles oppressed peoples to remedial secession. However, recognition practice with respect to concrete cases does not suggest that states have accepted that substate groups have a right to remedial secession. Still, whatever one's view of the 'safeguard clause,' it is clearly premised on the belief that unilateral claims to independence are, as a general rule, inadmissible.

- 6 Eritrea did eventually garner recognition, but this occurred only after Ethiopia's assent to let the Eritreans choose independence in a 1993 referendum. It was this consent that accomplished what the three-decades-long control of large swaths of Ethiopian territory could not. The same scenario replayed in South Sudan, which had gained the right to hold a referendum on independence in the 2002 and 2005 peace agreements with the central Sudanese government in Khartoum.
- 7 Article 46 (1) of UN General Assembly Resolution 61/295 (2007), the Declaration on the Rights of Indigenous Peoples, which acknowledges the right to self-determination of indigenous peoples, stipulates: 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'
- 8 Both documents were adopted under the auspices of the Organization for Security and Co-operation in Europe. The Charter of Paris acknowledges 'the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states.' The Copenhagen Document goes even further: it stipulates that persons belonging to national minorities do not have 'any right to engage in any activity or perform any action in contravention of ... the principle of territorial integrity of states.' The Copenhagen formulation subsequently found its way into Article 5 of the European Charter for Regional or Minority Languages (1992) and into Article 21 of the Framework Convention for the Protection of National Minorities (1995).
- 9 The Canadian Supreme Court summarized this state of affairs well in *Reference Re Secession of Quebec* (1998): 'the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states' (para. 131).
- 10 UN General Assembly Resolution 1541 (1960) outlined the procedures for the exercise of self-determination in colonial cases. While there were contentious cases, such as the popular consultation in the territory of West Irian on its status vis-à-vis Indonesia, colonial self-determination procedures worked, on the whole, quite smoothly. No such procedures have, however, been established internationally for postcolonial or noncolonial states.
- 11 See Address by President of the Russian Federation, March 18, 2014. It should be pointed out that Crimea declared independence from Ukraine only after Russia militarily invaded and occupied it. The secession was, therefore, the result of external force. Internal separatism was a wholly negligible phenomenon in Crimean politics prior to Russia's control of the territory.

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4

RECOGNITION OF STATES IN INTERNATIONAL LAW

Peter Radan

Introduction

The recognition of a territorial entity as a state by the international community of states is of fundamental importance to that entity. Irrespective of the relative merits of the declaratory and constitutive theories of state recognition discussed in Chapter 2, recognition constitutes important evidence of a territorial entity's status as a state and facilitates its entry into the international community of states. Recognition:

opens ... the way for the conduct of diplomatic relations, recognition of passports, recognition of a nation's consular protection of its citizens, trading in a national currency, trading in state assets and debts, acceptance of state guarantees, the possibility of concluding binding inter-state agreements, the possibility of becoming party to inter-state conventions, of taking a seat in the United Nations, and of acceding to other inter-state organizations.

(Bailes 2015: 253)

Although Article 3 of the Montevideo Convention on the Rights and Duties of States of 1933 (Montevideo Convention 1933) stipulates that a territorial entity's status as a state is independent of recognition by other states, without such recognition the continued viability and survival of a territorial entity as a state is unlikely to be maintained. However, while an unrecognized state continues to exist, some states, such as the United Kingdom, Australia, and the United States of America (USA), have enacted legislation that grants standing to appear before their courts to private corporations established pursuant to the laws of the unrecognized state. In passing such legislation these states have, in effect, drawn 'a distinction between recognition as an artifact of international relations and recognition as an influence upon private law' (Grant 1999: 68).

In the post-World War II era, the matter of recognition of states has arisen in two major contexts. The first is the emergence of new states as a result of decolonization pursuant to Article 72 of the Charter of the United Nations (UN) and the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples (Crawford 2006: 603–5). Here recognition and admission to the UN were generally readily granted to new states, given the widespread support of the international community of states towards ending colonization. The second, and more contested, context of recognition arose in cases where a part of a state, often a federal unit

within it, sought independence. Many of these cases were ones of unilateral secession in which the claim to independence was usually based upon the international law norm of the right of peoples to self-determination. For example, in the case of their independence claims from Yugoslavia, the claims to statehood of the federal republics of Slovenia and Croatia were both anchored in the right of peoples to self-determination (Trifunovska 1994: 286, 299). On the other hand, although the sub-federal unit Kosovo based its claim to statehood from Yugoslavia in 1991 on the right of peoples to self-determination (Trifunovska 1999: 767), its later declaration of independence from Serbia in 2008 did not (Kosovo Declaration of Independence 2008). In these contested claims to statehood, as is witnessed by Kosovo's unilateral secession from Serbia, international recognition is of particular importance and is usually the major foreign policy goal of any secessionist movement. As was observed by the Supreme Court of Canada in *Reference re Secession of Quebec*, 'the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states' (Reference re Secession of Quebec 1998: 289). Thus, the failure of the Confederate States of America, constituted by the unilateral secession of 11 slave states from the USA in 1861–1862, to obtain the recognition of Great Britain and the rest of Europe doomed whatever prospects it had of being a successful and lasting instance of state creation by secession. Widespread international condemnation of the secessions of Katanga from the Congo in 1960 and Biafra from Nigeria in 1967 consigned them to eventual failure (Raič 2002: 333–5). The fact that only Turkey has recognized the 1983 secession of the Turkish Republic of Northern Cyprus from Cyprus means that its secession has not, at least to date, been successful (Loizidou v Turkey (Merits) 1996: 471). On the other hand, the recognition by the USA, in 1822, of the states that emerged from the Spanish colonial empire in Latin America has been described as 'the greatest assistance rendered by any foreign power to the independence of Latin America' (Glejjeses 1992: 487). Similarly, the recognition by India, a significant regional power, of Bangladesh in 1971 was a key to the success of the latter's secession from Pakistan (Raič 2002: 335–42).

In outlining international law principles dealing with recognition, this chapter will first detail the traditional, essentially empirical, criteria of statehood that a territorial entity seeking recognition needs to satisfy before it can be recognized and, second, other criteria that have been suggested or applied in some cases of recognition. The following section will look at the question of derecognizing states. The final part of the chapter will outline the processes by which a state obtains recognition.

The requirement of statehood

For a territorial entity to be recognized as a state it must be a state. The generally accepted criteria for statehood are found in the Montevideo Convention, which in Article 1 stipulates that to be a state an entity must possess the following – essentially empirical – attributes: '(a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other states'. These elements reflected generally accepted criteria for statehood with roots going back to Roman law, and evidenced in the writings of scholars such as William Hall, Georg Jellinek, James Loriner, Georges Scelle, Hannis Taylor, and Henry Wheaton (Grant 1999: 6–9).

Defined territory

The requirement of a defined territory does not require a minimum area of territory, nor does the territory need to be contiguous. As the case of Israel's admission to the UN in 1949 illustrates, disputed claims to the territory claimed by a state seeking recognition does

not mean that recognition will necessarily be denied. Similarly, the fact that the Republic of Serbian Krajina effectively controlled a significant part of the territory claimed by Croatia at the time did not prevent the latter's recognition as a state and admission to the UN in 1992 (Radan 2018). Boundary disputes which leave in doubt the precise scope and borders of a state do not preclude recognition (Crawford 2006: 46–50). For example, Venezuela and Guyana are both internationally recognized states despite a border dispute that has been continuing for more than a century, the resolution of which was referred to the International Court of Justice (ICJ) in January 2018. Thus, Crawford concludes that '[t]he only requirement is that the State must consist of a certain coherent territory effectively governed – a formula that suggests that the requirement of territory is rather a constituent of government and independence than a distinct criterion of its own' (Crawford 2006: 52).

Permanent population

For a territorial entity to be a state it has to be habitable and populated by a permanent population. There is no minimum number of people needed to constitute a permanent population. Oppenheim has defined a permanent population as 'an aggregate of individuals of both sexes who live together as a community in spite of the fact that they belong to different creeds, or be of different colour' (quoted in Raič 2002: 58). Provided that there is such a population, the presence of refugees or the movement in and out of the territory of nomadic peoples does not preclude statehood (Raič 2002: 58–9).

Government

The existence of a government is the most important single criterion of statehood. To be a state, a territorial entity 'must possess a government or system of government in general control of its territory, to the exclusion of other entities not claiming through or under it' (Crawford 2006: 59). This criterion consists of two related elements. The first is the existence of 'an institutionalized political, administrative and executive organizational machinery for the purpose of regulating the relations in the community and charged with the task of upholding the rules' (Raič 2002: 62). In cases of unilateral secession of a federal unit from a state, this requirement is often not difficult to meet. Indeed, especially in multinational states, the granting of substantial social, political, economic, and legal rights to various national groups within a framework of federal and sub-federal units may provide such an institutional and administrative framework, and therefore facilitate independent statehood, as it did for the states that emerged from the break-up of Yugoslavia in the 1990s (Trbovich 2008: 237–8). It is because federal structures may provide an organizational platform for secession that states are sometimes resistant to adopting them. It was the fear that a platform for secession would be created that led Croatia, once it had seceded from Yugoslavia, to oppose the creation of a federal unit for its Serb minority population. (Radan 2002: 241–2). The second element of a government is the 'existence of effective government, which means that the institutionalized political, administrative and executive organizational machinery must actually exercise state authority over the claimed territory and the people residing in that territory' (Raič 2002: 62). However, as cases such as Georgia and Moldova, among many others, illustrate, recognition has been granted despite the absence of an effective government. On the basis of the number of such cases, political considerations, as the basis for these exceptions, appear to be inadequate. It has been argued that these cases are based on the international law norm of the right of peoples to self-determination (Raič 2002: 402–38).

The application of these two tests depends on the individual circumstances of any given case. These include ‘whether the statehood of the entity is opposed’, whether or not the previous sovereign continues to exist, and whether the territorial entity ‘has obtained authority by consent of the previous sovereign’ (Crawford 2006: 59). Thus, Taiwan, although possessing an effective government, has not been recognized in the face of China’s opposition and the fact that virtually every state in the world has recognized that Taiwan is Chinese territory (Crawford 2006: 209). On the other hand, the decision of Czechoslovakia’s federal parliament in December 1992 to dissolve its federal structure in the wake of the ‘Velvet Revolution’ led to the emergence and prompt international recognition as states and admission to the UN in January 1993 of the Czech Republic and the Slovak Republic (Crawford 2006: 402, 706–7). It can also be noted that some states, such as Ethiopia, Liechtenstein, and St Kitts and Nevis, have explicit constitutional provisions that allow federal units to become independent (Radan 2012: 15). In the case of Montenegro, its independence as a state was achieved in 2006 by consent pursuant to Article 60 of the Constitutional Charter of the Union of Serbia and Montenegro (Jovanović 2008). Finally, the courts of other states such as the USA (Texas v White 1869: 186) and Canada (Reference re Secession of Quebec 1998: 267–70) have recognized that their federal units may achieve independent statehood by consent.

Capacity to enter into relations with other states

A territorial entity is not required to have entered into relations with existing states in order to be a state. Rather it is the *capacity* to enter into such relations that is required. Thus, whether an entity, comprised of a territory upon which governmental authority is exercised over its population, has such capacity:

depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of international relations so that no other entity both carries out and accepts responsibility for them.

(Crawford 2006: 62)

In turn, this depends upon whether the territorial entity’s government is independent. In the *Island of Palmas Case*, Judge Huber observed that ‘[i]ndependence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State’ (Island of Palmas Case 1928: 838). However, this does not mean that ‘one State may not exert political pressure on another which may cause the latter to adopt or reject a particular course of action’ because ‘[i]f that [was] the meaning of independence, very few States would exist today’ (Raič 2002: 75).

Although a territorial entity may have formal independence, in the sense that governmental authority is derived from a constitution or granted by the previous sovereign, this does not necessarily mean that it is a state. Actual independence is required. This means that the territorial entity’s governmental authority must be real. Governmental authority may not be real if, for example, the territorial entity is ‘subject to foreign domination and control on a permanent or long-term basis’ (Crawford 2006: 76). For example, the putative Independent State of Croatia, proclaimed in the wake of the Axis invasion and dismemberment of the Kingdom of Yugoslavia in 1941, was a ‘puppet state’, which was subject to the will of Nazi Germany and fascist Italy, and therefore not independent (Socony Vacuum Oil

Company Claim 1954: 58–60). The same can be said of the Republic of Serbian Krajina, which declared its independence from Croatia in 1991, and Republika Srpska, which declared its independence from Bosnia and Herzegovina in 1992. Although both of these territorial entities could be said to have had formal independence pursuant to their constitutions, they were subject to the will of the Federal Republic of Yugoslavia until they collapsed in 1995 (Radan 2018: 28–9; Raič 2002: 79–82).

Other criteria for recognition

It has been suggested that there may be other criteria for statehood. The first is that of permanence, in the sense that, even though a territorial entity may meet the Montevideo Convention criteria, it must do so in a manner that indicates that it will do so on a permanent or long-term basis. However, Crawford suggests that permanence is not an independent criterion of statehood, although in some cases, such as unilateral secession, it may constitute important evidence that the territorial entity does meet the Montevideo Convention criteria (Crawford 2006: 90–1).

A second and more significant additional criterion may be a requirement that the territorial entity establishes that it respects and complies with international law norms, especially those associated with human rights. This is exemplified in the Declaration and Guidelines on Recognition (Trifunovska 1994: 431–2), issued by the European Community (EC), later the European Union (EU), in December 1991, which were applied by the EC early on when considering applications for recognition of a number of Yugoslavia's republics. The Declaration stipulated that in an application for recognition a republic had to state whether: (i) it wished to be recognized as an independent state; (ii) it agreed to accept the commitments of EC Guidelines on Recognition; (iii) it agreed to accept obligations respecting human rights and the rights of national or ethnic minorities; and (iv) it supported the continued efforts of the UN and EC to resolve the Yugoslav crisis. The EC Guidelines on Recognition, after explicitly confirming 'the principle of self-determination', stipulated recognition would only be granted if a republic could establish that it: (i) respected (a) the provisions of the UN Charter and (b) the Final Act of Helsinki agreed to by 35 nations at the Conference on Security and Cooperation in Europe, held in Helsinki, Finland, in 1975 and which was further developed with the adoption of the Charter of Paris for a New Europe in 1990, especially with respect to the rule of law, democracy, and human rights; (ii) guaranteed the rights of ethnic and national minorities; (iii) respected the inviolability of all frontiers, which could only be changed by peaceful agreement; (iv) was committed to the settlement by agreement or arbitration of all questions concerning state succession and regional disputes; and (v) accepted all relevant commitments with regard to disarmament and nuclear non-proliferation as well as those relating to security and regional stability.

The Yugoslav republics of Slovenia, Croatia, and Bosnia and Herzegovina were recognized by the EC in 1992. Owing to concerns raised by Greece, Macedonia eventually obtained recognition under the name of the Former Yugoslav Republic of Macedonia (FYROM) from all EC Member States in 1995 (Radan 2002: 174, 181, 187, 195). In June 2018, the foreign ministers of Greece and the FYROM reached agreement that, subject to approval of their respective parliaments and ratification by means of referendum in FYROM, the latter state would be recognized under the name of the Republic of North Macedonia (Marusic 2018).

In recognizing these republics, the EC was faced with a significant problem of determining whether they satisfied certain guidelines because, as was pointed out by Kingsbury, 'there were no international treaties that set forth in detail the meaning of – let alone the means of realizing

and ensuring – the rule of law, democracy, or rights of ethnic groups, national groups, or minorities’ (Kingsbury 1992: 505–6). In relation to the requirement of democracy, Grant notes that the EC’s ‘[p]rofessed commitment to “it” did not however translate into practice uniformly’ and that, although democracy ‘was overtly declared a principle relevant to recognition’, it ‘did not play a decisive role in all cases’ (Grant 1999: 95). In relation to the rights of minority ethnic groups, although Croatia’s constitutional law provisions on the rights of minorities were found to be inadequate, it was, nevertheless, recognized upon the basis of a hurried assurance, given by its president, that Croatia’s Serb minority population would be granted special autonomous status (Grant 1999: 164). Furthermore, both Slovenia and Croatia were recognized notwithstanding that their unilateral declarations of independence and forceful seizures of border posts were, as pointed out by the USA’s Secretary of State, James A. Baker, ‘all in violation of the Helsinki Accords’ (Baker 1995: 635). What can be said about the requirements for statehood associated with standards of human rights and democracy is that:

there is room for insistence [upon them] as an aspect of the stability and legitimacy of a new State, [b]ut this has not matured into a peremptory norm disqualifying an entity from statehood even in cases of widespread violations of human rights.

(Crawford 2006: 155)

In relation to the principle of self-determination, the EC took the view that the will of the people of each republic in favour of independence, and therefore recognition, had to be established. In each case this was by means of a plebiscite. Cassese opines that, in cases of unilateral secession, the holding of a plebiscite is now essential (Cassese 1995: 272). The plebiscites held by these republics were all accepted as reflecting the will of the people in favour of independence and recognition, notwithstanding doubts over their legality and legitimacy. The plebiscites held by these republics were ruled to be unconstitutional by Yugoslavia’s Constitutional Court. Their legitimacy was questionable, given that they were conducted in highly volatile political circumstances where nationalist passions had been inflamed and, in the cases of Macedonia and Bosnia and Herzegovina, against the background of war that had erupted on the territory of Yugoslavia. Furthermore, given that media outlets were under the control and influence of the republics, opponents of sovereignty and independence did not have the opportunity to present their case. A balanced debate on the merits or otherwise of competing views on the plebiscite did not take place, nor were official state documents and materials forwarded to all voters outlining the cases for the ‘Yes’ and ‘No’ votes. (Radan 2002: 207–8). In such circumstances, it was not surprising that overwhelming majorities voted ‘Yes’. In ethnically homogenous Slovenia the ‘Yes’ vote was 88.5%. In Croatia, where the majority of its Serb minority population boycotted the plebiscite, the ‘Yes’ vote was 93%. In Bosnia and Herzegovina, the ‘Yes’ vote was 99.4%, but only two-thirds of the population voted because the Serb minority population, which accounted for nearly one-third of the republic’s population, overwhelmingly boycotted the plebiscite (Radan 2002: 171, 177, 187).

Derecognition of states

If a recognized state ceases to meet the requirements of statehood because it has dissolved, in most cases that state is replaced by other states. Although the former state is not expressly derecognized, there is an implicit derecognition with the recognition of the newly emerged states over the territory of the former state (Delaney 2008: 15). The break-up of Yugoslavia

is an illustrative example. However, in cases where states have ‘failed’, the international community of states is extremely reluctant to derecognize the state, Somalia being an illustrative example. Derecognition is rare, with Japan’s derecognition of China in 1932 being a singular example, albeit that Japan’s derecognition was a pretext for the invasion and occupation of Chinese territory (Delaney 2008: 15). However, it has been argued that derecognition of failed states or states with repressive, illegal, or violent regimes is desirable as it would open up the way for an international response to stabilize the international scene and improve the quality of life of people within such states (Auron 2013; Delaney 2008). Such an approach would also be consistent with international law, discussed below, on non-recognition of states in certain instances of state creation.

The process of granting of recognition

International law does not require a state to recognize any other state. As Brownlie notes, recognition ‘is an optional and political act and there is no legal duty in this regard’ (quoted in Crawford 2006: 25). Recognition is the public act of a state, and, as Crawford notes,

there is nothing conclusive or certain (as far as other states [are] concerned) about a conflict between different states as to the status of a particular entity, and there is no reason why they should be bound either by the views of the first state to recognize or of the last to refuse to do so.

(Crawford 2006: 20)

Attempts to impose a duty of recognition of entities that meet the requirements of statehood have been consistently rejected (Crawford 2006: 38). One of the reasons for this is that making recognition obligatory would significantly erode state sovereignty (Buchanan 2004: 395). Although the establishment of a tribunal to adjudicate on claims to recognition of statehood could defuse political and military tensions in relation to the creation of new states, it is hard to imagine states ceding such a right and the consequential diminution of sovereignty.

However, if a state has been created by violating peremptory international law norms, such as prohibitions of aggression and the acquisition of territory by the use of force, customary international law imposes a duty of non-recognition upon other states (Crawford 2006: 160). Such a duty is also reflected in the combined effect of Articles 40(1) and 41(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts, which require states ‘not to recognize as lawful a situation created by a serious breach’ of ‘an obligation arising under a peremptory norm of international law’. State practice illustrative of the principle of non-recognition is particularly effective in cases where international organizations, such as the UN, issue resolutions to that effect. For example, Security Council Resolution 169 (1961), after ‘*completely rejecting* the claim that Katanga [was] “a sovereign independent nation”’, ‘*[s]trongly deprecate[d]* the secessionist activities illegally carried out by the provincial administration of Katanga’. Security Council Resolution 216 (1965) called upon states ‘not to recognize the illegal racist minority regime in Southern Rhodesia’. In relation to Turkish Republic of Northern Cyprus, Security Council Resolution 541 (1983) called upon states ‘not to recognize any other Cypriot state other than the Republic of Cyprus’. The independence declaration of the Turkish Republic of Northern Cyprus in 1983, which was also condemned by the Council of Europe, the EC, and the Commonwealth heads of government, was the final product of Turkey’s military intervention and occupation of one-third of the northern part of Cyprus in 1974, which had been condemned by Security Council Resolution 353 (1974) (Grant 1999: 132–3).

Although cases of unilateral secession, such as that of Kosovo from Serbia, make recognition and admission to the UN a protracted issue for the seceding entity, cases of a new state being created from an existing state with the consent of the latter do not. In such cases, widespread recognition of the new state and its admission to the UN generally follows. For example, following two decades of conflict between Sudan and the secessionist movement in Southern Sudan led by the Sudan People's Liberation Movement (SPLM), the Naivasha Agreement of 2005 between the government of Sudan and SPLM provided for a referendum to be held to determine whether Southern Sudan should become an independent state. An overwhelming vote in a referendum for independence in January 2011 was quickly followed by recognition of the Republic of Southern Sudan by Sudan, the EU, and the five permanent members of the UN Security Council and, on 14 June 2011, admission to the UN, without objections from any member of the General Assembly.

Recognition is the act of a state. It is for this reason that judicial tribunals rarely determine issues of statehood or recognition of states. For example, in 2010, the ICJ, when delivering its advisory opinion on the question of whether Kosovo's declaration of independence in 2008 was 'in accordance with international law', was emphatic in stating that the question did not raise the issues of 'whether or not Kosovo had achieved statehood' or 'the validity or legal effects of the recognition of Kosovo by those States which [had] recognized it as an independent State' (Accordance with International Law and the Unilateral Declaration of Independence in Respect of Kosovo 2010: 1424). On the other hand, in 1996, the European Court of Human Rights observed that, in the light of state practice and in the wake of UN Security Council Resolution 541 (1983), which called upon states not to recognize the Turkish Republic of Northern Cyprus, 'the international community does not regard the "TRNC" as a State under international law' (*Loizidou v Turkey (Merits)* 1996: 462).

Article 7 of the Montevideo Convention stipulates that the recognition of a state 'may be express or tacit' (Montevideo Convention 1933). Express recognition involves some open announcement by a state that it recognizes the state in question. Express recognition can be bilateral or collective. The simplest form of express bilateral recognition is a statement by a competent member of a state, such as a head of state or foreign minister, such as occurred, for example, when Condoleezza Rice, the Secretary of State for the USA, issued a press release on 18 February 2008 that stated that the '[t]he United States has today formally recognized Kosovo as a sovereign and independent State' (U.S. Department of State Archive 2008). An instance of implicit bilateral recognition may be the exchange of diplomatic representatives by establishing a consulate or embassy or upgrading a consulate to an embassy.

Recognition can also occur by the collective action of states. Such recognition can occur in a variety of ways. It may be that a group of states, after consultation, agree to individually recognize a state, or it may be that an international organization of states issues a recognition statement on behalf of its member states. A significant example of the latter was the recognition in January 1992 of Croatia and Slovenia by the EC. Germany, which had recognized Croatia and Slovenia in December 1991, played a pivotal role in securing this act of collective recognition, which, in the statement issued by the president of the EC, justified recognition on the basis that the EC Guidelines for Recognition (discussed above) had been met by the two Yugoslav republics (Trifunovska 1994: 501). On the other hand, Germany and other major members of the EU have been unable to secure collective recognition by the EU of Kosovo's unilateral secession from Serbia, with five of its 28 Member States (Cyprus, Greece, Romania, the Slovak Republic, and Spain) vetoing such an act (Ker-Lindsay 2012: 144–6).

Admission to the UN, although an important step towards achieving international recognition, does not, of itself, amount to recognition by any of its member states. Nevertheless, a territorial entity's admission to the UN is significant because it removes any doubts as to its status as a state. Article 4 of the UN Charter regulates admission to the UN. The ICJ has ruled that, although the UN General Assembly is the body that formally admits a state to membership of the UN, such a vote cannot be taken in the absence of a recommendation by the UN Security Council that an applicant state be admitted to membership (*Competence of the General Assembly for the Admission of a State to the United Nations* 1950). It is for this reason that there has been no General Assembly vote on Kosovo's application for admission to the UN, even though, in the ten years since its declaration of independence from Serbia in February 2008, 116 states have expressly recognized Kosovo. On the other hand, in the great majority of instances, admission to the UN leads to universal recognition. A notable exception here is Israel, which, although a member of the UN, has not been recognized by 19 UN member states. Other exceptions include South Korea, North Korea, Armenia, Cyprus, and the People's Republic of China (Ker-Lindsay 2012: 130–6).

If membership to the UN or widespread international recognition has not been achieved by a state, acceding to membership of various international or regional organizations is usually actively sought as stepping-stones towards achieving these objectives, as is participation in international cultural and sporting activities by such institutions within that state. For example, Kosovo has gained membership of the International Monetary Fund, the World Bank, and the European Bank for Reconstruction and Development. In relation to international cultural and sporting activities, in 2015 the Kosovo Basketball Association became a member of the Federation of International Basketball Associations. Kosovo's athletes have participated in both the summer and winter Olympics since 2016, the same year in which the Kosovo Football Federation was admitted to the Federation of International Football Associations (FIFA) and the Union of European Football Associations (UEFA). Kosovo's admission to FIFA was facilitated by a change to Article 10 of the FIFA Statutes that had, prior to 2013, required a football association to be from a state recognized by the international community. Since 2013, Article 10 merely requires a football association to be a member of a football confederation. Kosovo's football association acquired membership of UEFA, a football federation, in May 2016, at a time when Article 5 of its Statutes required a football association to be based in a state 'which is recognized by the United Nations as an independent state'. Subsequently Article 5 was amended to require an association to be based in a state 'which is recognized as an independent state by the majority of members of the United Nations'.

On the other hand, Kosovo, has, to date, not obtained membership of the World Trade Organization, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization, or the European Investment Bank (Ker-Lindsay 2012: 144–57). Serbia's opposition to Kosovo's membership in international and regional organizations has from time to time been condemned by other organizations. For example, in 2016, the EU adopted a resolution deploring the 'active obstruction by Serbia' that led to the rejection of Kosovo's application to join UNESCO (European Parliament Resolution of 4 February 2016 on the 2015 Report on Kosovo 2016).

To a large extent, Kosovo's admission to the UN in the wake of its unilateral secession from Serbia will be contingent upon Serbia agreeing to it. As Crawford, who defines secession, somewhat narrowly as 'the creation of a State by the use or threat of force without the consent of the former sovereign' (Crawford 2006: 375), has noted, '[s]ince 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State' (Crawford 2006: 390). Although

Crawford's definition of secession has been contested and debated (Anderson 2013; Radan 2008), an arguable exception to his claim relates to the admission to the UN of Slovenia, Croatia, and Bosnia and Herzegovina in May 1992. Crawford does not view the establishment of these states as the product of unilateral secession. Rather, he views their creation and subsequent admission to the UN as instances in which the predecessor state of Yugoslavia was, at that time, 'dissolving' and that what remained of Yugoslavia, that is, Serbia and Montenegro, 'had no title to represent the former Yugoslavia as a whole', in which case there was no state to consent to the admission of the three former Yugoslav republics to the UN (Crawford 2006: 401). Crawford's conclusion that Yugoslavia was in the process of dissolution is largely based upon statements to that effect issued by the Arbitration Commission, which was established by the EC to advise in relation to difficulties between 'relevant authorities' occasioned by the eruption of conflicts and hostilities in Yugoslavia in the early 1990s. However, Crawford's argument here has been contested on the basis that the three former Yugoslavia republics explicitly asserted that they were unilaterally seceding from Yugoslavia and that there was no legal basis for the conclusion that Yugoslavia was dissolving or had dissolved at the times they were admitted to the UN (Radan 2002: 204–16; Raič 2002: 356–61).

Conclusion

Although a territorial entity that seeks to be recognized as a state needs to satisfy, as a minimum, the Montevideo Convention criteria for statehood, it is clear that these criteria are loosely applied. The same can be said in relation to the possibly emerging criteria based upon standards of human rights and democracy. Many territorial entities that do not meet one or other of these criteria have had their statehood confirmed by recognition. Conversely, territorial entities that do satisfy the criteria for statehood are not recognized as states. Furthermore, it is arguable that recognized states that cease to meet the criteria for statehood should be derecognized. States are not compelled to recognize any territorial entity that satisfies the criteria of statehood. Political considerations, perhaps most notably illustrated by the seemingly intractable Palestinian claim to statehood and recognition (Crawford 2006: 421–48), often enter into the calculus of factors that influence states in determining whether or not to recognize a territorial entity as a state. Indeed, it has been suggested that the criteria for recognition demanded by the EC in December 1991 in relation to the recognition of the republics that seceded from Yugoslavia were politically inspired (Grant, 1999: 105). However, whatever the mix of legal or political factors is in relation to the creation and recognition of states, widespread recognition from the international community of states is vital for the continued existence and viability of a state and, as is illustrated by the case of Kosovo, states will do all that they can to achieve such recognition.

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5

SELF-DETERMINATION AND THE RECOGNITION OF STATES

Costas Laoutides

Introduction

State creation is a political and diplomatic act that encapsulates the essence of political organization in the international system under the so-called Westphalian model. Political communities are defined as such through the creation of territorial states; these are territorial administrative units in which the political community exercises supreme authority – in other words, it is sovereign. The validity of this act is underscored by two conditions: first, the extent to which the political community can exercise effective control over the territory it claims sovereignty and, second, whether the entity is recognized as such by other sovereign states in world politics. In combination these conditions are necessary and sufficient for the creation of a sovereign state which becomes a member of the international society. Not meeting one of these conditions can still lead to state creation, for example, if there is effective control of territory manifested by state structures but no international recognition of this entity, then the entity is called a *de facto* state (Caspersen 2012). Alternatively, when an entity is internationally recognized but cannot exercise effective control over the entire territory it claims under its jurisdiction, then it can be described as a fragile state (Brock et al. 2012). Originally recognition of statehood was a marginal field of scholarly attention; early students of international society located the source of state sovereignty within the territorial unit thus there was no need for recognition by other states (Pufendorf 1744: 165–6).

Gradually, the interest increased and the views on the question of state recognition were crystallized along the axis between constitutive and declaratory accounts. The core question these theories are trying to answer is whether the act of recognition is necessary for the existence of an independent state, in other words whether state creation is a question of law or fact (Crawford 2006). The international practice of state creation has been associated with the idea of collective self-determination. In the current international system territorial borders are more likely to change as a result of internal revolution, violent or not, than as a result of conquest. International recognition in contemporary international politics indicates that the act of state creation is legitimate and manifests the collective right of self-determination of the entity's population. This chapter will investigate the evolution of self-determination as a collective norm and how it informed the international practice of recognition and state creation. In doing so the chapter discusses the subject of self-determination as well as its association with emancipatory politics.

Self-determination and state sovereignty until the end of World War II

International relations until the start of the nineteenth century were mainly composed by states based on dynastic rule. The borders of states could change either through war or inheritance based on royal marriage. The locus of state legitimacy was the absolute sovereign monarch, who was accountable only to God. Accordingly, recognition of sovereignty by other states was seen as unimportant, an early nineteenth-century author summarizes the dominant view in the scholarship of the time:

[I]n order to consider the sovereignty of a State as complete in the Law of Nations, there is no need for its recognition by foreign powers; though the latter may appear useful, the *de facto* existence of sovereignty is sufficient ... thanks to the perfect independence of States a foreign power is not authorised to judge the legality or illegality of what happens in another State but has to take only facts into consideration.

(Saalfeld 1833: 26, 63 in Alexandrowicz 1958: 189)

The transition from the *ancien régime* to the era of nation states during the nineteenth century paved the way for the evolution and crystallization of the principle of self-determination in the years after World War I as the driving force for state creation and state recognition based on a territorial understanding of political communities. Collective self-determination could only appear in the presence of a democratic/popular ideology, which obtained momentum in the second half of the eighteenth century. Two different manifestations of self-determination highlight the complexity of the issue and the role that identity played in shaping the political agenda of collectivities. In some cases, and depending on the sociopolitical setting, the concept of self-determination had a political/civic orientation which downplayed, to a degree, ethnic considerations, whereas in other cases the concept was strongly linked to ethnic and cultural factors.

The political and administrative homogenization that had developed in Western Europe by the eighteenth century had produced a sense of national identity and political cohesiveness within the boundaries of the then existing states. With the French Revolution the people collectively became the locus of supreme authority following an emancipatory path in which the people took control of their system of government (Hinsley 1966; Tuck 1996). The turning point in this development was that popular sovereignty reflected an electoral body that included literally all the inhabitants of the territory (Hall 1999: 142–3). The belief that elections should have some effect on how political power was exercised allowed the principle of sovereignty to embrace notions of a popularly exercised self-government. With the influence of the new national and democratic ideas, the notion of the people started taking shape; the people, characterized by an increased perception of coherence, were called the nation, were the source of sovereignty, and identified with the territorial state. The logical consequence of the democratization of the state was the theory of national self-determination (Laoutides 2015).

The second manifestation of self-determination was based on ethnic identity and culture. In the early nineteenth century Johan Gottfried von Herder developed the idea of the *Volk* (people or nation). According to Herder, a *Volk* was a community bound together by blood ties and characterized by a particular language, culture, religion and set of customs (Hobsbawm 1992: 57). The nation was understood as a natural social unit, being an extension of the family. Accordingly, every nation had the right to develop its own political institutions uninfluenced by others and, thus, could express its own unique character in the political realm. Herder's work influenced other writers in Central and Eastern Europe such as Johann Fichte, Ernst Arndt, Friedrich von Schlegel and Giuseppe Mazzini, who was then

working in favour of Italian unification. Mazzini believed that each nation had a certain mission to accomplish, which would further human progress overall. This mission could only be accomplished through the instrumentality of the nation state. It was, therefore, of the utmost importance that nations could achieve political unity (Beales 1969: 146).

Furthermore, we should note that the concept of the 'nation state', in both the civic and the ethnic manifestation of self-determination, eventually essentialized the relationship between the territorial state and the political community that exercises effective and legitimate control of the state. Later, under the UN Charter, the sacralization of national territory and its normative confirmation came to underscore the politics for state recognition in the international system. Self-determination that emphasizes national identity could be seen in this context as exclusive and particular in nature because it attaches primary importance to the group rather than the individual (Brubaker 1992). During the nineteenth century the need to establish a national cause emerged, further soliciting the oppression of ethnically diverse groups within states that felt compelled to be homogeneous. In the event that a political entity was not homogenized enough for its people to regard themselves as a single national community and, therefore, be able to become a nation state, the entity ought to lose its cohesion and its diverse elements should fly apart – this is what happened to the Austro-Hungarian and Ottoman Empires. From this perspective, the history of self-determination is essentially a history of the making of nations and the breaking of non-national states (Cobban 1945: 6). The collapse of dynastic rule in Europe signified the impossibility of defending states as possessions of individuals or families. The transfer of state ownership to the collective was a corollary of the historical transition from oligarchy to collective rule via consent. But who this collective is within a territorially demarcated state that holds the right to self-determination has remained an open question. Although nationalism was projecting a straightforward basis for the new global order, namely that world politics should be consisted of nation states, the core of this assertion, the definition of the nation, has been highly contested to this day.

The theory and practice of state recognition during this period did not provide any solution to this question. By drawing a distinction between the conditions that formed a new state and the process of obtaining legal personality, the law of nations at the time was not concerned with the origin of a new entity. Rather international recognition was seen as an initiation rite for *de facto* entities to enter the society of states which were operating under the 'standards of civilization' doctrine (Crawford 2006). As Phillimore (1879: 79–80) aptly argued, 'the question as to the origin of States belongs rather to the province of Political Philosophy than of International Jurisprudence'. In tune with this approach, state recognition in cases of national liberation struggles was based on the test of effectiveness of the new entity. In the context of the Greek struggle for independence, George Canning, British Foreign Secretary 1822–1827, formulated the test as follows:

acknowledgment to be subject to the qualification that such State shall have shown itself substantially capable of maintaining an independent existence, of carrying on a Government of its own, of controlling its own military and naval forces, and of being responsible to other nations for the observance of international laws and the discharging of international duties. *These are questions of fact. By acknowledgment we can only acknowledge what is.* ... We should look to Greece ... with a disposition to seize the first occasion of recognizing as an independent State such portion of her territory as may have freed itself from Turkish dominion.

(Canning 1826: 1216, emphasis added)

The hidden paradox of the international practice on state recognition in the nineteenth century was that by ignoring to question the origins of state creation the international society was sending tacit signals of legitimization for the nationalist agenda, which continues to grow fast.

The collapse during the long nineteenth century of the once powerful empires that had dominated European political life for so long acted as a warning against newly coined states which did not hesitate to implement policies of cultural assimilation. The exact correlation between the boundaries of a nation and those of a state led to tensions and grievances in the relations of majority and minority groups defined along ethnic identity lines. Ethnic minorities could not join in building the national character and culture of the dominant people, nor could they have their own national aspirations satisfied. Minorities were perceived as anomalies within the nation state, therefore they ought to be assimilated so that the entire population of the state reflected one culture and one language (Petrie 1946; Hayes 1960). Assimilationist policies were often counter-productive, leading to increased national and political awareness of the underdog that paved the way for subsequent claims in favour of independent statehood (Guelke 2012).

The evolution of the principle of self-determination and its link to popular sovereignty brought about a firm connection between nationalist and democratic movements. The political thinking of the post-World War I period treated nationalism and democracy as almost synonymous (Mayall 1990). The nation state was regarded as the political expression of the democratic will of the people. In effect, the principle of self-determination was serving a dual purpose. On the one hand, it was the principle chosen to guide international governance in the new post-dynastic world order. On the other hand, it was serving as the underpinning principle for the social contract within states, old and new.

However, although self-determination posed as the only means of allowing the democratization of nation states, the oppression of minorities it generated was largely silenced. Even though the principle was designed to allow the peoples to achieve political emancipation in their states, its national dimension inflamed and justified oppression against those whose identity did not match the dominant national narrative. The elevation of popular will in the government of states could not be applauded enough; however, the emancipatory character of self-determination was lost along the way in a zealous effort to apply the principle to the extreme. Post-World War I denial of ethnic diversity within nation states became a standard policy given that ethnic pluralism was perceived as a direct threat to the emerging political order underpinned by the centrality of a single nation as the new body politic. In this light, Kurds in Turkey, for example, during the first few decades after the creation of modern Turkey in 1923, were sent to the gallows 'for having claimed that the Kurds existed' (Nezan (aka Kendal) 1980: 77).

Self-determination during the Cold War

The employment of self-determination in redrawing the European map after World War I was not extended to non-European territories, neither was such an extension intended in any of the treaties promoting self-determination as the *par excellence* principle of the new political era (Manela 2007). Nevertheless, it provided anti-colonial movements with a precedent that could potentially be applied in non-European contexts (Cassese 1995: 27–31; Musgrave 1997: 33–7). The reluctance of adopting self-determination as a universal legal norm was confirmed by the League of Nations, which introduced minority rights as an international regime with the aim of taming nationalist aspirations and maintaining international peace (Kymlicka 1995; Nickel 1997: 235–44; Jackson-Preece 2005). Thus,

during the interwar period self-determination continued to inspire and mobilize populations without, however, having any legal validity. It is important here to note the obvious tension between the two facets of self-determination as a political principle. Internally, it provided legitimacy for the social contract between the political community and the government. Externally, it created the basis for a new international order based on legitimate claims of a collective over territory. In doing so it unpacked the complexities of defining collective political identity, for the uncertainty about who is (or should be) member of the political community first requires boundaries to be in place.

The mind-blowing scale of the two world wars with their territorial ramifications kept the issue of suppressed nationalities and their right to statehood to the forefront. Still, the long debate on whether self-determination ought to be included in the UN Charter was an indication of the unease caused at the international level from the very early stages of its theoretical formation. This uneasiness can be explained post 1945 as a balancing act by the UN in pursuit of international peace: on the one hand, to outlaw the use of violence as an instrument of foreign policy including territorial changes and, on the other, to ensure that state creation would be based on popular will and free choice (Grenville 1974: 198–210).

The principle of self-determination was included in the final draft of the Charter in San Francisco after a Soviet proposal was put forward, according to which references to the ‘self-determination of peoples’ should be included. The Committee, which adopted the amended articles unchanged, provided little clarification of the meaning or import of self-determination. It indicated that the principle of equal rights and the self-determination of peoples were ‘two complementary parts of one standard of conduct’ and that ‘an essential element’ of the principle was ‘a free and genuine expression of the will of the people’ without simultaneously shedding new light on the difference among ‘nations’, ‘peoples’ and ‘states’ (Russell 1958: 811–13; Sureta 1973: 99). Eventually the ‘self-determination of the peoples’ was included in Articles 1(2), 55 and 57 of the UN Charter, leading to the accurate observation by Ivor Jennings (1956: 56) that ‘on the surface it seemed reasonable: let the people decide. It was in practice ridiculous because the people cannot decide until someone decides who are the people’.

Jennings’s observation was not a moot point, and after 1945 there were two parallel developments that pushed for clarification regarding the subject of collective self-determination under the UN. First, the decolonization movement was growing fast across Asia and Africa underpinned by nationalist politics; the newly created states proceeded with the consolidation of political identities along ethnic lines and such a process created internal divisions and spheres of exclusion for minority groups. For example, Myanmar (formerly Burma) introduced a system of ethnically based citizenship in its constitution which excluded from citizenship any individual who was not a member of a formally recognized ‘national race’; this had a significant impact on the status of the Rohingya in Myanmar, who were turned effectively stateless (Cheesman 2017; Ware and Laoutides 2018). The second development was the perceived or real involvement of metropolitan powers with the politics of former colonies. Katanga’s unsuccessful secession from Congo-Léopoldville is a case in point: Belgium (the former metropolis) provided Katanga with support that amounted to no less than the total panoply of state infrastructure (Heraclides 1991). Such interference was perceived as a neo-imperial effort of divide and rule aiming to perpetuate dependency and control of the newly founded states that could potentially derailed the whole decolonization process.

The response to this challenge came with a rather strict definition of the ‘people’ who have the right to self-determination. It was deemed that only European colonies could claim the right to self-determination but even this needed further qualification because in many

parts of the colonial world populations had been separated between different colonial administrations, resulting in high levels of social heterogeneity, which was seen as the kernel for any secessionist movement driven by neo-colonialism (Mojekwu 1980; Ouguergouz and Tehindrazanarivelo 2006). The solution was the introduction of the principle of *uti possidetis* (a Latin phrase meaning ‘as you (plural) possess’), which confirmed the borders of colonies as the borders of the new independent states. In this light, the inhabitants of these administrative units were seen collectively as the ‘people’ with the right to self-determination and state creation (Hannum 1990). In essence, *uti possidetis* defined a people in territorial terms, as the population of a territorial unit which is either an internationally recognized state or a colonial entity. In the latter case, the people in the colonial entity could exercise their right to self-determination and become an independent state (Ratner 1996; Buchanan 2004). During the apex of the decolonization movement the self-determination units seeking independence were recognized almost immediately. The requirements of stability and permanence that were emphasized in nineteenth-century international practice did not necessarily apply (Crawford 2006).

The introduction of *uti possidetis* led to two important conclusions for self-determination movements during the Cold War. First, the international community eschewed any definition of the people on identity grounds by deferring this discussion as a matter of internal organization and nation-building in the newly created states. Second, the territorial approach to self-determination precluded a part of the population of any territorial unit from being a ‘people’, thus blocking any secessionist aspirations from having any international legal anchorage. From this perspective, self-determination as the basis for state creation was closer to its Western European understanding of representative government and it was consistent with the post-World War II political order based on the territorial integrity of states and the inviolability of international borders.

The adoption of self-determination by the UN could be described as a victory of the oppressed who liberated themselves from colonial rule and institutionalized racial discrimination. But the particular interpretation of the principle by the UN also explains the negative climate in which unilateral state creation is still received internationally. In addition, the above analysis also exemplifies that the focus in the discussions and practice for the international governance of state creation is temporally limited up to the moment of creation and recognition. There is little control over the type of regime that the new state will establish post secession. We can theoretically be persuaded about the maltreatment of communities in their host states, but we cannot regulate that secession will realize the emancipatory character of self-determination, since the interpretation of the principle at the inter-state level is bestowed upon the community. Although we may often assume that people who have experienced violations of human rights are bound to respect these in their own state, we forget the realities of separatist struggles, that is, that most of these communities had little, if any, experience of democratic governance and the daily exercise of self-determination. A case in point here is the complex conflict in Rakhine State in Myanmar, where, although the ethnic Rakhine have been subject to oppression and discrimination by the Bama-dominated military rule, their dominant narrative for self-rule treats the Muslim Rohingya as intruders creating thus another level of ethnic dichotomy and oppression (Ware and Laoutides 2018).

Self-determination after the Cold War

The consolidation of *uti possidetis* allowed for the control of ethnic centrifugal tendencies within the former colonies. Because sub-groups within new territorial units were not the subject of the collective right to self-determination, the right only concerned the people of

the territorial unit as a whole, without further distinction or fragmentation. The case of Bangladesh's independence in 1971 was the exception that confirmed the validity of *uti possidetis* during the Cold War (Heraclides 1991). The collapse of the Eastern Block signalled the end of bipolarity and the start of a democratic transition for the Soviet Union and its satellites. This was followed by a series of claims to statehood, especially in Eastern Europe and the Balkans. The response of the international community to the dissolution of the Soviet Union and Yugoslavia represented a departure from the established approach to self-determination, making space for the reformulation and enforcement of a new understanding of the collective right to self-determination (Musgrave 1997: 123–4).

The European Union (then known as the European Community) considered the exercise of popular sovereignty within the constituent republics of the Soviet Union and of Yugoslavia as amounting to acts of self-determination (Pazartzis 2006: 361–7). Western states seemed no longer able to assert, as they had traditionally done in the UN context, that self-determination must occur within the state as a whole and among its entire population (Higgins 1994). On the contrary, it appeared that the great powers of the time were accepting the proposition that the process of self-determination and, subsequently, state creation could legitimately occur within one section of a state's territory and among one part of that state's population. The response of the European Community, and subsequently the UN, to the situation in Yugoslavia indicated that sections of the state's population, inhabiting certain regions of the state, could unilaterally create an independent state of their own. This state would be, in turn, recognized by the international community on the basis that an act of self-determination had occurred (Caplan 2005). In addition, although Western states emphasized that self-determination must occur within the frontiers of a constituent republic and among its entire population regardless of ethnic criteria, the exercise of popular sovereignty within the constituent republics of the Soviet Union and of Yugoslavia was in reality an act of self-determination by particular ethnic groups, because the constituent republics had been organized on an ethnic basis. In front of the politically appealing dilemma to break up Yugoslavia and the Soviet Union with the less possible normative impact of the established interpretation of collective self-determination, the international community adopted the argument that both countries were federations in a process of disintegration (Gray 1992: 477–84; Pullat 1991: 512).

An inevitable and unforeseen result of allowing self-determination to occur within a territory organized along ethnic lines was that an act of national self-determination had taken place leading to the creation of an independent nation state. But the unwillingness of the international community to generalize the ethnic interpretation of self-determination beyond the constituent federal republics of the Soviet Union and Yugoslavia is evident by the way that attempts for further application of the right to self-determination by ethnic communities within the constituent federal units, as in the cases of Krajina in Croatia and Vojvodina in Serbia, were discouraged and eventually blocked (Waters 2000; Radan 2018). The redrawing of boundaries along ethnic lines through the principle of self-determination confirmed the non-emancipatory character that had been historically attached to it: ethnic minorities within these new states already experience ongoing repression. Thus, in essence the international community's balancing act to satisfy strategic interests in the emerging new world order without jeopardizing the normative landscape with regard to self-determination led to treating new state creation in the Soviet Union and Yugoslavia as acts of decolonization (Mayall 2011).

The fear of nationalist tendencies to perpetuate the fragmentation of the international system is also found in the attempt of the then UN secretary-general, Boutros Boutros-Ghali, to discourage unilateral secession with a strong system of human rights protection that include protection of minorities. In his words, 'if every ethnic, religious or linguistic

group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve' (Boutros-Ghali 1992: para. 17). Accordingly, a way to reconcile claims to self-determination with respect of territorial integrity and state sovereignty was through 'respect for democratic rights at all levels of social existence ... : in communities, within states and within the community of states' (Boutros-Ghali 1992: para. 19).

The new states that emerged from the ashes of the Soviet Union and of Yugoslavia also propelled a new discussion of the UN's approach to the principle of self-determination (Hannum 1993: 57). As already mentioned, the principle of self-determination found a field of application in the former colonies which declared their independence under the support of the UN. The treaty and customary law of the UN attempted to confine the right to self-determination on a territorial basis to colonial people only or populations who were under foreign occupation. To this end, the international community was highly concerned with implementing the principle in order to grant independence to former colonies, while they paid little attention to the political structures of the new independent states. There was a lack of anticipation regarding internal self-determination because of reluctance towards an articulation of customary law in this field (Henrard 2000: 288). This attitude may be attributed to the fear that any action in this field by the international community would lead to unwitting interference with the domestic affairs of sovereign states. Given the fact that the principle of non-interference is a fundamental rule of the international system, every attempt that would create the potential to challenge it was received with scepticism. Even though the common Article 1 of the UN International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights has been in effect since 1966, democratic values have been subordinated to the maintenance of state sovereignty. Nevertheless, customary law of internal self-determination has been in the process of formation as the right for a people to develop itself socially, economically and culturally within an encompassing state and to determine its political status within that state. The European Community declared to the Third Committee of the UN General Assembly in 1986:

In accordance with the principles set out in the Charter, the common first article of both International Covenants proclaims the right to self-determination. It is important to remember that, under the Covenants, self-determination is a right of peoples. It applies with equal force to all peoples, without discrimination ... the mere absence of foreign invasion or occupation did not mean that a people was free to exercise its right of self-determination, which was not a single event but a continuous process. People must have regular opportunities to choose their Governments and their social systems freely, and to change them when so they wished.
(UN 1986: paras 37, 38)

In addition, the Vienna Declaration on Human Rights in 1993, signed by 160 state members of the UN, adopted pluralist representative democracy as the means of securing the well-being and progress of citizens within a state, regardless of any particular identity they might possess (Henrard 2000). Hence, a new understanding of the principle of self-determination towards a more democratic and 'internal' interpretation has already been put forward. This understanding was further confirmed in the UN Declaration on the Rights of Aboriginal Peoples (2007). The forms of internal self-determination may vary, from a very weak version of basic political rights of representation and participation in the government of the encompassing state to a form of self-government such as one implying a special constitutional status

that address an asymmetric relationship between a majority and a minority in the encompassing state. The *via media* between the two versions of internal self-determination is the right to self-government implying that the people has political control over its own institutions within the state as in the cases of Scotland and Wales in the United Kingdom (Kymlicka 2007).

The UN architecture as was designed in Boutros-Ghali's *Agenda for Peace*, viz. the right to self-determination of the people, involved, at least in theory, a stratified implementation of self-determination with an internal application of the people to 'freely determine their political status and freely pursue their economic, social and cultural development' within the territorial unit they exist. If the encompassing state is not willing to grant internal self-determination to its peoples, this for the UN may count as an injustice and seems to justify state creation and recognition as a remedy to gross violations of human rights (Buchanan 2004). Nevertheless, so far, a linear relationship between gross violations of human rights, such as genocide or ethnic cleansing, and the right to external self-determination has not been established.

After the end of the Cold War the international community seemed to be in limbo with regard to revisiting the notion of self-determination and its application in the creation and recognition of new states in the post-colonial world. If we set apart rare cases such as Czechoslovakia and Montenegro, whose so-called 'velvet divorce' was based on mutual consent between the different peoples to break up their territorial unit and create two or more new states, then the international community seems to have followed an *ad hoc* approach towards self-determination movements, typically recognizing the political outcomes generated through military victory or through mediation after a period of armed violence, which has eventually led to a stalemate. Since 1989–1990 there has been no case of state creation which was declared unilaterally by the separatist movement and which received unambiguous international recognition, measured as state creation leading to UN membership (Crawford 2006: 415). The reliance on the outcome of international mediation is evident in the case of South Sudan, where the 2005 Comprehensive Peace Agreement ended the longest civil war in Africa. The peace agreement provided the opportunity for a referendum on South Sudan's independence after a transitional period of joint government. In January 2011, the people of South Sudan voted overwhelmingly to declare its independence by July 2011, although several issues are pending resolution, including the division of oil revenues and the status of the border. The UN recognized the right of self-determination of the South Sudanese as a result of a negotiated settlement after a very long period of civil war and destruction. Most importantly, the ongoing ethnic violence that followed in South Sudan after independence highlights that external self-determination does not necessarily lead to internal self-determination.

From a different standpoint, Kosovo's unilateral declaration of independence by the majority Albanian government in February 2008 followed a period of international military intervention and administration. Until December 2018, Kosovo was recognized by 116 states, of which ten have since withdrawn their decision to recognize Kosovo, but as yet Kosovo is not a member of the UN. Those states that recognized Kosovo would argue that the Kosovar government's independence was constitutional and legitimate. In October 2008 the UN General Assembly issued a resolution requesting an advisory opinion by the International Court of Justice on the legality of Kosovo's declaration of independence. The ICJ delivered an ambiguous advice suggesting that Kosovo's declaration of independence did not violate international law (ICJ 2010). Nevertheless, the ICJ advisory opinion has been perceived as more favourable to Kosovo because it has helped to consolidate independent statehood and facilitated the country's growing participation in the international community. So far, Kosovo has become a member in international and regional organizations which are

open to international entities that are not necessarily independent states such as the International Monetary Fund, the European Bank for Reconstruction and Development and the Council of Europe Development Bank (Caplan and Wolff 2015).

Conclusion

International recognition is an indicator of legitimacy of any national self-determination movement. From a political perspective the survival of a new state is more secure when it enjoys wider recognition and increases the state's participation in the international community including membership in the UN and major regional organizations. State creation is directly associated with the right to self-determination of the peoples. However, the international framework for self-determination and subsequent state recognition is still entrapped in the logic of *uti possidetis* and the territorialization of the people. In cases where the decolonization principle cannot be applied the international community pegs international recognition on an unprincipled *fait accompli* of power politics, either violent or non-violent. The static anti-colonial view of territorial self-determination not only refrains from granting any right of internal or external self-determination outside this context but, also, does not provide any remedy for the present plight of so many minorities. The reluctance of the international community is also evident in the lack of a formal international forum where oppressed minorities can voice their grievances and put forward their claims at the international level. How and where can the Rohingya, for example, register their grievances about ethnic cleansing and what ways are available for them to exercise their right to self-determination? A final thought about state recognition and self-termination is related to the idea of progress in the international system. Historically, progress in international relations has been equated with expansion. This idea echoed the position that only nations of a certain size could constitute states (Mill 1998: 431–5). Thus, the move from small political units – typically conforming to family, clan or tribal patterns of social organization and political authority – to larger ones – in which social and political organizations were regulated by the market and defended by the military – was irreversible. There was no other way to extend human progress, but through the merger of smaller nations with larger ones. But, if progress is identified with ongoing enlargement of human economies, societies and cultures, the fate of small peoples, languages and traditions is bound to be represented as conservative resistance to the inevitable advance of history (Hobsbawm 1992: 41). A new interpretation of self-determination should overcome the small states syndrome and focus on a principled process of state recognition that can maximize the emancipatory potential of the peoples broadly defined.

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6

THE ETHICS OF STATE RECOGNITION

Chris Naticchia

Introduction

Moral skepticism toward international recognition holds that no moral principles bind the practice of recognizing states under international law. If any standards bind recognition decisions at all, they are legal or prudential, not moral, ones. States and international bodies are therefore morally free to confer or withhold recognition from political entities that seek it. While recognition decisions can still be criticized, they can be criticized only for being illegal or imprudent, not immoral. There are two types of moral skepticism toward international recognition: *strong* skepticism and *moderate* skepticism. Strong skepticism claims that, just as no moral principles bind international agents in the recognition decisions that they will confront, so too did no such principles bind them in the past decisions that they have already confronted. No future recognition decisions can be criticized as immoral. Similarly, no past recognition decisions can be criticized as immoral. Moderate skepticism, by contrast, applies retroactively, but not prospectively. Like strong skepticism, moderate skepticism denies that moral principles apply to past recognition decisions. International agents were not bound by such principles and their past decisions cannot be appraised by them. Such decisions are now simply fixed points that any theory must take into account. But future recognition decisions are subject to evaluation by moral principles, and they bind the agents who make them. Those future decisions can be criticized as immoral, not just illegal or imprudent.

Strong and moderate skepticisms represent different threats to developing an ethics of international recognition. However, they are not the only threats. There is a third type of moral skepticism – call it *weak* skepticism – that is not properly speaking skeptical, even though it bears some resemblance to it. According to this form of “skepticism,” moral principles bind the practice of recognizing states under international law, prospectively and retroactively, but they are merely strategic principles designed to guide us toward some goal or end. The goal or end might be something like international peace or global justice, and the principles would help direct international agents toward achieving it when they face recognition decisions. This view is nonskeptical because it entails that recognition decisions (past and future) can be evaluated as immoral and not just illegal or imprudent. They are or were immoral simply in virtue of whether they violate principles whose justification rests on their ability to bring us closer to the goal or end when followed. Perhaps a more apt name for such a view would be *instrumentalism*,

since it insists that, although moral principles bind recognition decisions, their status as moral principles is thin, since their justification is at bottom strategic or instrumental rather than normative or philosophical. For their formulation and justification, we might turn to specialists in international relations, law, or political science rather than (say) to philosophers. This makes the view skeptical in spirit toward normative theorizing.

Any attempt to defend an ethics of international recognition, therefore, must fend off the skeptical threat from both directions – from the direction of strong and moderate skepticisms, which threaten to eliminate or reduce the scope of moral appraisal, and from the direction of instrumentalism, which threatens to collapse all normative expertise and judgment into strategic expertise and judgment. My aim here is to counter these threats and to show how we might begin to evaluate individual recognition decisions and the practice of international recognition as a whole. By demonstrating which principles ought to bind international agents, we can pave the way for reforming our overall practice while providing grounds for publicly justifying individual decisions (especially) when they are controversial. I begin this task by first examining the sources of moral skepticism toward international recognition.

Sources of skepticism

What are the sources of moral skepticism toward international recognition? One prominent source is *realism in international relations*. On this view, states are the principal international actors. Because no reasonably effective authority exists over them, the international realm is anarchic. Further, states always act so as to promote their own national self-interest. Because no reasonably effective authority exists over them to enforce moral standards, such standards do not bind them, and they therefore remain free to act as they routinely do act, which is to promote their own national self-interest. No doubt this characterization of the view is rough. But it should be enough for us to proceed. This characterization of realism combines two main theses. One is *moral skepticism about international relations*, which is the denial that there are any binding moral requirements in the international realm. The other is *Realpolitik*, which infers from moral skepticism about international relations that states may always act so as to promote their own national self-interest. Taken together, these theses seem to imply that states may only be criticized for failing properly to act in their national self-interest, which is to criticize them only for being imprudent, not immoral.¹ Strong skepticism toward international recognition follows directly.

One strategy for countering strong skepticism, therefore, is to undermine realism as its source. That can be done either by attacking moral skepticism about international relations, or – if one were to insist that *Realpolitik* need not rest on it – by attacking *Realpolitik* itself. Therefore, if we can offer a positive defense of binding international requirements, and show that they aren't simply reducible to enlightened national self-interest, we can undercut the two theses that comprise realism – a task I attempt below. Even if one rejects realism, though, one might still embrace a weaker view that captures the pragmatism that seems to underlie it. The pragmatism goes like this. Members of the international community are likely to reject any proposal calling for the potential derecognition of one of their members. For this reason, the only plausible ethics of international recognition is one that defends standards for recognizing new states – leaving existing states alone. Call this view *asymmetrical pragmatism*.² Asymmetrical pragmatism entails moderate skepticism. To counter moderate skepticism, then, we must reject the assumption upon which it rests, which is that members of the international community will likely reject potential derecognition. The proper response to this assumption, it seems, is to defend a theory that is *worthy* of acceptance –

even if it evaluates past recognition decisions and calls for potential derecognition of some currently recognized states. If the theory is worthy of acceptance, its rejection would be unreasonable – more so if it takes into account the pragmatic concerns that motivate the assumption in the first place, as I attempt below.

Instrumentalism

Instrumentalism represents a different kind of threat. Whereas strong and moderate skepticisms challenge the existence or scope of moral principles that bind international recognition, instrumentalism accepts their full range but insists that they are ultimately merely strategic – not the sort of thing that requires normative expertise or judgment. More precisely, while instrumentalism can accept some room for normative content, the normative content that it accepts is merely the obvious goals or ends of international peace and global justice – which (again) are not the sort of thing that requires (much) normative expertise or judgment. Hence, the theoretical heavy lifting comes from the derivative principles that guide us in reaching those goals, and their formulation requires only the kind of practical expertise that scholars and practitioners of international relations, political science, and law provide – nothing more – which is strategic, not moral, expertise.

Nonetheless, there may be some preliminary, conceptual work that must be done before one formulates the derivative principles. For example, it may be that there is really just one goal, not two, and the other is just a means to it. It may be that advancing global justice is just a means of achieving international peace, in which case international peace is the only genuine goal. Similarly, it may be that facilitating international peace is just a means of reaching global justice, in which case global justice is the only genuine goal. Alternatively, it may be that international peace and global justice are independent goals, not reducible to the other. At times, we ought to accept sacrifices in global justice in order to maintain international peace. At other times, we ought to sacrifice international peace for the sake of achieving greater global justice. There is no algorithm for deciding – we weigh the two intuitively. Either way, though, once we've performed the necessary conceptual work, the task that remains is instrumental or strategic – we formulate the best rules for achieving international peace, or global justice, or the appropriate intuitive weighting of the two.

Characterized in this way, instrumentalism seems consequentialist: we evaluate moral principles according to how well they produce the outcomes of international peace, or global justice, or both, appropriately weighted. Since my aim here is not to relitigate the strengths and weaknesses of consequentialism, I will simply observe that the skeptical appearance of instrumentalism seems to stem from its denial that there can be any binding nonconsequentialist moral principles on international recognition. Therefore, a strategy for countering instrumentalism would be to show that there actually are binding nonconsequentialist principles on international recognition, as I attempt below.

We should now take stock of our analysis so far. Strong and moderate skepticisms represent one kind of skeptical threat. Instrumentalism represents another. We can counter the first kind of threat by defending internationally binding moral principles that are not reducible to mere enlightened self-interest, yet still take into account, in the right way, pragmatic concerns. We can counter the second kind of threat by defending internationally binding moral principles that are nonconsequentialist. If we can meet both criteria simultaneously, we will have eliminated the main threats to developing an ethics of international recognition. When confronted by the twin threats of skepticism and instrumentalism, the best defense of an ethics of international recognition is a good offense.

Critical mass

In this section, I introduce a principle of international recognition that I call the *critical mass* principle (Naticchia 2017: 165). According to this principle:

Political entities ought to be recognized as states if and only if they belong to the critical mass of entities which, working together, is necessary for making at least some moral progress toward the ideal.

Just what counts as the ideal I leave open. We can think of it narrowly as involving simply international peace, or global justice, or the appropriate intuitive weighting of the two. Or we can think of it broadly as involving some more specific account of justice, such as some variant of liberalism. The idea behind the critical mass principle is that, however we specify the ideal, reaching it doesn't just happen on its own. It has to be worked at. Working at it requires the collective efforts of many countries – enough to form a critical mass willing to labor under the most difficult of circumstances – to surmount decades or even centuries of hostilities, some of which have frozen into hatreds. The international community of recognized states starts with this critical mass and builds upon it (Naticchia 2017: 131).

Now, before I turn to defending the critical mass principle, we should note the following about it. First, it describes a moral requirement. Entities that belong to the critical mass must receive international recognition. Second, this requirement holds independently of whether recognizing this or that entity as a recognized state within the critical mass of internationally recognized states is in the national self-interest of the recognizing state. Third, it requires derecognition of states that do not belong to the critical mass. In combination, these observations show that, if the critical mass principle is defensible, it refutes both strong and moderate skepticism. It refutes strong skepticism by undercutting the realism that grounds it. In embracing a positive moral requirement, it rejects moral skepticism about international relations, one of the two theses comprising realism. Further, in embracing a positive moral requirement that holds independently of an entity's national self-interest, it rejects *Realpolitik*, the other of the two theses comprising realism. In accepting the possibility of derecognition, finally, it appraises past recognition decisions instead of merely taking them into account as fixed points and issuing judgments about future decisions alone – implying the falsity of moderate skepticism.

Although the critical mass principle is consistent with consequentialism, it does not require it. In fact, as we will see, its defense does not rest on mere means–ends instrumentalism. The expertise required for its defense is robustly normative, not merely strategic. The critical mass principle is consistent with consequentialism because, clearly, it is better to make progress toward the ideal than to fail to make progress toward it – the consequences are better – and we produce those better consequences by recognizing a critical mass of entities as states, whereas we produce worse consequences by not recognizing a critical mass. However, from the fact that, in recognizing a critical mass of entities as states, we produce better consequences than if we do not recognize them, it does not follow that we must always produce the best consequences overall – that we must maximize the goodness or value of such consequences. Further, and more to the point, even if we were to give a consequentialist justification of the critical mass principle, the defense that I will offer, a social contract defense, will be nonconsequentialist – showing that an ethics of international recognition need not rest on instrumentalism. I will turn to that defense, and explain why it is nonconsequentialist, shortly. If the critical mass principle is defensible,

therefore, we refute strong and moderate skepticism and provide an alternative to instrumentalism. In so doing, we show that normative, not merely strategic, expertise is needed (at least if we reject consequentialism). And the social contract defense of the critical mass principle, if successful, will demonstrate that expertise. It will demonstrate the possibility of an ethics of international recognition.

An ethics of international recognition will obviously require more than just the critical mass principle. At a minimum, it will require a principle indicating when states must recognize new states formed through secession. It might also include a principle for adding to the stock of recognized states – a principle specifying when entities outside the critical mass ought to be admitted into the international community of recognized states – and explain why. But I will not pursue those possibilities here. I shall focus instead on the logically prior task of demonstrating that an ethics of international recognition is even possible, a task to which I now turn.

Social contract

In this section, I begin my social contract defense of the critical mass principle, drawing on the social contract tradition that comes down to us from Hobbes, Locke, Rousseau, Kant, and Rawls. While I mainly follow Rawls in how I set up the contractual circumstances, the argument also deviates in significant respects from his own. The critical mass principle, I will show, would be selected in a fair hypothetical contract suitably specified. A logically prior question, naturally, is why one might think that showing this suffices to justify the bindingness of the principle selected. Here I simply observe (as Rawls himself does) that, if we accept the features of the contractual circumstances as adequately specifying what a fair contract should look like, and if we accept the reasoning leading to the outcome, then we should regard the outcome as a fair outcome binding upon international actors (Rawls 1971: 587).

So how should we set up the fair hypothetical contract? Setting up such a contract requires three types of decisions: what the target is of the deliberations, what the negotiating rules are, and the characteristics of the parties – what their interests are, and what they know. Let us consider each one of these in turn (Naticchia 2017: 167–171). The target of the deliberations is a set of principles governing international recognition. A complete set of principles will specify when recognition is required, forbidden, or permitted. They will indicate which political entities ought to be internationally recognized as states, with the rights, privileges, and immunities of statehood, and an entitlement to participate in the processes for formulating, adjudicating, and enforcing international law. Such principles should meet several conditions. First, they should be the final court of appeal in our normative reasoning about recognition. In other words, there are no higher standards to which our normative reasoning about recognition should answer. Second, they should be general in form, excluding proper names and rigged definite descriptions from their formulation. These features are similar to the formal conditions that Rawls imposes on principles in his theory. The negotiating rules should require unanimity, so that the interests of all parties are properly safeguarded, and the agreement reached should be acknowledged as one that will hold in perpetuity, which forces the parties to make a sober assessment of the risks of each proposal they entertain, without the possibility of renegotiation as a fallback position. In the absence of agreement, the parties are not bound by any normative principles at all, since the hypothetical contract is meant to establish the very principles that bind them. So, if the parties do not reach an agreement, they are free to act as they wish, including egoistically.

By far the most difficult matter is how to characterize the parties – what their interests are, and what they know. A common question is whether the parties should be construed as individuals or as political societies, a choice that we should seemingly resolve by considering our theoretical purposes. Rather than considering this question in extensive depth, however, I will simply suggest that, if we can defend the critical mass principle by using the weaker of the two views, then this will show that the principle need not rest on the stronger view. So, I will follow Rawls here by stipulating that the parties to the contract are political societies, since this view need not rest on liberal individualism, as the alternative stipulation seems to, and thus is theoretically neutral toward societies whose bases might be either liberal or nonliberal. This is the weaker of the two stipulations since it does not require a defense of principles that rest on liberal presuppositions that nonliberal societies might reject. Clearly, this is an important issue that requires more extensive treatment, but I believe that, for our theoretical purposes here, we may bracket the question and simply utilize the weaker stipulation.

However, I shall also add a further feature that seems plausible in light of the fact that we are considering recognition. In deciding which principles ought to govern the practice of recognizing states under international law, we must take into account the vantage point and interests of minority nations within a multinational state or political society, since their desires to remain within, or secede from, the state that governs them is one of the vexing problems of international law. Let us say, provisionally, then, that the parties are political societies that may potentially include minority nations within a multinational state. In order for the choice of principles within this hypothetical contract to be genuinely fair, we will impose upon the parties a veil of ignorance: we shall deprive them of knowledge so as to neutralize the morally contingent factors that may give some of them an unfair bargaining position. They will not know whether, or to what extent, their political society contains minority nations. They will not know whether they represent a liberal or a nonliberal society. They will not know their population, extent of natural resources or economic development, or military strength. They will not know any particular facts about their society.

Nonetheless, they will know certain general facts about their global order. They will know that the circumstances of justice obtain. No one of them can dominate the rest. They are all vulnerable to attack to a certain extent. Moderate scarcity exists. They make conflicting claims on resources. Their knowledge is imperfect. They have different ends. Still, they are mutually disinterested – or so we assume in order to model circumstances in which principles are required to adjudicate conflict. And they are rational. Again, these stipulations are more or less similar to ones that Rawls makes in his hypothetical contracts. Yet they know that their global order is imperfect in several respects. Even if it were desirable, a stateless international society is out of reach for the foreseeable future. Plus, their global order is unjust as it stands. No practicable route to a global order manifesting full justice is available to them except through their practice of recognizing some political entities as states and endowing them with the rights and duties of statehood, and an entitlement to participate in the processes of international law. Given this, they can either select principles that cover recognition, or reject them entirely and remain free to pursue their national self-interest however they see fit. What they cannot do, however, is wish away the existence of states and start anew. That choice is not available to them.

We still need to specify the interests of the parties, the factors that move them. Here I will offer a very thin account of their interests, though, since I believe that no thicker account is needed in order to defend the reasoning from behind the veil of ignorance to the selection of the critical mass principle. In fact, I believe that we can rely entirely on our imaginative capacities to envision what it would be like to live under the alternative proposals that I will soon describe. If our setup of the contract so far is successful, it should

represent a fair hypothetical contract, one whose stipulations produce a situation where the selection of principles should be regarded as fair, and therefore binding upon the agents who are parties to it. No party to the contract can tailor principles to his or her society's advantage, and no society is given an advantage in the negotiations by having greater resources of some sort or other.

Moral progress

In this section, I continue my social contract defense of the critical mass principle by describing the reasoning of the parties from behind the veil of ignorance. The parties do not reason directly for the critical mass principle. Instead, the parties reason indirectly. They reason indirectly by considering whether to accept or reject a principle that I call the *necessity of moral progress* (Naticchia 2017: 166). I will begin by describing the necessity of moral progress, then I will explain how accepting the necessity of moral progress supports the critical mass principle. In the next section, I will show why the parties would select the necessity of moral progress. The necessity of moral progress holds that, necessarily, in matters moral, we are permitted to make moral progress toward the ideal state of affairs – international peace, global justice, or some weighting of the two. In claiming that we are always permitted to make moral progress, the principle denies moral absolutism, the view that some acts are prohibited no matter what the circumstances, no matter what the consequences. Denying moral absolutism, however, does not commit one to the view that the ends always justify the means. Denying moral absolutism simply denies that the ends never justify the means. In other words, denying moral absolutism commits one to the view that the ends sometimes justify the means. In particular, the ends will justify the means as a last resort, on grounds of necessity, after other options have been exhausted.

If the idea that we are always permitted to make moral progress toward the ideal state of affairs seems intuitive, an apparent implication of that view might give us pause. An apparent implication of that view is that it permits us to recognize some unjust political entities as states, if we can make moral progress by doing so. If we recognize some unjust political entities as states, though, then, by admitting them to the international community of recognized states, enabling them to participate in the processes for formulating, adjudicating, and implementing international law, and conferring upon them the rights, privileges, and immunities of statehood, we seem to be reinforcing their unjust coercive powers. We seem to be complicit in the injustices that they commit over their own members and beyond their borders. This apparent implication motivates the absolute prohibition on recognizing any unjust political entities as states. Embracing an absolutist prohibition forbidding complicity in injustice under any circumstances bars this implication. But this raises the question of whether absolutist prohibitions of any sort are defensible. I will argue that they are indefensible, and do so by showing that the parties to the hypothetical contract would reject them, because they would accept the necessity of moral progress and reject its denial.

If we accept the necessity of moral progress and reject its denial, then we may include some unjust political entities as recognized states within the critical mass if that is what we need to do in order to make moral progress. As I argue elsewhere, this permission is crucial, because, as the world is currently constituted, we must recognize quite a number of unjust political entities to make any sort of moral progress at all (Naticchia 2017: 130–138). But this permission will not be a *blanket* permission to admit unjust political

entities into the international community of recognized states. It is a permission under the special circumstances of necessity. The special circumstances of necessity override the prohibition against being complicit in injustice. This prohibition is not an absolutist prohibition, because no absolutist prohibitions are defensible. However, the critical mass principle states a requirement, not a mere permission. Recall that the critical mass principle claims that political entities *ought* to be recognized as states if and only if they belong to the critical mass of entities that, working together, is necessary for making at least some moral progress toward the ideal. Therefore, we need to defend a *requirement* rather than a permission. Nonetheless, if the occasion for making progress is especially urgent, as it arguably is when considering the injustices that occur internationally, and the international community holds a unique, perhaps the sole, position to remedy them, then we have grounds for strengthening the permission into a requirement. In short, if we can show that the parties would accept rather than reject the necessity of moral progress, then by implication we will show the critical mass principle to be defensible (Naticchia 2017: 167).

Contractual reasoning

Like the parties to Rawls's hypothetical contract, the parties to our hypothetical contract will use maximin reasoning. Using such reasoning, they will select the necessity of moral progress over its denial (Naticchia 2017: 171–175). I defend those two claims in this section. Maximin is a decision rule for choice under conditions of uncertainty. It requires us to pursue that course of action which, of all the available alternatives, provides the best worst outcome. Rawls maintains that the most rational circumstances for using maximin are ones that possess three features. First, there must be good reason for discounting probability estimates of various circumstances obtaining – that is, knowledge of likelihoods is either impossible or difficult to come by. Second, the parties care little for what they can acquire above what they can guarantee themselves under maximin. Third, they can hardly accept the outcomes under the rejected alternatives. While these three features need not all be present for use of maximin to be rational, Rawls suggests, its use is most rational when they are all present.

In our hypothetical contract, the parties are behind a veil of ignorance. The veil is thick, and deprives them of information that they need to estimate probabilities. More specifically, its thickness renders them unable to estimate the likelihood of the various circumstances that their society might encounter once the veil is lifted. They cannot tell if their circumstances will be favorable or unfavorable, or the likelihood of each possibility, or range of possibilities. It would be irrational for them under such contractual circumstances to gamble and play the odds, since they cannot calculate the odds to begin. Therefore, it seems like their choice circumstances possess Rawls's first feature.

Deciding whether the other two features obtain, however, requires a bit more ingenuity. We need to ask what the worst outcomes would be like under the two alternatives, where the parties accept, versus where the parties reject, the necessity of moral progress. Recall that earlier I suggested that we can rely on our imaginative capacities, without specifying in any greater detail the interests of the parties, who represent societies, without knowing whether, and to what extent, they contain minority nations. Imagine, then, what life could be like under the denial of the principle. We might belong to an oppressed peoples or nation, marginalized by the larger, majority nation that controls the state apparatus. We might face extreme injustices as individuals in virtue of our nationality. In addition, we might face injustices as a people or as a nation. For instance, we might be subject to forcible relocation, the

breaking up of our ancestral lands for purposes of settlement or development. We might see our histories erased in our public schools, or our native languages suppressed. Worse still, we might have our societies invaded or annexed, or our economies strangled by our neighbors if they are powerful enough to control what enters our borders. We could lead our lives under these conditions with no end in sight.

By contrast, while we could face very similar conditions of life under the principle's acceptance, the conditions would not be identical, because we would at least have a (moral) route to escape them. The route to escape would be to violate what would otherwise be (under the alternative principle) an absolutist prohibition – even though we risk being a victim too. For instance, we might find ourselves oppressed by a government whose coercive power is reinforced by its being accepted into the international community of recognized states, just so that the international community might involve its diplomats into ameliorating similar injustices elsewhere. We might find the international community legitimizing our annexation just so that the resulting state can be included in efforts to reduce illegitimate annexations elsewhere. In other words, where we would bear no such risk in a social world that accepted the relevant absolutist prohibitions on conduct, we would bear such a risk in a social world that accepted the necessity of moral progress and rejected the absolutist prohibitions. By the same token, however, in the world where we accept the absolutist prohibitions but reject the necessity of moral progress, we risk being forever stuck in our unjust conditions, whereas in the world where we accept the necessity of moral progress but reject the absolutist prohibitions, we at least have the prospect of escape.

These reflections suggest the following. Contrary to Rawls's second feature, the parties to this hypothetical contract do care for what they can obtain above whatever minimum they might be able to assure themselves, since, regardless of whether they have an escape route, they might encounter severely unjust conditions. The second feature does not seem to hold, therefore. In contrast, the third feature does seem to hold, since the alternative that requires us to accept being forever mired in injustice with no prospect of escape seems to be quintessentially an outcome that the parties can hardly accept. So, the choice situation does not fully possess the three features that make use of maximin most rational. This raises the question of whether maximin might be rational to use nonetheless, as Rawls himself seems to allow. In answering this question, we might observe that even Rawls himself stresses that the parties to the contract must act as responsible trustees for those whose interests they represent – they must neither guess nor gamble. In circumstances like these, then, where the parties cannot ensure a decent outcome no matter what and risk grave outcomes no matter what, it seems that the parties must inevitably try to establish a safety net on what can happen to them. And avoiding the very worst outcomes seems to be one rational way of setting one, even if the parties cannot prevent all bad outcomes when they try to do so. Accordingly, the maximin rule for choice under uncertainty seems rational under the contractual circumstances that the parties face in our hypothetical contract.

Given this, the relevant question seems to be something like this. Would it be worse for one's society or nation to be forever mired in injustices of the sort that we have already vividly described, with no possible escape route in sight, or would it be worse instead to risk being the victim of an act that overrides what otherwise would have been an absolutist prohibition but which could break us free from that desperate plight? These are the two worst outcomes, respectively, under the rejection and the acceptance of the necessity of moral progress. In principle, this question admits of an answer, even if, to answer it, we rely solely on our imaginative capacities. And in fact, in relying on our imaginative capacities, worse outcomes seem unimaginable than being forever stuck in deep injustice with no

prospect of escape. Rational agents, being disinclined to acquiesce or succumb to such a dystopia, would select the necessity of moral progress over its denial.

Implications

If the argument just presented is sound, then the parties to a fair hypothetical international contract would select the necessity of moral progress over its denial. If the parties would select the necessity of moral progress, then, for the reasons previously given, this shows that the critical mass principle is defensible. If the critical mass principle is defensible, moreover, then this refutes strong and moderate skepticism, and its justification, resting as it does on contractarian reasoning that is not reducible to consequentialism, demonstrates its independence from instrumentalism. In short, if the argument just presented is sound, then we have eliminated the main threats to developing an ethics of international recognition, and developed its first phase. Obviously, we need to supplement the critical mass principle, for, standing alone, it is not plausible as a complete normative theory governing international recognition. But, as I have argued elsewhere, the hypothetical contract contains within it the resources for providing two further principles to an ethics of recognition: a principle indicating when secessionist entities ought to be recognized as new states, and a principle allowing us to expand upon the critical mass by recognizing more states, in order to promote economic development (Naticchia 2017: 181–212). In combination, these three principles provide a complete normative theory of recognition.

In providing a complete normative theory of recognition, we shift the burden of proof onto potential critics. The main criticism will likely be that the theory countenances the possibility of derecognition, since it implies that, if there are currently recognized states that belong neither to (i) the critical mass of political entities whose recognition as states is needed to make at least some moral progress toward the ideal nor to (ii) the political entities whose recognition as states is required by the supplemental principles, then those currently recognized states ought not to be recognized. However, two things can be said to reduce the criticism's force. First, the critical mass is likely to be capacious – including not just one critical mass for the entire globe but a series of critical masses for various regions of the globe, regions that overlap and whose efforts reinforce one another in improving the world morally (Naticchia 2017: 175–177). Joining these critical masses would be entities whose recognition is required by the supplemental principles – very likely decreasing, perhaps significantly, the number of states that would need to be derecognized. Second, even for those states that would have to be derecognized, we could have some sort of trustee arrangement (suitably modernized) and alternate form of representing the interest of its population. While I do not mean to minimize the challenges, the essential point is that the issues are not without precedent (Naticchia 2017: 231). If this is correct, and the theory defended here is otherwise worthy of acceptance, then it should also indicate topics of further investigation. By getting politicians and diplomats to consider new possibilities, or to rethink old ones, we honor philosophy's unique role in providing an ethics of international recognition (Naticchia 2017: 21).

Notes

- 1 One or both of these views are sometimes attributed to Thucydides 431 BC; Machiavelli 1532; Hobbes 1651; Carr 1939; Morgenthau 1948; Hoffman 1965; Kennan 1966.
- 2 Buchanan 2004 seems to hold a view like this.

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7

POWER POLITICS AND STATE RECOGNITION

Milena Sterio

Introduction

Recognition of states is a political act, exercised by the sitting government of an existing state vis-à-vis an aspiring 'state.' Recognition is in theory and in practice distinct from the legal requisites of statehood. A sovereign state can choose to recognize, or not, an entity vying for statehood, regardless of whether such an entity satisfies the legal criteria of statehood. While sovereign states exercising their right to recognize a candidate for statehood should carefully consider whether such a candidate satisfies the legal requisites of statehood, in practice recognition is linked to power politics. Powerful states often choose to legitimize a group seeking statehood by bestowing upon it official recognition if this advances the powerful state's own geopolitical interest, or the interests of one of its close allies. This chapter will examine the theory and practice of state recognition, as well as the role of power politics in state recognition. This chapter will first describe existing international law theories of state recognition. Next, this chapter will focus on the role of powerful states, so-called 'Great Powers,' in the field of state recognition, by examining how Great Powers have granted and denied recognition to some aspiring state-like entities, because of geopolitics, as well as how Great Powers have imposed additional recognition requirements, beyond existing requisites of statehood, on other such entities. This chapter will conclude that recognition of states is closely linked to power politics, and that acts of recognition often have little to do with the legal criteria of statehood.

Theories of recognition under international law

As mentioned above, recognition is a political act, and sovereign states are free to recognize or to deny recognition to entities that seek statehood. Statehood, by contrast, is a legal theory, enshrined in the 1933 Montevideo Convention, according to which an entity can achieve statehood if it fulfills the following four criteria: it if has a defined territory, a permanent population, a government, and the capacity to enter into international relations (Montevideo Convention 1933).¹ Recognition and statehood are distinct processes, but they may be interrelated on a theoretical level, depending on which theory of recognition one ascribes to, and they are closely connected in practice, as this chapter will discuss below.

First, recognition and statehood may be related on a theoretical level. International law scholars have described two different theories of recognition of states: the declaratory view and the constitutive view (Sterio 2015: 48). Under the former, recognition is seen as a purely political act having no bearing on the legal elements of statehood (Sterio 2015: 48). Under this view, outside states can choose to recognize the new state, or not, but that decision does not influence the legal determination of statehood. Under the latter, recognition is seen as one of the main elements of statehood (Sterio 2015: 48). Thus, an entity cannot achieve statehood unless it is recognized by outside actors as a state (Sterio 2015: 48). Under the constitutive view, recognition and statehood go hand in hand: an entity vying for statehood must garner the support of other existing states, which must express their desire to formally recognize this entity as their sovereign sister state (Sterio 2015: 48).

Second, recognition and statehood are closely connected in practice. As one scholar has argued:

While international recognition is no longer widely considered to be a required element of statehood, in practice the ability to exercise the benefits bestowed on sovereign states contained in the Westphalian sovereignty package requires respect of those doctrines and application of them to the state in question by other states in the interstate system.

(Kelly 2005: 382)

While most academics would support the declaratory view (Sterio 2015: 48), the constitutive view remains very important in practice. In fact, one of the four criteria of statehood – the capacity of the entity seeking to prove statehood to enter into international relations – seems closely linked to recognition, because an entity claiming to be a state cannot conduct international relations with other states, unless those other states are willing to enter into such relations with that entity (Sterio 2015: 48). In other words, the conduct of international relations involves a reciprocal relationship between the new ‘state’ and outside actors (existing states) that have to be willing to accept the new ‘state’ as their sovereign partner.² No state can exist in a vacuum – a fact well established by international practice. When Southern Rhodesia (now Zimbabwe) decided to separate from the United Kingdom and to form an independent state in 1965, most of the world refused to recognize Southern Rhodesia as a state (Sterio 2015: 48).³ Consequently, Southern Rhodesia remained isolated from the world and was unable to conduct international relations (Sterio 2015: 48).⁴ The nonrecognition of Southern Rhodesia by outside actors prevented it from fully exercising the attributes of legal statehood (Sterio 2015: 48).⁵ Thus, recognition, whether it is considered a political or legal act, has a direct impact on the pragmatic determination of statehood: whether an entity will be able to truly act as a state on the international scene. It may be argued that important states, such as Great Powers, support the constitutive view, because they equate recognition with statehood. In other words, Great Powers, as well as other important states, may decide whether to treat an emerging entity as a state based on their own geopolitical interests, and not based on whether the entity satisfies the legal criteria of statehood (Dugard and Raič 2006: 98).⁶ In the context of the former Yugoslavia, European Great Powers as well as the United States decided to prematurely recognize Croatia and Bosnia and Herzegovina, although such recognition ‘was granted at a time when the entities in question did not exercise complete control over their territories or meet the traditional requirement for statehood of effective government’ (Dugard and Raič 2006: 135).

Similarly, Great Powers may use nonrecognition as a tool of statehood denial. For example, the United States refused to recognize the People's Republic of China (PRC) until 1978, although the PRC satisfied the legal criteria of statehood. Moreover, Turkey was isolated in its own recognition of the Turkish Republic of Northern Cyprus as a state, although this entity did not necessarily fulfill all the legal elements of statehood (Dugard and Raič 2006: 98).⁷ Russia has refused to entertain any possibility of recognizing Kosovo as a state, although Kosovo has been recognized as a new state by many other states and international actors, and although Kosovo's fulfillment of the legal criteria of statehood is at the very least open to reasonable debate (see, for example, Travers 2018). As two scholars have already argued, 'non recognition, the instrument by which States collectively or unilaterally express their disapproval of territorial change, has become more important and more widely practised' (Dugard and Raič 2006: 98). Thus, Great Powers, as well as many other states, have demonstrated that, in practice, recognition remains constitutive of statehood.

In addition to the declaratory and constitutive views, scholars have advanced a third, intermediary view on recognition. The intermediary view seeks to combine the declaratory and constitutive views while acknowledging what truly goes on in practice. This view posits that recognition is a political act independent of statehood, but that outside states have a duty to recognize a new state if that state objectively satisfies the four criteria of statehood (Dugard and Raič 2006: 98):

Recognition, while in principle declaratory, may thus be of great importance in particular cases. In any event, at least where the recognizing government is addressing itself to legal rather than purely political considerations, it is important evidence of legal status.

(Crawford 1979: 133)

According to this intermediary view, recognition and statehood are also related on a theoretical level, because states have a duty to recognize an entity that objectively satisfies the legal criteria of statehood.

In sum, unless one supports the declaratory view, recognition and statehood remain connected on the theoretical level, and recognition and statehood are almost always interlinked in practice. Although recognition and statehood are distinct processes, it is nearly impossible to analyze the recognition of new states without focusing on the legal theory of statehood. In addition to the link between recognition and statehood, recognition is always a political process, dominated by global politics and the interests of powerful states. The next section will analyze the role of power politics within recognition processes.

Recognition and politics

Recognition is a sovereign and inherently political act: an existing state can freely choose whether it wishes to recognize an emerging state-like entity. This section will focus on the role of powerful states, so-called 'Great Powers,' in the field of recognition. This section will analyze how Great Powers have aided some separatist movements in their quest for statehood, by formally recognizing them as sovereign states, and how Great Powers have delegitimized other state-seeking groups and movements through the denial of recognition. In addition, this section will discuss how Great Powers have imposed additional recognition criteria on some emerging states, as political conditions upon the latter's attainment of statehood. This section will conclude that Great Powers play a crucial role in the field of recognition, and that Great Powers most often base their recognition decision on their own geopolitical interests, and not an analysis of the legal criteria of statehood.

The role of the ‘Great Powers’

International law espouses the principle of state sovereignty: the idea that each state is sovereign and free to act however it wishes in the international arena. In theory, the idea of state sovereignty implies equality among states – that all states are equally sovereign and equally free to exercise their free will. However, as early as the mid-nineteenth century, scholars noticed a ‘sliding scale of sovereign equality’ among states, by linking ‘the degree of sovereignty a state has to the degree of equality it enjoys on the international stage’ (Kelly 2005: 377). The notion of unequal state sovereignty was further enhanced through the creation of the United Nations and its Security Council structure, giving veto power to five super-states: the United States, Russia, France, the United Kingdom, and China. Scholars and historians have dubbed such powerful states the ‘Great Powers,’ and this evolving club of super-sovereign states currently also includes three other G8 countries: Germany, Italy, and Japan (Kelly 2005: 364). Political scientists have described Great Powers as states with ‘attributed major power status’ – because policymakers of other states perceive Great Powers as ‘being unusually powerful and willing to influence the course of global affairs’ (Volgy et al. 2011: 6). Moreover, Great Powers have both the opportunity and willingness to act as major powers; they may influence status attribution of other states by creating institutions and norms which pressure other states to concur with the Great Powers. Additionally, Great Powers may exercise pressure on other states to dissuade the latter from privileging those who may be in conflict with the particular Great Power itself. In sum, the status of a Great Power ‘requires unusual material capabilities, the willingness to pursue a wide range of foreign policy interests across a large geographical area, and recognition by other states that they are major powers’ (Volgy et al. 2011: 12).

The Great Powers possess higher, more unequal sovereignty attributes than other states, because they have enhanced decision-making authority in the institutional context as well as in the military, political, and economic realm (Volgy et al. 2011: 3). The Great Powers are thus able to influence the behavior of other states. As one scholar has already noted, ‘Great Powers are a set of states with the greatest relative material capabilities ... they are also presumed to have the most relational power – or the potential to get others to do what they would not do otherwise’ (Coggins 2014: 42). Because of their detention of veto powers within the Security Council, Great Powers wield tremendous military influence in the global arena, and can unilaterally determine whether military force is used in a particular country or region. Great Powers benefit from enhanced political importance as well, in light of their veto power in the Security Council. Great Powers are able to support their allies and to undermine their foes through their exercise of the veto power (Sterio 2018: 45). Recently, rogue leaders such as Bashir Assad in Syria have been shielded from meaningful Security Council action because of the Russian and Chinese veto or threat of veto (see, for example, McKirdy 2017). Similarly, Slobodan Milosevic in Serbia was protected from any United Nations–led uses of force against his own regime because of the Russian veto (Corboy et al. 2002). In addition, Great Powers, and some of their allies, possess nuclear weapons, and the very threat of nuclear weapon use can significantly shape and influence the behavior and actions of other states. For example, it has been reported that the United States threatened Iraq with the use of nuclear weapons in 1990, in order to dissuade Iraq from using biological or chemical weapons in Kuwait, during the First Gulf War (Baker 1995: 359). This evidence indicates that a state may have been deterred from an aggressive course of behavior by a Great Power’s threat of the use of nuclear weapons.

Finally, in light of their economic prowess, Great Powers can often dictate world trade and financial policies, and can influence decisions within global economic organizations such as the World Trade Organization, the International Monetary Fund, the World Bank, etc.

(Sterio 2015: 45). All of these super-sovereign advantages that attach to the Great Powers are equally present in recognition practices – the Great Powers’ decision whether to recognize an emerging state-like entity often has a tremendous influence as to whether the entity is able to achieve statehood. As it will be argued below, in the cases of several former Yugoslav republics, premature recognition by Western Great Powers led toward their emergence as independent states (Dugard and Raič 2006: 112). Conversely, a Great Power’s decision not to recognize an emerging state-like entity may have disastrous consequences upon the latter: because of the Great Power’s super-sovereign powers, as described above, the emerging entity may lack military and political support, which it needs in order to solidify its statehood, and may lack access to economic support and global trade if these are blocked by the nonrecognizing Great Power. Examples of such state-like entities that have been denied recognition and thus access to statehood include Chechnya and Abkhazia: in both instances, Russia, a Great Power, has acted to stifle these entities’ quests for recognition (Dugard and Raič 2006: 112). In sum, lack of recognition by one or more Great Powers may prevent an entity from effectively achieving statehood.

A related yet separate question is what motivates Great Powers in their recognition practice. As described above, Great Powers wield tremendous power in the international arena and are able to determine whether an entity is recognized as a new sovereign state. As other scholars have already noted, Great Powers’ recognition practice appears to be driven by geopolitical and strategic reasons, and not by the legal criteria of statehood. One scholar has argued that Great Powers act pursuant to their own interests, which include geostrategic and external security interests, domestic security, and system stability (Coggins 2014: 45). According to this scholar, recognition case studies ‘found that the Great Powers routinely pursued their own interests where the recognition of new states was concerned’ (Coggins 2014: 220).

Great power politics and state recognition in practice

This chapter will analyze several recent recognition practices, which exemplify the role of the Great Powers in the international arena. Such examples include Kosovo, East Timor, South Sudan, Northern Cyprus, and the ‘frozen’ conflicts in the Caucasuses, including South Ossetia and Abkhazia. The first three include examples where Great Powers supported separatist movements and acted to legitimize such movements through recognition of these movements’ newly declared ‘states.’ The latter three include examples where Great Powers have refused to support separatist movements and have rejected such movements’ quest for statehood, through a denial of recognition.

Kosovo unilaterally declared independence from its mother state, Serbia, in 2008, following decades of unrest and a violent conflict (MSNBC 2008; Sterio 2015: 119). At the time of its declared independence, Kosovo was administered by a United Nations provisional authority, and the governments of Serbia and Kosovo were supposed to negotiate the future of Kosovo (see Gruda 2005; Hasani 2005). Serbia was vehemently opposed to Kosovar independence; Kosovo, however, was supported by several Great Powers, including the United States, the United Kingdom, and France. The United States recognized Kosovo as an independent state but claimed that Kosovo was a unique case presenting ‘unusual’ factors, such as ‘the context of Yugoslavia’s breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration’ (U.S. Department of State Archive 2008). Thus, the United States grounded its own recognition of Kosovo in factors that are not linked to the legal theory of statehood, or to any other legal rights for Kosovar Albanians, such as self-determination or secession. Instead, the United States established its own pseudo-legal

recognition factors, relevant to the Kosovo situation only (according to the United States). The United Kingdom, like the United States, recognized Kosovo shortly after the latter declared independence. The United Kingdom's position has been that Kosovo is a state 'defined by its existing borders' and that Kosovar statehood is important for regional stability (UK Government 2010). In addition, the United Kingdom has defended the legality of the Kosovar declaration of independence during the International Court of Justice proceedings, by arguing that the declaration was not prohibited by international law, or by Security Council Resolution 1244 (RTS 2009).

Finally, James Crawford has argued that in the context of Kosovo 'recognition rather than declarations makes statehood' (RTS 2009). The United Kingdom's position regarding its own recognition of Kosovo has been that Kosovo is a state, and that the United Kingdom's recognition of Kosovo, as well as such recognition by numerous other states, supports the conclusion that Kosovo is a state. Like the United States and the United Kingdom, France recognized Kosovo as an independent state immediately after the latter's declaration of independence. France has recently argued in favor of ending the United Nations' Mission in Kosovo's mandate, as well as in favor of full international recognition of Kosovo and its acceptance into the United Nations (Unrepresented Peoples and Nations Organization 2017). France has not advanced normative arguments regarding its own recognition of Kosovo, but has consistently provided Kosovo with political and economic support.

In the few days following Kosovar declaration of independence in 2008, the United States, as well as about 20 European Union countries, formally recognized Kosovo. As of March 2019, 116 out of 193 United Nations member states, 23 out of 28 European Union member states, and 25 out of 29 NATO member states have recognized Kosovo as an independent state. What is remarkable about the Kosovo case is that, at the time of its unilateral declaration of independence, three Great Powers (the United States, the United Kingdom, and France) had pledged their support to Kosovo and had acted very quickly to recognize it as a new sovereign state. Kosovo had already attempted to declare independence from the former Yugoslavia in the early 1990s, but its attempt received almost no support from Great Powers or from any other significant countries in the world community. By 2008, however, Kosovo had begun to enjoy the Great Powers' support, and this translated directly into such Great Powers' recognition of Kosovo (Sterio 2015: 125). As I have argued elsewhere, it may be that Great Powers decided to recognize Kosovo because of their own geopolitical interests, such as undermining Serbia, which had been perceived as the culprit of the 1990s civil war in the former Yugoslavia and which has been traditionally and historically allied with Russia, as well as establishing their own commercial and military outposts in the newly independent state of Kosovo. First, Serbia had been ruled by Slobodan Milosevic for more than a decade, and Milosevic had been perceived in the West as a rogue leader, largely responsible for the civil war that took place in the Balkans in the early 1990s. Despite Milosevic's fall from power, Serbia has remained in a somewhat tense relationship vis-à-vis the West, and has enjoyed political and economic support from its historic ally, Russia (see, for example, Watkins 2014). It may be argued that the Western Great Powers have not been supportive of Serbia and have actively promoted Kosovar independence as a way of diminishing Serbia's, and indirectly Russia's, influence in the Balkans region. '[T]he Great Powers determined that Kosovo should be independent, without any reliance on international law rules. International politics trumped international law in Kosovo, and the great powers' rule eviscerated any rule of international law' (Sterio 2015: 126). Second, Kosovo is an area of strategic interest to

some Great Powers, and particularly to the United States. Since the end of the conflict, the United States has established an important military base in Kosovo. In the wake of the 1999 NATO air strikes against the Federal Republic of Yugoslavia, and the crucial role that the United States played therein, it is unlikely that Serbia would have agreed to the presence of a United States' military base on its own territory. Finally, Kosovo has significant mining resources, and some of the Western Great Powers may wish to pursue commercial interests within a sovereign state of Kosovo, without having to engage in fraught relations with Serbia (see Morelli 2018).

It should be noted that another Great Power, Russia, has played an important role in promoting Kosovar nonrecognition. As mentioned above, Russia has been traditionally allied with Serbia and at odds with the Western Great Powers. Russia has thus rejected any Kosovar independence-related arguments, has argued against the legality of the Kosovar declaration of independence in the International Court of Justice, and has actively lobbied other states to deny recognition to Kosovo. In 2017, it was reported that the South American country of Suriname had withdrawn its recognition of Kosovo, following a three-day meeting between Suriname and Russia's foreign ministers in Moscow (Morina 2017). Serbian leadership has also claimed that Liberia, Burundi, and Guinea-Bissau have withdrawn their recognition of Kosovo (Baumgartner and Vidishiqi 2018). Russian nonrecognition of Kosovo appears equally driven by Russia's geopolitical interests, and not by the lack of Kosovo's fulfillment of the legal criteria of statehood.

Kosovo represents an example of a statehood-seeking entity supported and recognized by several Western Great Powers. It appears that these Great Powers (other than Russia) have not supported Kosovo because they determined that Kosovo satisfies the legal criteria of statehood; instead, these Great Powers have assisted and ultimately recognized Kosovo because of their own strong geopolitical interests in the region.

East Timor had been colonized by Portugal for centuries. After a brief conflict, East Timor declared independence from Portugal in 1975 (Simpson 1993: 323–4). However, one year later, Indonesia invaded and occupied East Timor; Indonesian occupation continued until 1999, when the international community backed an independence referendum in East Timor (Fan 2007: 179). East Timor emerged as a new state in 2002, when it officially joined the United Nations. The recognition of East Timor as an independent state was entirely dominated by the political interests of the Great Powers. Although East Timor declared independence back in 1975, and although its declared independence was a legitimate exercise of the right to self-determination within the decolonization paradigm, Western Great Powers supported Indonesia throughout the Cold War, and were willing to turn a blind eye to its illegal occupation of East Timor (Sterio 2015: 111). In fact, the United Nations Security Council was paralyzed and unable to pass any resolutions on East Timor from 1976 until 1999. 'East Timor's right to self-determination was sacrificed to Cold War politics' (Sterio 2015: 105). Throughout this period, East Timor was not formally recognized by any of the Western Great Powers, and, within the United Nations, East Timor was considered to be a territory administered by Portugal (Charney 2001: 455–65). Australia, in particular, had commercial interests in East Timor, which translated into Australian foreign policy of support for Indonesia. In fact, Australian government documents released recently demonstrate that the Australian government supported Indonesia as East Timor's occupier because Australia hoped to negotiate an advantageous seabed border extending over East Timor's territory with Indonesia (Davidson 2018). The border was important to Australia because it would have provided the latter with important gas and oil reserves. These government documents 'suggested the Australian

government was “embarrassed” to publicly reveal that border negotiations were the key issue motivating Australia to give legitimacy to Indonesia’s occupation’ (Davidson 2018). It may be argued that Australia, an important ally to Western Great Powers, played a dominant role in the legitimization of the Indonesian occupation over East Timor, and in the nonrecognition of East Timor.

Throughout the Cold War, the people of East Timor were unable to achieve recognition as a sovereign state, as they lacked the Great Powers’ support. After the end of the Cold War, Western Great Powers no longer needed Indonesia as a strong regional ally and became willing to entertain East Timor’s quest for independence. In addition, the Asian financial crisis of 1997 sparked an urgent need in Indonesia for financial assistance from the international community; this in turn enabled the latter to exert more significant pressure over Indonesia about its occupation of East Timor. Moreover, in 1991, Indonesian military opened fire against East Timorese protesters in Dili, East Timor’s capital. The so-called Dili Massacre, during which 270 protesters were killed, caught the world’s attention and global opinion began turning in favor of East Timorese independence (Sterio 2015: 105–6). Thus, some of the Western Great Powers, including the United States, the United Kingdom, and Australia, changed their stance toward Indonesia and ‘ganged up to recognize East Timor’s right to self-determination and acted as midwives for its birth as an independent state’ (Benzing 2005: 295–300). In May 1999, Indonesia, Portugal, and the United Nations negotiated agreements authorizing the people of East Timor to vote in a popular referendum. After close to 80 percent of the people of East Timor voted in favor of independence, and with significant assistance from the United Nations as well as the Great Powers, East Timor became an independent nation in May 2002 (Sterio 2015: 106). The United Nations, with support of the Great Powers, was thus instrumental in assisting in East Timorese independence. Notably, the United Nations Security Council authorized the deployment of peacekeepers to East Timor in 1999 to prevent Indonesian forces from intimidating the Timorese population; ironically, Australian forces led this peacekeeping effort. This is in stark contrast to the Security Council’s refusal to authorize any military force in East Timor in 1975, when Indonesia first occupied the island, as well as in stark contrast with the Australian support of Indonesia during the latter’s occupation of East Timor (Benzing 2005: 308).

After the Cold War, Great Powers became willing to recognize East Timor as an independent state, and it may be argued that Great Powers were instrumental in contributing toward East Timor’s achievement of statehood, as in the case of Kosovo, through their assistance but also through their willingness to recognize East Timor as a new sovereign state partner (Sterio 2015: 111).⁸ In East Timor, as in Kosovo, Great Powers acted to recognize the new state of East Timor once the creation of this new state began to coincide with their own strategic interests in the region. However, it should be noted that the recognition of East Timor as a sovereign state may also be explained as an instance of delayed decolonization or delayed self-determination. As mentioned above, East Timor was a Portuguese colony until 1975. When the people of East Timor demanded independence from Portugal, such independence was based on the right to self-determination: the idea that colonized peoples ought to be able to rid themselves of colonial governments that do not adequately represent the colonized subjects’ interests. Indonesian occupation of East Timor may be viewed as an interruption in the process of self-determination, and the ultimate Timorese independence in 2002 may be analyzed as delayed exercise of the right to self-determination in the decolonization context (Sterio 2015: 108). While East Timorese recognition in the post-Cold War era may be explained through the self-determination lens, this conclusion

does not eliminate the role of the Great Powers in this independence struggle. It may be argued that Great Powers supported East Timorese independence and thus decided to recognize East Timor as a new state because of a combination of factors, which included both the Great Powers' geopolitical interests and the acceptance of the Timorese right to delayed self-determination.

South Sudan was a part of Sudan, which had become an independent state following its independence from the United Kingdom and Egypt in 1956. Relations between the north and the south remained strained post-independence, and South Sudan continued to fight for independence through several violent civil wars (Sterio 2015: 163–4). However, it was not until 2011 that South Sudan was able to separate from Sudan and to become an independent state. Like in Kosovo and in East Timor, Great Powers played a significant role in South Sudan's quest for independence. It may be argued that South Sudan's independence was postponed for many decades during the Cold War, because of geopolitics and the pursuit of the Great Powers' own interests. First, at the time of Sudan's independence, one of the Great Powers, the United Kingdom, purposely decided to favor the 'lighter-skinned people of the north,' who were given control of the entire country once the British left (Sterio 2015: 169). In addition, during the Cold War, Sudan was supported by non-Western Great Powers, including the Soviet Union and China, and the people of South Sudan were thus unable to garner international support and recognition (Sterio 2015: 170). After the Cold War, and, in particular, after September 11, the international community's attitude vis-à-vis Sudan shifted. Western Great Powers, and the United States in particular, became fearful of strong Islamic states, such as Sudan. Western Great Powers thus began to exercise political, diplomatic, and economic pressure on Khartoum, to force the Sudanese government to negotiate independence with South Sudan (Sterio 2015: 170). South Sudan began to enjoy the international community's support in its quest for independence, which culminated in the 2011 independence referendum, in which the majority of South Sudanese people expressed their wish to form an independent state (Fick 2011). As in the case of East Timor, the United Nations, with support of the Great Powers, was instrumental in securing South Sudanese independence. The 2011 referendum was supervised by the United Nations, and the United Nations Mission in South Sudan, a Security Council-authorized peacekeeping force, has been present in South Sudan since 2011 (United Nations Mission in South Sudan).

Once South Sudan was established as an independent state, it was recognized by many states, including most Western Great Powers. Thus, as in the cases of Kosovo and East Timor, Great Powers contributed significantly to South Sudan's lack of independence for several decades, and then to its achievement of statehood, through various forms of support as well as through recognition. As I have argued elsewhere, 'the great powers' rule represented a key factor in allowing for the South's independence' (Sterio 2015: 170). The Great Powers' recognition of South Sudan followed the same pattern as in the cases of Kosovo and East Timor, described above: South Sudan was supported and recognized as a sovereign new state once this outcome began to coincide with the Great Powers' specific interests in the region. As in the case of East Timor, it should be noted that the recognition of South Sudan can also be viewed through a self-determination lens. As in East Timor, it may be argued that South Sudan represents a case of delayed self-determination: the people of South Sudan were not able to properly exercise their right to self-determination, at the time of decolonization, because they were forcibly incorporated into a larger state of Sudan (Sterio 2015: 165). South Sudan's separation from Sudan thus represents an instance of delayed self-determination, and South's Sudan's quick recognition as a new state may be explained in this fashion. Nonetheless, the influence of the Great Powers in Sudan throughout the Cold War remains undeniable. It is most accurate to argue that South Sudan's recognition as a new state was driven by

the Great Powers' changing geopolitics in the post-Cold War era, which led the Great Powers to recognize South Sudan's delayed right to self-determination. The case of South Sudan is thus similar to that of East Timor, discussed directly above.

Northern Cyprus is a self-declared state; it has been recognized by Turkey as a sovereign entity, but the remainder of the international community considers it to be a part of Cyprus. Cyprus, an island occupied by a Greek majority population and a Turkish minority, used to be a British colony; the island achieved independence in 1960 (Wippman 1996: 141). After independence, tensions remained present between the Greek majority and the Turkish minority. Although violence sporadically erupted in the 1960s, a major crisis took place in 1974, when the military government of Greece orchestrated a coup in Cyprus to replace the Cypriot president with a pro-Greek leader (see Vezbergaite 2012). Several days later, Turkey invaded Cyprus and occupied the northern third of the line; this line of demarcation still holds today, and Northern Cyprus, the portion of the island above this demarcation line, has de facto seceded from Cyprus. In 1983, Northern Cyprus unilaterally declared independence, but this move was not recognized by any states other than Turkey. De facto, despite its lack of recognition as a state entity, Northern Cyprus functions independently from the remainder of Cyprus and depends on Turkey for economic aid (Boas 2012: 177).

Northern Cyprus constitutes a de facto secession because this region has attempted to secede from Cyprus and has in reality succeeded through the exercise of state-like sovereign functions independently from the remainder of Cyprus. But the secession has not led to the creation of a new state of Northern Cyprus because of the lack of recognition by the international community (Bilefsky 2014).⁹ In fact, the case of Northern Cyprus is illustrative of the doctrine of collective nonrecognition: the idea that an act – Northern Cyprus's unilateral declaration of independence through an illegal use of force – committed in violation of a *jus cogens* norm is illegal, and that states are under a duty to not recognize such acts under customary international law, as well as under general principles of law. Collective nonrecognition has been confirmed as an international law doctrine by the International Law Commission in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 (Dugard and Raič 2006: 100). Because Northern Cyprus acted illegally, in using force to declare independence from Cyprus, the United Nations, using collective nonrecognition, directed existing states not to recognize Northern Cyprus as a new state. In addition, geopolitics and the Great Powers' strategic interests have been instrumental in contributing toward Northern Cyprus's lack of recognition. Although some Western Great Powers, like the United States, are allied with Turkey, other European countries support Greece, a European Union member. It is thus unlikely that this situation will be resolved in the near future. Northern Cyprus exemplifies a situation where a de facto secession has not led to recognition of the seceding entity as a new state. Unlike in the cases of Kosovo, East Timor, and South Sudan, described above, Great Powers have been unwilling to assist Northern Cyprus and to recognize it as a new state. Without such support by at least some Great Powers, and without international recognition, Northern Cyprus has been relegated to a pseudo-state status, which has seriously inhibited this region's development (Bilefsky 2014).¹⁰ Although recognition is not a formal criterion of statehood, and although Northern Cyprus may objectively satisfy the legal requirements of statehood, lack of recognition has effectively prevented Northern Cyprus from acting as a state in the international arena (Christakis 2006: 168).¹¹

South Ossetia and Abkhazia are provinces of Georgia, the former Soviet republic, which have proclaimed the right to independence (Borgen 2009: 1–5). However, because of conflicting geopolitical interests of the Great Powers, these conflicts have remained 'frozen' (Borgen 2007: 478).¹² It may be argued that the Great Powers' lack of support

and recognition has contributed to these entities' lack of success in achieving statehood. After a conflict in 2008, which involved Georgian forces seeking to reestablish control of these 'run-away' provinces, as well as Russian troops assisting South Ossetia and Abkhazia, the status of the two provinces remains disputed (Kramer 2008; Sterio 2015: 152). Russia and a small group of other states have recognized South Ossetia and Abkhazia as independent states (Kramer 2008; Sterio 2015: 148–9). It is uncertain what Russian intentions truly are, and some have expressed their fear that Russia wishes to annex these two regions. The Western Great Powers, however, support Georgia, which is an important NATO ally, and have rejected South Ossetian and Abkhaz quests for statehood. 'This kind of opposition among the great powers may prevent South Ossetia and Abkhazia from achieving negotiated statehood any time in the near future' (Sterio 2015: 152). In fact, Western Great Powers may refrain from any meaningful intervention in South Ossetia and Abkhazia, because of the potential to upset Russia; South Ossetia and Abkhazia have thus been unable to garner international support, and their attempts at statehood have been left unrecognized. As argued elsewhere:

The most relevant observation about the great powers' rule in the context of attempted secession is that the great powers' support, or lack thereof, for a secessionist movement, plays a crucial role with respect to recognition. If the great powers are willing to recognize secessionist entity as a state, this will likely speed up other recognitions. ... In contrast, secessionist movements that have not garnered the support of the majority of the great powers, such as ... South Ossetia ... and Abkhazia, 'may control territory, but they are political pariahs.' In other words, if these secessionist entities are unable to obtain recognition by some key number of states, their de facto secession will remain 'frozen.'

(Sterio 2015: 155)

As in the case of Northern Cyprus, the conflicting Great Powers' geopolitical interests have prevented South Ossetia and Abkhazia from achieving wide-ranging international recognition; this in turn has inhibited these regions from seeking statehood. In sum, the examples above demonstrate that the Great Powers perform a recognition function based on their strategic interests in a given region. It does not appear that the Great Powers analyze whether a statehood-seeking entity satisfies the four criteria of the Montevideo Convention, or that the recognition determination is based on particular legal criteria. As another scholar has argued, '[t]he Great Powers' recognitions constitute the most critical of the critical mass required to surpass the threshold to secure external sovereignty' (Coggins 2014: 42). The section below will describe another phenomenon in the recognition practice of the Great Powers: the imposition of additional criteria on emerging states, as a pre-requisite for recognition.

Adding new criteria for recognition

In addition to recognizing separatist entities as new sovereign states, as well as denying recognition to others, Great Powers have at times imposed specific recognition criteria on emerging states. In this manner, Great Powers have been able to advance their own geopolitical interests through the practice of recognition. The best example of this type of recognition practice involves the recognition of former Soviet and former Yugoslav republics as new states in the early 1990s. In fact, following the breakup of the former Soviet Union and the former Yugoslavia, European Community (EC) foreign ministers developed

guidelines on the recognition of new states in Europe (Recognition Guidelines). The EC foreign ministers, concerned with the existence and maltreatment of minorities within the former Soviet Union and the former Yugoslavia, announced that one of the criteria of recognition of new states within the EC would be the respect of human rights, as well as the protection of minority rights (Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union 1992).¹³ Thus, an entity applying for statehood within the EC had to prove that it treated minority groups fairly and that it respected minority rights in its territory (Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union 1992). It may be argued that these new recognition criteria demonstrate both a normative development as well as the advancement of the EC Great Powers' geopolitical interests.

More recently, since human rights and self-determination have become more important in international law, it has been suggested that for a new entity to succeed in a claim for statehood, it should meet the standards and expectations of the international community on these subjects.

(Dugard and Raïć 2006: 96)

In other words, Great Powers' interests may at times advance normative developments of international law; in this instance, it may be argued that the EC Recognition Guidelines have contributed to the practice of collective recognition, by requiring the respect of human and group rights for any statehood-seeking entity. At the same time, it may be argued that these criteria reflected the EC Great Powers' strategic interests in the 1990s, such as their interest in protecting certain minority groups within the newly emerging states.

While these criteria have not reached the status of international custom and do not bind states that are not members of the European Union, they show nonetheless an evolution of international practice in the field of recognition.¹⁴ In fact, it seems that international practice allows outside actors to impose additional requirements on entities striving for recognition.¹⁵ Regional bodies, organizations, and states can thus choose to require that the entity seeking recognition comply with specific criteria that have nothing to do with the legal contours of statehood. This phenomenon illustrates the fact that Great Powers or groups of states, like the European Community, often dictate the fate of independence-seeking movements by choosing to legitimize their plight (or not) under specific conditions. While most would agree that the EC Recognition Guidelines mentioned above, which imposed the respect of human and minority rights as a condition of recognition for newly emerging states, were largely a positive phenomenon, it may be argued that dictating any types of conditions as a requisite of recognition is inconsistent with the notion of state sovereignty. In addition to requesting that emerging states respect human rights, Great Powers can impose additional and seemingly random conditions as a pre-requisite to recognition. Great Powers can thus advance their own interests at the expense of an emerging entity, which needs to be recognized in order to access the benefits of statehood.

In the context of the European Community, such imposition of additional criteria of recognition was used several times by the Badinter Commission, an arbitral body of experts established to deal with the various issues arising out of the Yugoslav crisis in the 1990s (Sterio 2015: 49–50). In addition to the Recognition Guidelines, mentioned above, which the EC announced regarding any new entity emerging from the former Soviet Union and the former Yugoslavia, the EC also issued a Declaration on Yugoslavia. In this Declaration, the EC announced that the former republics of Yugoslavia could express their desire to be recognized as independent states

if they accepted the commitments from Recognition Guidelines. This Declaration also announced a potential date for recognition of January 15, 1992, and determined that recognition requests had to be submitted to the Badinter Commission (Dugard and Raič 2006: 127). With respect to Macedonia, the Badinter Commission recommended that Macedonia not be recognized as a new state unless it agreed to insert a clause in its constitution promising not to claim additional territory against neighboring states (Badinter Arbitration Committee 1992: Opinion No 6).¹⁶ After Macedonia agreed to follow the Badinter Commission recommendations, the EC foreign ministers decided to impose yet another requirement on Macedonia by indicating that this new state would be recognized only if it used a name that did not include the term Macedonia (Sterio 2015: 50).¹⁷ It may be inferred that this ‘requirement’ resulted from a geopolitical grievance by EU member Greece, which was afraid that the new state of Macedonia would have territorial claims to a part of northern Greece that had also been known as Macedonia centuries ago (Sterio 2015: 50). As of today, the name dispute has not been resolved. Although Macedonia has been recognized by most states, Greece has effectively prevented Macedonia from joining NATO and the EU (Baboulias 2018). The Macedonian name dispute demonstrates that powerful states may be able to impose additional nonlegal recognition criteria on emerging states, and that the nonfulfillment of such criteria may have negative consequences on the new state. With respect to Croatia, the Badinter Commission determined that this republic did not satisfy all the recognition conditions set forth by the EC, because Croatia’s national legal system failed to meet minority protection requirements under general international law. However, before the Badinter Commission had actually delivered this opinion, Germany made it clear that it had already decided to recognize Croatia, as well as Slovenia (Dugard and Raič 2006: 127). Although Germany declared that it would delay the implementation of its recognition decision until January 15, 1992, by which time the Badinter Commission would have had time to deliver its opinion, Germany’s premature recognition of Croatia indicates that Germany decided to act pursuant to its own interests, and not to follow the legal opinion of a commission of experts. Finally, with respect to Bosnia and Herzegovina, the Badinter Commission determined that this republic also did not meet criteria for recognition because ‘the will of the peoples of Bosnia-Herzegovina to constitute [the Republic] as a sovereign and independent State cannot be held to have been fully established’ (Dugard and Raič 2006: 130). Nonetheless, EC countries as well as the United States recognized Bosnia-Herzegovina as an independent state. As in the case of Germany, recognition of Bosnia-Herzegovina demonstrates that the Great Powers acted pursuant to their own geopolitical interests, and not pursuant to any legal criteria or legal advice by the Badinter Commission. In the cases of both Croatia and Bosnia-Herzegovina, ‘[r]ecognition ... had a consolidating effect, as it served to secure the independence of the State and to bolster the effectiveness of its government by lending international legitimacy’ (Dugard and Raič 2006: 135).

The use of such additional criteria of recognition by the EC signals a regional trend of conditioning recognition on the respect of fundamental rights and rules of international law, as well as on obedience with the regional geopolitical equilibrium.¹⁸ Additionally, regional powers have signaled that the recognition of some new states, although not based on the legal criteria of statehood, may lead toward the independence of such new states and toward a consolidation of their new statehood. Moreover, the use of the additional criteria for recognition described above demonstrates the leverage and power that Great Powers have on the international scene. As this chapter argues, entities seeking to become recognized as new states must garner the support and help of the most powerful states. As a corollary, entities seeking to become recognized as new states must at time accept the rules set forth by Great Powers, like Macedonia did when it sought to separate from the former Yugoslavia.

The acceptance of these new recognition rules by the weaker states demonstrates their acquiescence in the existing global order of sovereign, more sovereign and less sovereign states. Whether an emerging entity is ultimately recognized as a new state correlates directly to whether that entity enjoys the support of the most sovereign states, the Great Powers. In addition, it appears that the Great Powers exercise their recognition prerogatives based on their own strategic interests, and not based on an analysis of whether the emerging entity satisfies the legal criteria of statehood.

Conclusion

The difference between a ‘selfistan’¹⁹ – a circle drawn around a person’s feet, resulting in that person seeking independence and statehood – and a more legitimate independence-seeking territory such as Kosovo, South Sudan, or East Timor, often lies in how the entity is perceived in the international community. Is the specific group recognized as legitimate, and is its plight sufficiently recognized and supported by powerful actors in the international community, or is its cause deemed irrelevant or unworthy of global attention? The latter attitude vis-à-vis an independence-seeking entity will most often result in the blessing of the mother state as the legitimate ruler of the affected group and the quest itself will most often remain unsuccessful. The former, however, will lead toward a legitimization of the independence quest, through formal recognition, and toward, at times, a denigration of the mother state as the illegitimate ruler of the affected people. Recognition, through its formal process of recognizing an entity as a new sovereign state, and through its more informal forms of (de)legitimization of an independence quest, often plays a crucial role in determining whether a new state emerges in the international arena. And, as argued in this chapter, super-sovereign states, the Great Powers, exercise a tremendous amount of influence in the creation of new states. Most states which have emerged over the past two decades have enjoyed the support of at least some Great Powers, and at least some Great Powers have been willing to recognize such emerging entities as new states. As this chapter has discussed, recently emerged states such as Kosovo, South Sudan, and East Timor, have enjoyed the support of some Great Powers, and, in the cases of South Sudan and East Timor, the support of the United Nations. Some separatist conflicts, on the other hand, have remained ‘frozen’ because the independence-seeking entity has been denied recognition by at least some Great Powers. Examples of such frozen conflicts, as discussed above, include Northern Cyprus and South Ossetia and Abkhazia. In most cases, it does not appear that Great Powers are determining whether to recognize an independence-seeking entity based on the latter’s fulfillment of the four criteria of statehood. Instead, Great Powers seem to be basing their recognition decisions on their own strategic interests. Thus, Great Powers, through their recognition practices, often dictate the results of statehood attempts. Recognition, in today’s world, remains closely linked to power politics by the Great Powers.

Notes

- 1 Montevideo Convention on the Rights and Duties of States (Montevideo Convention) (1933), (165 LNTS 19). Signed December 26, 1933, entered into force December 26, 1934.
- 2 Thus, an important treatise states that ‘[r]ecognition, while declaratory of an existing fact, is constitutive in nature, at least so far as concerns relations with the recognizing state’ (Jennings and Watts 1992: 133).
- 3 Note that the UN Security Council (1965) condemned the Southern Rhodesia declaration of independence and declared that it had no legal validity.

- 4 Noting that nearly all states refused to conclude treaties with Southern Rhodesia.
- 5 Note that the situation was resolved in 1978, following a peace accord that led to a majority government in Zimbabwe.
- 6 'States do not regard themselves as being under a legal duty to recognize entities as States once they comply with the requirements of statehood.'
- 7 Noting that the Turkish Republic of Northern Cyprus has received very little recognition, and that it is thus hard to argue that this entity is a state.
- 8 Arguing that the people of East Timor were not able to assert independence from Indonesia on their own, as they 'lacked the political, economic, and military capability to do so and that the western Great Powers began to truly support East Timor in the 1990s.
- 9 Noting that the two Security Council resolutions declaring the Northern Cyprus declaration of independence as illegal caused most other states not to recognize Northern Cyprus and effectively economically and diplomatically isolated this part of the island. In addition, some scholars have argued that the Northern Cypriot declaration of independence was deemed illegal because the creation of Northern Cyprus, through Turkish military intervention, was a violation of *jus cogens* norms (see Vidmar 2014).
- 10 Noting that Northern Cyprus is 'effectively isolated' and deprived of 'international legitimacy, as well as much-needed foreign investment.'
- 11 Noting that Northern Cyprus has been regarded as an illegitimate secessionist entity in the international community, and not as a state, despite the fact that Northern Cyprus may possess attributes of statehood.
- 12 Explaining that 'frozen conflicts' are a series of secessionist conflicts in Georgia (South Ossetia and Abkhazia), Moldova, and Azerbaijan.
- 13 Requiring 'respect for the provisions of the Charter of the United Nations ... especially regarding the rule of law, democracy and human rights' and 'guarantees for the rights of ethnic and national groups and minorities' for a new state to be recognized.
- 14 In fact, the Badinter Commission, an arbitral body of experts operating in the early 1990s to resolve legal issues arising from the Yugoslav dissolution, added a new criterion for recognition of new states because 'it embraced democratization and respect for human rights' as such criteria (see Hasani 2005).
- 15 For example, the EU set out the respect of human rights as fundamental prerequisites for recognition with respect to new states emerging from the former Soviet Union and the former Yugoslavia.
- 16 Note that the debate over Macedonian recognition was sparked by Greek claims that Macedonia would have territorial claims against northern Greece, a region also known as Macedonia (see: Sterio 2015: 50).
- 17 Ultimately, this issue was resolved when Macedonia was admitted to the UN under the name of 'The Former Yugoslav Republic of Macedonia' pending settlement of the name issue with Greece. The United States government decided in 2004 to refer to the country as the Republic of Macedonia.
- 18 The latter proposition of conditioning recognition on the respect of the regional geopolitical equilibrium is well illustrated by the Greek opposition to the recognition of Macedonia if the new entity wanted to be called by that name. In fact, nothing in the international legal doctrine on recognition authorizes states to require new entities to change their name if they wish to be recognized; yet, in practice, such results are possible and have occurred at least once in Europe.
- 19 Salman Rushdie wrote, in the context of a disputed territory, Kashmir, '[w]hy not just stand still and draw a circle round your feet and name that Selfistan?' (Rushdie 2005).

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8

INTERNATIONAL RECOGNITION AND HUMAN RIGHTS TREATIES

Ralph Wilde

Introduction

The invocation of human rights considerations when states recognize or deny recognition to other states and governments in general, and particular activities performed by those other states in particular, is a common, long-standing feature of international relations.¹ This practice is often characterized by inconsistency, double-standards, mixed motives and bad faith. In international law, the issue of statehood, and the recognition of states and governments, is a matter of ‘customary international law’ (on custom, see e.g. Chimni 2018; on statehood and recognition, see e.g. Crawford 2007). This is the area of international law derived from identifying a consistent practice between states, allied to evidence that the practice in question is understood by the states concerned to be not merely a matter of discretion but taking place on the basis of compulsion. Of necessity, discussing human rights and recognition/non-recognition by adopting this focus takes as its starting point the recognition/non-recognition practice of states. Working within this context, it is necessarily difficult to find sufficient evidence to meet the test for customary international law, at least as a matter of generality, bearing in mind the aforementioned inconsistency, double-standards, mixed motives and bad faith (on this, see e.g. Roth 1999). However, an important international legal development that has taken place since the turn of the millennium suggests a new avenue through which this enquiry could be pursued, through a branch of international law other than customary international law. This development is the acceptance that international human rights treaties include responsibility regarding extraterritorial ‘effects’, and apply to states when they act extraterritorially (see Wilde 2005, 2013a, 2013b, 2016). For the first half-century into the lifespan of the foundational instrument of international human rights law, the Universal Declaration of Human Rights of 1948—and the second half of the twentieth century—the question of whether and to what extent human rights treaty law, which followed from the Universal Declaration (itself not a treaty), has an extraterritorial dimension was a scant feature of decisions by international human rights enforcement modalities, and usually entirely absent from general academic discussions of international human rights law.

However, in the post-millennial, second-semi-centennial period of international human rights law, not only have certain extraterritorial actions associated with the ‘War on Terror’ and continuing outside that designation, involving human rights concerns—e.g. the US detention facility in

Guantánamo Bay, Cuba, the Abu Grahیب prison abuse scandal, extraordinary rendition, the practice of targeted killings by so-called ‘drones’—brought the general topic of human rights and extraterritoriality to more general prominence (see Wilde 2005). Also, there has been a considerable increase in decisions by judicial and quasi-judicial bodies affirming the position that human rights treaty law includes obligations relating to territorial acts and omissions by states that have an extraterritorial ‘effect’ on human rights, notably through a *non-refoulement*-type obligation (an obligation not to send someone back to another country when there is a risk of harm there) being ‘read into’ treaties that do not contain an express stipulation of this kind, and also that human rights treaty obligations apply to states when they act extraterritorially (see McAdam 2007).² These decisions have ranged across all the global and regional human rights bodies that interpret human rights treaties, such as the United Nations Human Rights Committee when it comes to the International Covenant on Civil and Political Rights, and the Inter-American and European bodies interpreting their associated regional instruments. Such specialist jurisprudence has been complemented, in the case of extraterritorial applicability, by wide-ranging treatment by the generalist International Court of Justice (Wilde 2013b). Building on earlier decisions, this jurisprudence has consolidated the treatment of extraterritoriality (extraterritorial ‘effects’ responsibility, and applicability extraterritorially) so that there is now a critical mass of canonical authority on this topic, as a matter of human rights treaty law, as was not the case at the turn of the century and the moment of the semi-centennial of international human rights law.

These developments are significant for the topic of recognition/non-recognition because they potentially suggest a different source of applicable human rights standards to the usual approach of seeking to identifying such standards from within the customary international law framework: human rights treaty law. At the same time, the meaning and scope of both the extraterritorial ‘effects’-based obligation, beyond its particular non-refoulement manifestation, and the extraterritorial applicability of human rights treaty law, are still considerably uncertain and underdeveloped, the aforementioned decisions on extraterritorial applicability, for example, mostly having addressed the topic piecemeal through considering particular situations involving direct state extraterritorial actions (e.g. military occupations). Hitherto, recognition/non-recognition has not been a case study considered through either the extraterritorial ‘effects’ obligation or the extraterritorial applicability frameworks (to be set out below). However, from the decisions it is possible to discern the contours of a general framework, albeit one that constantly shifting and expanding, which can be considered to be potentially operable in relation to any situation with extraterritorial implications, including the recognition/non-recognition of states and governments. Given this, the present chapter applies the general framework of human rights treaty obligations to the topic of recognition/non-recognition, explaining how this might operate and what it would require of states in their practice here were this to happen.

The chapter begins by explaining the general approach to the particular circumstances in which international human rights treaty obligations operate in relation to extraterritorial situations. It then considers how these circumstances might relate to the practice of recognition/non-recognition, thereby being potentially operable to it. The role of recognition of states and governments in international law is then explained. Following this, the chapter addresses what human rights treaty standards would require of recognition/non-recognition were they to be in operation. Finally, consideration is given to what account, if any, needs to be given to a divergence in the human right treaty obligations of the recognizing/non-recognizing state, and the obligations of the object of that recognition/non-recognition.

The territorial and extraterritorial application of human rights treaty obligations

It is assumed that human rights treaty law applies to a state within its own territory (Wilde 2013a). As mentioned, an extraterritorial ‘effects’-based obligation operates in the context of transfers of individuals from state territory, in circumstances where such individuals face certain forms of human rights abuses in the place to which they are being transferred—a form of *non-refoulement* obligation. An express provision concerning *non-refoulement* is contained in the Torture Convention, and operates for individuals who meet the definition of a ‘refugee’ in the Refugee Convention. Such an obligation was established as something to be ‘read into’ certain other human rights treaties not containing express provisions to this effect, through the interpretation of international human rights bodies, beginning with a decision by the European Court of Human Rights in 1989.

Outside the particular context of transfers of individuals, there has also been a more general affirmation of the applicability of human rights law on the basis of extraterritorial ‘effects’, whereby ‘responsibility can be involved because of acts’ of state authorities ‘producing effects outside their territory’.³ This is of potential relevance in a broader set of circumstances, yet to be clarified and determined in authoritative decisions. So far, the one area where clarification has been provided outside the context of the non-refoulement-type obligation is in connection with environmental damage, in relation to which in 2017 the Inter-American Court of Human Rights stated that there would be responsibility under Inter-American human rights instruments if there were a causal relationship between something happening within a state’s territory and the human rights of people outside its territory.⁴

In addition to the uncertainty over what the scope of the term ‘effects’ is (including how the ‘causal relationship’ invoked by the Inter-American Court is defined), the scope of rights implicated in this area of responsibility is unclear. The *non-refoulement* type of obligation (covering one particular ‘effect’) is presently understood to relate only to a subset of core human rights, notably those which are non-derogable, i.e. incapable of any limitation.⁵ These include the prohibition of torture, inhuman and degrading treatment, the prohibition of racial discrimination, the prohibition on slavery, and the right not to have life arbitrarily deprived, which all exist as a matter of international human rights treaty law as well as in customary international law.⁶

As for the application of human rights law to a state acting extraterritorially, although some of the key states whose direct kinetic actions in extraterritorial contexts have important implications for human rights—Israel, Russia, the UK, the USA—refute the extraterritorial application of human rights treaty law, either in general or in relation to some, but not all, the treaties they are parties to, the universally held position as a matter of all regional and global human rights interpretation bodies, and the International Court of Justice, as well as independent academic experts, is that human rights treaties do apply extraterritorially (see Dennis 2005; Wilde 2005). The aforementioned consolidation of the international authority on this matter in the post-millennial period makes the refusenik position difficult to sustain credibly. What is subject to broader dispute and considerable uncertainty is the question of the extent of applicability.

This position is complex because human rights treaty provisions are not uniform when it comes to applicability in general, a matter that has implications for extraterritorial applicability. To summarize overall a very complex and varied position, the extraterritorial applicability of human rights treaty obligations operates in the following

manner. The general prohibitions of racial and sex discrimination in the associated specialist conventions apply extraterritorially in a generalized, free-standing sense (Wilde 2013a). All other human rights treaty obligations apply to situations where a state exercises effective control over either territory or individuals, and/or if a state exercises effective authority and/or decisive influence over another state or non-state entity exercising territorial control (Wilde 2013a). In addition, for socio-economic rights, there is a further obligation, designated as ‘international co-operation’, within which resource and technology transfers across borders are situated (Wilde 2016). The aforementioned ‘effects’-based obligation can operate extraterritorially, at least in circumstances where a state exercises effective control in such a context. Here, a state bears an obligation relating to acts or omissions taking place within a zone of extraterritorial control exercised by that state, when these acts or omissions have an effect on the enjoyment of human rights extraterritorially outside that zone of control.⁷ The same uncertainty as to the potential content of this obligation, beyond a *non-refoulement*-type requirement, exists as in the case of its territorial manifestation.

These twin developments in human rights law—obligations regarding extraterritorial ‘effects’, notably in the context of the transfer of individuals, and extraterritorial applicability—have both developed by way of the interpretation of human rights treaties that did not contain express provisions clearly indicative of the position in this regard (apart from the express *non-refoulement* obligations in the Refugee and Torture Conventions). These interpretations reflect a teleological approach to the interpretation of human rights treaties as ‘living instruments’, where meanings change over time. As the changes in both areas have been in the direction of progressively expanding coverage, it can be speculated that there is the potential for further developments in the future that could encompass other extraterritorial effects outside the context of the transfer of individuals. This has already happened, with the aforementioned Advisory Opinion of the Inter-American Court of Human Rights, in the context of environmental damage, and could therefore move further to encompass recognition and non-recognition.

Applying human rights treaty law to recognition/ non-recognition practice

Bearing in mind the foregoing observations about the territorial and extraterritorial application of human rights treaty obligations, how might these obligations apply to acts of recognition and non-recognition? As determinations that originate in government departments, usually in state capitals, acts of recognition and non-recognition take place territorially. Clearly, then, they fall within the territorial scope of the state’s human rights obligations in terms of the accepted regime of applicability. Moreover, the implementation of determinations on recognition/non-recognition will often have consequences for the state’s own extraterritorial activities in its relations with other states, since the position taken on recognition/non-recognition will determine, for example, where and on what basis diplomatic premises are located, with whom and on what basis diplomats and other state officials such as military personnel meet with foreign officials, how decisions are made within intergovernmental organizations etc. At the very least, human rights law applies to states in their extraterritorial diplomatic premises and military facilities, as one of the most well-established accepted situations of extraterritorial applicability.⁸

The role of recognition of states, governments, and state activities in international law

Before addressing what these human rights norms might require of states in recognition/non-recognition practice, it is necessary to clarify certain key aspects of the normative framework concerning recognition of states and governments as a matter of general international law (Chimni 2018). In international law, the state is the legal person—the actor who is the bearer of rights and obligations. The government is the agent for that legal person—the representative of it, whose acts and omissions engage the state’s legal responsibility. Changes of government usually have no bearing, legally, on the continued existence of the state. Recognition/non-recognition practice can thus be focused on the state itself (e.g. the decision to recognize/not recognize a secessionist entity as a distinct state and in consequence to recognize/not recognize that the territory covered by the entity is no longer part of the territory of the state within which it was located) or the particular government within a state (which is not a matter of whether or not the state the government purports to represent is or is not being recognized). Recognition/non-recognition can be focused on the existential claims made by the state and the government: for the state, that it is a state; for the government, that it is the legitimate representative of the state. It can also be focused on the legitimacy of a particular activity performed by the government on behalf of the state, an associated claim, if any, about the basis for this, and the international legal implications of the activity and associated claim, for example when a state administers territory outside its sovereign territory (e.g. an occupation).

International law prescribes criteria which must be met before an entity claiming new statehood can enjoy this status in law (Crawford 2007). These criteria are based on practical viability across the key attributes of statehood—whether there is a co-existing effective government, defined territory, and fixed population, and independence from external authority. In general, the recognition practice of other states to claims of statehood—whether they decide to recognize or not recognize such claims—is regarded to be, legally, merely ‘declaratory’ not ‘constitutive’ of statehood—i.e. it does not have normative effect in and of itself (Crawford 2007). However, it can be ‘constitutive’ in certain circumstances in borderline cases where conformity to one or more of the aforementioned criteria is in question. Here, then, the recognition practice of states can have a material effect on whether or not a claimant entity can become a state as a matter of international law.

The general obligations that states bear to other states, to respect sovereignty and territorial integrity, require them to ‘recognize’ other entities as states if such entities meet the legal criteria for statehood. This is a *de minimis*, essentially negative requirement concerned with non-intervention. States are not required to conduct diplomatic relations and/or recognize a particular government but they would be required to respect the state’s territorial integrity and so its territorial borders. This would include, therefore, an obligation not to recognize that part of the territory of a state is somehow not its territory, if such a position would run counter to the position on the status of the territory as a matter of international law. This therefore has implications for recognition practice generally, for example if a state were to recognize as part of one state a territory that is actually legally part of the territory of another state.

What human rights treaty law would require of recognition/ non-recognition practice?

What, then, might human rights treaty law norms require of recognition/non-recognition practice? This would all be in the category of the speculative scope of the ‘effects’ obligation beyond its non-refoulement-type manifestation, both territorially and extraterritorially. To consider

what this might involve, it is necessary to review the general elements of human rights obligations. Here, the nature of what human rights obligations require in substance is complex and varied, both within and between different human rights treaties and also, because of different constellations of treaty accession and associated declarations and reservations by states, between states. In very general terms, states are obliged to 'respect', 'protect' and 'fulfil' the human rights in these instruments. 'Respect' denotes a negative obligation not to interfere negatively in the enjoyment of human rights. 'Protect' denotes an obligation to protect individuals and groups from interferences in the enjoyment of their rights by others. 'Fulfil' is again of a positive character, an obligation to secure the fulfilment of rights in a broader sense, notably in contexts where public provision is needed (e.g. in relation to certain socio-economic rights).

Bearing in mind that the subject matter at issue is the human rights situation as far as the object of recognition/non-recognition is concerned, the starting point is to consider what role recognition/non-recognition by another state could potentially play—what 'effect' it might have—when it comes to this situation. In other words, if a state or claimant state fails to respect/protect/fulfil human rights, what implications might this have for the obligation other states have to respect/protect/fulfil rights through their recognition/non-recognition practice in relation to the first state?

When recognition is understood legally to play a constitutive role in a claim to statehood that would involve a violation of human rights law, there is a clear causal link between it and the violation in a direct sense, implicating the obligation to 'respect'. This would suggest, then, that when it comes to recognition that might be constitutive of a claimant entity's right to statehood, and the statehood in question would involve a violation of human rights law, then states would be prohibited as a matter of their human rights treaty obligations from the act of recognition. An example of this situation arising would be if an entity claiming statehood is constituted in a manner that involved a violation of the right to self-determination, which exists as common Article 1 to the two main human rights treaty Covenants, as well as existing in customary international law.⁹

Equally, even when recognition does not play a legally constitutive role in an arrangement that involves a violation of human rights, if the violation of human rights is inherent in that which is being recognized, the positive obligation to 'protect' would require the state to refuse recognition. This would therefore cover the aforementioned example of an entity claiming statehood which is constituted in a manner involving a violation of self-determination even in circumstances where recognition would not play a constitutive role, and also other scenarios, for example a state claiming to annex territory outside its own sovereign territory, in contravention of the right of self-determination of the people of that territory. In such a situation other states would be prohibited as a matter of their human rights treaty obligations (quite apart from any other relevant areas of international law) from recognizing the annexation.

Beyond the above two types of recognition to which human rights treaty law would oblige particular practices, are the much more common situations where a government that might be recognized or not recognized is engaged in some form of human rights violations, but the violations are not directly bound up in those aspects of it which would be recognized were recognition to happen. For example, in the aforementioned example of a state purporting to annex land in violation of the right of self-determination of the people of that land, where the act of recognition at issue is not of the annexation itself but of the government's general claim to represent the state involved. In this context, there is no direct link between the act of recognition/non-recognition and the human rights violation in the same manner as the two earlier cases. Of course, recognition practice can be a means through which the human rights concerns could be

addressed and, indeed, this practice could be used as leverage to address them. Equally, the recognition of a state and/or government involved in human rights abuses could be regarded as a tacit endorsement of/collusion with the abuses. However, what might be most effective in securing human rights in such circumstances is not straightforward. Non-recognition can act as an effective device to improve practice in some cases, or lead to a bunker mentality and an increase in repression in others. Engagement can be seen as encouragement to continue business-as-usual, or be the basis for successful efforts to try to promote greater human rights compliance.

All of this suggests is that the particular activity at issue—recognition and non-recognition—is not of a nature that is amenable to a clear position when it comes to its effect on human rights compliance outside of the two areas reviewed above (in those two areas, its effect, and so the requirements of human rights law to it, is clear). The state's human rights obligations when it comes to diplomatic relations generally, including recognition and non-recognition, are best understood in these contexts as requiring best efforts determined by the particular situation at issue. This is important in and of itself, because it moves the question of human rights promotion as a matter of diplomatic practice from an arena of discretion to one of obligation. But then what is required will vary in any given case, not necessarily tied (outside the two categories above) to a particular requirement of recognition or non-recognition.

What the present account of the extraterritorial meaning of human rights law is that, actually, diplomatic relations is an arena where states are obliged to take action to promote human rights, not simply given the right to do so if they chose. For the present focus on recognition and non-recognition, this does, therefore, mean that human rights considerations are a mandatory not discretionary part of the law applicable to practice in this area. That said, bearing in mind the foregoing analysis, what they require in any given case is not a straightforward matter when it comes to whether or not recognition is permissible. As mentioned, there are two areas where the implications for recognition practice are clear and uniform. Outside these areas, the obligation to secure rights through recognition practice continues—so an obligation, not just a right—but whether or not this requires non-recognition would fall to be determined in any given situation by considering recognition alongside the full range of diplomatic measures and considering what, in the round, and based on the context, a 'best efforts' test would require.

In addition, it is also necessary to consider the state's human rights obligations in the round, which brings in its obligations vis-à-vis the people of all other states, not just the particular state/claimant state that is the focus of an individual instance of recognition/non-recognition. And, of course, the rights of the people within its own territory. The implications for all these obligations in the round would have to be brought into the analysis when determining what the legal position would be in any given instance of recognition/non-recognition. Moreover, beyond human rights law, the state will also have other obligations in international law, which may also apply in a particular instance of recognition/non-recognition. The legal position the state would be arrived at by taking full account of all the applicable law, not just human rights law.

It might be said that this normative picture is far too complex, multi-layered and varied to be amenable as regulatory system that is capable of clear, meaningful and consistent application. Such a question asked in relation to the present topic is a particular instantiation of a broader challenge that operates in relation to the international legal system generally. A consideration of it is beyond the scope of this piece, implicating the general work that has been done on the question of normative complexity and overlaps.¹⁰ But it is a challenge that has to be faced up to in relation to international law generally, not only the present topic of human rights and recognition in particular.

That said, there is one particular feature of human rights law that can be emphasized by way of illustrating one key element of how the challenge might be addressed. Certain core areas of human rights obligations are understood to have *jus cogens* 'trumping' status.¹¹ This status denotes that they are incapable of limitation—the aforementioned non-derogability—and would prevail in the face of any conflicts with other legal obligations. A narrow subset of human rights obligations have such status, covering the foregoing list of non-derogable rights of a universal character (so not the prohibition of the death penalty), as well as the right of self-determination, core protections of individuals in humanitarian law (the laws of war), and the prohibition on racial discrimination in general and apartheid in particular. The characterization of these norms as having this status would be an important factor when considering in any given situation of recognition/non-recognition how the implications for particular rights have to be balanced against each other and how certain human rights obligations have to be balanced against other obligations in international law.

How would obligations be linked to those of the recognized/ non-recognized entity?

It has already been observed that there is a wide variety of different constellations of acceptance of international human rights treaty obligations between states. It is commonplace, then, for any given state engaged in recognition practice to be subject to a different configuration of human rights obligations when compared to the position of the states and governments that are the object of its recognition practice. This situation of divergence is potentially acute in a situation when new states are being recognized and their position as far as being bound by human rights law is unclear/contested/to be determined. The foregoing analysis on the potential role of human rights law to recognition practice has referenced 'human rights abuse' and 'human rights violations' in terms that omitted to indicate 'according to whom'. Whereas the focus is on the object of recognition when it comes to the concerns/violations/abuse, the potential divergence between the substantive obligations of that state, and the recognizing state, raises the question as to which standards should be used to determine which violations the recognizing state then has a responsibility to be concerned with in its recognition practice.

It is important to distinguish between recognition/non-recognition on matters that directly implicate the rights and obligations of the recognized/non-recognized entity, and all other matters. In the case of the former category, if the standards that were being adopted by the recognizing/non-recognizing state were not applicable to the object of this practice, then the adoption of the former would involve imposing them on the latter without its consent. This is 'imposition' in the sense that the latter's own rights and obligations are contingent on compliance with the standards in question. Such a situation would be the case if, for example, a state made compliance with human rights standards that are not legally universally accepted (e.g. the prohibition of the death penalty) a criterion for its acceptance of a claim to statehood of an entity that met the legal criteria for statehood.

In such instances, then, the role of human rights treaty law standards in recognition/non-recognition must be limited to those standards that are universally applicable or, at least, applicable in common as a matter of treaty law as between the recognizing/non-recognizing state and the object of this practice. The category of 'universally applicable' denotes standards in customary international law, and so would cover, at least, the aforementioned areas of human rights obligations regarded to have *jus cogens* status. In the case of the latter category, recognition/non-recognition would not have a direct bearing on the legal rights and

obligations of the object of the recognition/non-recognition. This would include, for example, the decision to recognize/not recognize a particular government in a state. Given that, as mentioned above, there is no right on the part of a state to have its government recognized by other states, making such recognition contingent on compliance with human rights legal standards that are not applicable to that state would not involve imposition of those standards on the other state in the same way.

Conclusion

In ratifying international human rights treaties, states have accepted obligations which have potential implications for their recognition practice of other states and governments. These potential implications are derived from the existence of extraterritorial ‘effects’-based responsibility and the operation of human rights treaty obligations both territorially and extraterritorially. Both these elements have come to be accepted interpretations of human rights law, and suggest the potential for further interpretative developments that would encompass obligations relative to recognition/non-recognition as part of them.

Notes

- 1 This chapter was published on the basis of double-blind peer review. The work on it was funded by the European Research Council. Warm thanks to Dr Lorenzo Gasbarri for excellent research assistance. Responsibility for the content remains exclusively with the author.
- 2 An express non-refoulement obligation exists in the Convention Relating to the Status of Refugees, Geneva, 28 July 1951, entry into force 22 April 1954, 189 UNTS 137, <www.unhcr.org/3b66c2aa10.html> (Refugee Convention 1951), Art. 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, entry into force 26 June 1987, 1465 UNTS 85, www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (CAT 1984), Art. 3. For the ‘reading in’ of a somewhat equivalent obligation to treaties that do not contain an express stipulation, see *Soering v. the United Kingdom*, European Court of Human Rights, 161 Eur. Ct. H.R. Series A (1989), [obtainable from www.echr.coe.int], 7 July 1989.
- 3 See *Drozdz and Janousek v France and Spain*, Appl. 12747/87, ECtHR, 26 June 1992, Series A, No. 240, <http://hudoc.echr.coe.int/eng?i=001-57774> (*Drozdz and Janousek* 1992), para. 91, and *Al-Skeini and Others v United Kingdom*, Appl. 55721/07, ECtHR, Grand Chamber, 7 July 2011, (2011) RD 1093, (2011) 53 EHRR 18, <http://hudoc.echr.coe.int/eng?i=001-105606> (*Al-Skeini* ECHR 2011), paras. 131, 133.
- 4 *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/18, IACHR, 15 November 2017, (ser. A) No. 23, www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf (*Environment and Human Rights* IACHR 2017).
- 5 On the scope of the non-refoulement-type obligation, see the sources cited above, note 1.
- 6 See the following derogation provisions: European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, entry into force 3 September 1953, ETS 5, 213 UNTS 221, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (ECHR 1950), Art 15; International Covenant on Civil and Political Rights, New York, 16 December 1966, entry into force on 23 March 1976, 999 UNTS 171, www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (ICCPR 1966), Art. 4; American Convention on Human Rights, San Jose, 22 November 1969, entry into force 18 July 1978, 1144 UNTS 123, <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf> (ACHR 1969), Art. 27.
- 7 *Al-Saadoon and Mufidhi v United Kingdom*, Appl. 61498/08, ECtHR, 2 March 2010, DR 2010-II, 61, <http://hudoc.echr.coe.int/eng?i=001-9757>.
- 8 See e.g. *VM. v Denmark*, App. No. 17392/90, 15 EHRR CD28, European Commission of Human Rights, 1993) (on diplomatic premises) and *Al-Saadoon* ECHR 2010 (note 7).

- 9 See ICCPR 1966, Art 1; International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, entry into force 3 January 1976, 993 UNTS 3, www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (ICESCR 1966), Art. 1. On self-determination, see the sources cited in the following Oxford bibliographies entry: www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0033.xml
- 10 See the work by international lawyers through the rubric of ‘fragmentation’, e.g. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Study Group of the International Law Commission (finalized by Martti Koskeniemi), 13 April 2006, U.N. Doc. A/CN.4/L.682 (ILC Fragmentation 2006).
- 11 See the Oxford Bibliographies entry, www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml, and Encyclopedia of Public International Law entry, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1437?prd=E> PIL, and sources cited therein.

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9

STATE RECOGNITION IN A TRANSITIONAL INTERNATIONAL ORDER

Edward Newman

Introduction

This chapter considers if the transitional international order – defined here as the geopolitical, normative and institutional changes which occur as key states rise and fall in relative power and influence – is shaping the evolving international politics of state recognition. While the material requirements for sovereign statehood are established in doctrine, the practice of international recognition demonstrates that a political and legal grey area exists which is influenced by great power rivalries, normative contestation, and sometimes arbitrariness. Important recent cases – such as Kosovo, South Ossetia and Abkhazia – have been particularly divisive, and raise questions about the impact of unilateral recognition by powerful states, and a possible shift away from international consensus for the recognition of new states. While membership of the United Nations is generally, and traditionally, regarded as the ultimate confirmation of international recognition and sovereign statehood, different – and often rival – positions on recognition in relation to key cases by permanent UN Security Council members suggest a heightened fragmentation of the norms and practices which govern international recognition. International recognition has long been recognised as decentralised, political and closely tied to the whims and interests of great powers. Nevertheless, this chapter examines whether the political and normative friction associated with the changing international order makes the possibility of a rigorous, rules-based regime for international recognition more remote than ever. The core question at the heart of this chapter, therefore, is whether, in the context of the transitional international order, the politics and practice of international recognition are facing an upheaval in the context of renewed great power friction.

The chapter explores this subject by considering three scenarios in which the transitional international order may be shaping the evolving politics and practices of international recognition. First, it will consider if there are patterns of practices among ‘rising’ and ‘status quo’ – or Western and non-Western – powers in terms of international recognition. Is there a distinct split, in key cases – such as Kosovo or Palestine – between status quo and rising powers in terms of recognition? Powerful states – such as the US, China and Russia – often take opposing sides on recognition conflicts, resulting in a number of new states that enjoy only partial membership of international society. The status of these aspiring states is thus politicised in the context of global great power tensions and rivalries. Second, the chapter

will explore if and how the rivalries and tensions associated with the transitional international order play a role in multilateral debates and decisions about recognition as a result of traditional great power rivalries. In this scenario, great power protagonists may take different or opposing positions on international recognition not necessarily as a result of competing normative world views but because cases of recognition become embroiled in diplomatic spats and broader rivalries of great powers. Third, the chapter will explore if normative contestation associated with the transitional international order is relevant to evolving international recognition politics and norms, as well as specific cases. In this scenario, the question will be whether practices of recognition reflect a tension between conservative, statist interpretations of international law and recognition, which emphasise territorial integrity and state sovereignty – a ‘pluralist’ world view often associated with ‘rising’ non-Western powers such as the BRICS grouping – and an evolving, more liberal approach to international recognition which places more emphasis upon ‘remedial secession’ in the interests of justice, human rights and democracy. The context for this latter scenario reflects an expanded understanding of the principle of self-determination of peoples and popular sovereignty beyond decolonisation. In this third scenario, international recognition is a key site of normative contestation in relation to the evolving international order. International recognition appears to be increasingly about politics rather than law; according to Ryngaert and Sobrie (2011: 467, 490), the rules governing the process of state recognition are in ‘existential crisis’ due to their ‘uncertainty and incoherence’. A core objective for this chapter is to explore if this apparent incoherence is in some way driven, or exacerbated, by changes in the international order.

The evolving norms and practices of international recognition

The formal requirements of sovereign statehood have, in principle, reflected general international agreement since the first half of the 20th century, linked firmly to settled norms which underpin international order. However, the practice of international recognition has often been ad hoc (Bartelson 2016), and international recognition is one of the most unregulated and decentralised aspects of international relations (Gant 2015: 204). The international recognition of new states is often politically and legally sensitive, in the absence of a rigorous normative framework and institutionalised procedures to regulate it. In particular, where the legal sovereignty of an entity seeking recognition is contested, whether by the immediate parties to the dispute or by other states, the politics of international recognition are controversial and can have far-reaching implications for international order. First and foremost, there remains disagreement on the definition of the state in international law. In practice, the Montevideo Convention of 1933 (a regional instrument) has become a global reference on the core conditions of statehood. However, the role of recognition in supporting claims to statehood remains contested. Some scholars claim that recognition is a constitutive element and an essential precondition of independent statehood (Brownlie 2008; Jackson 2000), while others see the existence of sovereign statehood, based upon the inherent merits of the territory concerned, as something that is independent of recognition by other states (Lauterpacht 1944).

Although legal doctrine governs the conferment of statehood and the interactions of states, the process by which some entities become recognised as states and others do not is largely political and sometimes quite arbitrary (Dugard 1987: 9). Despite some efforts following World War II to delegate the right of state recognition to the UN – and thus institutionalise collective recognition – states could not agree to such a delegated, collective approach. There is therefore no regime to objectively apply criteria for international recognition or enforce

a duty to recognise new states (Tierney 2013). Ryngaert and Sobrie (2011: 484) thus argue that ‘the lack of a clear-cut normative framework gives way to uncertainty and incoherent policies’. Rationales for recognition in practice are generally driven by the self-interest of recognising states, although this may be guided by a range of factors, including alliance commitments and normative standpoint. This leads to overlapping practices of bilateral recognition and non-recognition as well as collective recognition and non-recognition by states, including the increasing role of international and regional organisations.

In this context, certain norms have governed practice, such as a tendency for states to recognise new states collectively rather than unilaterally, and the idea that membership of the United Nations is a general confirmation of international recognition and sovereign statehood. However, in recent years there have been a number of high-profile, controversial cases of recognition by powerful states which are not based upon consensus, and which have been quite divisive or had implications for other contested cases. In a number of ways, these controversies and divisions can be linked to changes in the international order, given that the most powerful states are the key actors in both the international order and international recognition practices.

International order

The ‘international order’ – in the sense of a coherent, unified set of practices or principles – is a problematic concept that is often not upheld in reality. Scholars have explored whether the Western-led, ‘liberal’ international order is coming to an end, and if the world is entering a new phase (Acharya 2014; Ikenberry 2011; Schweller 2011; Stuenkel 2016). Yet there can be multiple forms and understandings of ‘international order’ operating in parallel, and the idea that Western countries are uniformly upholding liberal international institutions is increasingly tenuous. Nevertheless, international order can be defined by the norms and institutions which regulate international politics: the accepted rules, reflected in the behaviour of states and other actors (this section draws upon Newman and Zala 2018). Fundamental norms related to state sovereignty, the rules governing the use of armed force, international law, and diplomatic practice, among others, may be thought of as primary institutions of international order. Multilateral arrangements – the means of managing international interactions – are secondary institutions. This order is often associated with the distribution or balance of economic and military power, or the perception of such power, but it is importantly also a matter of norms which guide or proscribe behaviour. In broader context, a changing international order might be a consequence of a sustained change in the distribution of power, especially when associated with the relative rise and fall of states that has an impact upon international norms. It is in this context that international norms and institutions are under transition and arguably under challenge (Newman 2018).

According to some analysts, the relative rise in power of a number of non-Western states has resulted in a process of normative contestation and resistance in international politics, and questions relating to the creation, internalisation and institutionalisation of norms are increasingly controversial (Stuenkel 2016; Xiaoyu 2012). According to this perspective, non-Western powers are increasingly unwilling to be passive ‘norm takers’, and various forms of normative resistance can be seen in relation to a number of issues, such as human rights and governance (Li 2014). This can have an impact upon a range of policy areas, including decisions relating to the recognition of new states. In addition, the manner in which decisions are made and upheld through multilateral governance is also increasingly fractious. Many ongoing international challenges occur against the background of this apparently changing

international order, and appear to reflect a growing division between established, liberal states and ‘rising’ powers, including China, Russia, India and Brazil. In some ways, this contestation reflects normative differences relating to primary norms – relating, for example, to state sovereignty, territorial integrity and the use of force. In this way the rising power narrative often reads as an expression of resistance to liberal norms and the attachment of liberal norms to issues such as development, often seen as a form of interference. But contestation is also found around secondary institutions; it reflects a desire among rising powers for greater control of the agenda, a desire for sovereign equality and respect (Paul et al. 2014; Volgy et al. 2011). This is a form of international contestation, but not a challenge to the fundamental principles which underpin international order (Newman and Zala 2018). In this context, the unregulated norms and practices relating to state recognition offer emerging powers a vehicle for exercising influence, expressing demands for international status, and defying what is perceived to be the West’s attempts to maintain its hegemony.

In connection with this, the distinction between the ‘pluralist’ – reflecting a conservative, legal view of sovereignty and territorial integrity (Hurrell 2007) – and the liberal world view may in some ways characterise the normative contestation of the transitional international order. According to this, rising powers tend to project a commitment (in theory) to strict statist norms of non-intervention, territorial integrity and respect for state sovereignty. In line with this, there are no grounds for international judgements about the legitimacy of national governments in relation to domestic issues apart from in the most exceptional circumstances, and state legitimacy is assumed (Newman and Zala 2018). This contrasts with a liberal internationalist world view which – in theory – might give greater emphasis to universal human rights principles, democracy, and the international rules which govern state behaviour, and has a contingent view of sovereignty. According to this, state sovereignty is increasingly conditional, and issues such as economic and political governance and human rights can no longer be legitimately regarded as exclusively domestic issues.

Thus, international contestation may be occurring in relation to the political friction between established and rising powers both in terms of primary and secondary institutions. In turn, both forms of contestation are potentially relevant to the politics and practices of international recognition. Cooley (2015) sees contestation as a deliberate effort on the part of conservative states to resist pressure to democratise and to reinforce the principle of sovereign jurisdiction: an ‘international backlash against liberal democracy’. For Lai (2012: 614), this is not a coherent vision but a ‘coalition of sovereign state defenders’, resisting perceived incursions into the sovereignty norm brought by interdependence and interventionist political norms: ‘the BRICS – even the democratic ones – fundamentally diverge from the liberal vision of Western countries’. This may shape the attitudes of states such as China, Russia, India and Brazil in terms of the types of circumstances in which they recognise new sovereign states. In terms of multilateral processes and decisions, contestation can have an impact if cases of international recognition become embroiled in vying political agendas – with Kosovo and Palestine being key examples in relation to contested regional and global rivalries.

In the existing order, prevailing norms relating to state creation and subsequent recognition tend to give primacy to state sovereignty and territorial integrity over self-determination and unilateral secession. They also tend to favour collective non-recognition of states emerging from acts of aggression, while deeming unilateral recognition of states as either premature or destabilising, and thus problematic. Two overarching practices thus underpin the existing order: respect for sovereignty and the territorial integrity of states, and the acceptance of secession as part of a UN-led decolonisation process with the consent of host/parent states (usually following a peaceful referendum). Examples of this include South Sudan and East Timor.

The practice of state recognition has always been in flux, and never a stable element of any order. Between 1945 and 1974 many states emerged and became part of the UN through decolonisation, followed by the 1989 dissolution of federations, followed more recently by unilateral secession of sub-units of these federations. Each round of secession was governed by different norms and practices. The European Community sought to set guidelines for the recognition of new states in Yugoslavia, Eastern Europe and the post-Soviet space, in a movement towards regulating and unifying international responses to state creation and recognition. However, that practice was short-lived as the EU and other regional and international bodies have failed to set common policies on state recognition (Newman and Visoka 2018). Moreover, regional power complexes have influenced the practice of regional powers and smaller states in their surrounding areas or spheres of influence. For example, the US more or less shapes how the EU states respond to secession elsewhere (with the exception of four countries which do not recognise Kosovo). Russia certainly influences the response of Central Asian states. Similarly, China influences countries in its region, and South Africa influences parts of Africa in terms of their response to recognition claims. In addition, the politics of recognition allows states to demonstrate their influence and express resistance; Russia, for example, has expressed its resurgence, in part, by opposing Western influence, including Kosovo 2008. Against this background, the next section will explore how the contested transitional international order may be shaping the evolving politics of state recognition according to a number of scenarios.

The transitional international order and the evolving politics of international recognition: three scenarios

The transitional international order shapes the politics and practices of international recognition

In a number of important cases – including Kosovo and Palestine – the friction which accompanies the changing international order is having an impact upon the politics of international recognition. There are patterns of practice among ‘rising’ and ‘status quo’ powers demonstrated by a split, in some cases, in terms of decisions to recognise, or withhold recognition of, statehood. In a prominent case, Kosovo is recognised by the majority of Western states, including most of the members of the EU, the US and the UK, but none of the BRICS countries – Brazil, Russia, India, China and South Africa. The declaration of independence of Kosovo 2008, which was sponsored and supported by the US and many European countries, became a point of conflict specifically between Russia and a number of Western states, but more broadly also between a number of Western and non-Western states. Russia, in particular, sees the West’s sponsorship of Kosovo’s independence as highly provocative – as an assertion of Western hegemony broadly – in addition to being counter to its interests in the region. This was a culmination of Western – and in particular British and US – involvement in the region, including military intervention in 1999, which was polarising and arguably destabilising. Russia and the West have been active diplomatically in promoting or countering and promoting Kosovo’s attempts to gain international recognition and representation in multilateral regimes. The politics of contestation is played out in a number of arenas, including supporting or obstructing the membership of Kosovo in international organisations such as UNESCO and INTERPOL. In these and other diplomatic contexts, there is a discursive

confrontation between the US and Russia on Kosovo that echoes broader political friction.

In contrast, Palestine is recognised by all the BRICS countries (and many additional non-Western countries) but not the US, France or the UK (although the latter gives the territory non-member state status). Again, this is a polarising case which is highly contentious in the context of the politics of the Middle East, approaches to the Israel–Palestine peace process, and relationships with Israel. Some third-party states believe that a ‘two-state solution’ remains a fundamental part of a peace process, but that recognising Palestine can be prejudicial to that eventual goal by putting undue pressure upon Israel. Others believe that Israel has shown insufficient goodwill and commitment to the peace process, and that the need to extend solidarity to the people of Palestine and strengthen their position politically – in their relationship with Israel but also in international institutions and organisations – is overdue. The struggle of Palestine and Kosovo for membership of international bodies demonstrates very clearly the polarisation and tensions between Western and emerging powers. The US has opposed Palestine’s bid for admission to the UN, including observer status, and has proactively lobbied against its membership in international agencies, such as UNESCO and INTERPOL. In apparent retaliation, BRICS withheld support for Kosovo’s subsequent bid for membership in these two organisations.

Other contested territories, such as Abkhazia, South Ossetia and Crimea, have also become politicised in the context of the transitional international order, although these territories are only recognised by Russia and a handful of other pro-Russian states. Indeed, it has been suggested that Russia’s recognition of Abkhazia and South Ossetia – and perhaps its de facto annexation of Crimea – would not have happened in the absence of Kosovo’s declaration of independence and its recognition by key Western states (Fabry 2012). Moreover, Russia’s justification for its policies towards these contested territories has made explicit reference to the case of Kosovo and Western states’ support for Kosovo, citing ideas of self-determination and democratic will (B92 2016; Russia Today 2014). Arguably, all of these cases represent a possible increase in the tendency for powerful states to take the lead in recognising contested states where they have special ties – although Kosovo enjoyed far wider international recognition for its statehood – even when consensus has not been reached collectively (Oeter 2014).

The preceding cases of unilateral secession and recognition by groups of states has served as a pretext to justify counteractions by rival blocs. Potentially, this threatens a major fragmentation of the practices of state recognition which followed the end of the Cold War – and which had been apparently stabilised around a basic consensus among great powers in favour of collective recognition. It could also lead to an increase in contested territories with partial recognition, given the number of aspiring states with some level of support from major states. However, this has not (yet) occurred. International society remains fundamentally conservative in terms of the acceptance of new states, and so there has not been a transformation of recognition practices or a dramatic escalation of unilateral recognition by powerful states (Fabry 2012; Oeter 2014). Yet, many cases of secession and recognition do demonstrate how international recognition can become embroiled in great power rivalries as states rise in relative power and influence, and wish to assert their interests and status.

The Realpolitik of international recognition and great power rivalry

A number of key studies have demonstrated that the politics of international recognition is very much shaped by great power politics and vying interests. Fabry (2010: 8) argues that

‘recognition by the great powers has normally preceded, and carried far more weight than, recognition by other states’. Similarly, Coggins’s (2014: 206) extensive study on great power politics and state formation concludes that ‘state interest, rather than the facts on the ground determine recognition, and collectively, whether the secessionist actor will be admitted full membership in international society’. Rivalry and tensions associated with the transitional international order similarly play a role in multilateral debates and decisions about recognition. In this scenario, it may not be matters of principle at stake, or competing judgements as to the merits of a particular case for international recognition, but rather a tendency for aspiring states to become tied up in great power rivalries or tensions. That is, major states take a particular position on a case not because they have a clear vested interest or principled position but rather because they wish to oppose the position taken by a ‘rival’ major power.

The creation of new states tends to reshuffle not only the cartography of states but also the power relations and interests of great powers. Great powers tend to support secessionist entities and movements which would either preserve or expand their dominance. In the present situation, the US is more prone to oppose the expansion of states, especially if the new nascent states signal strategic alliances with Russia or China among other emerging powers. During the Cold War, the US did not support the efforts of Biafra, Eritrea, Kurdistan and South Sudan for independent and recognisable statehood, fearing that such territories would become allies of the Soviet Union and thus undermine its interests in postcolonial Africa (Paquin 2010: 4). The US considers the West Balkans to be an important geopolitical zone for preserving and expanding the Euro-Atlantic community and limiting the role of other competing powers. Support for the independence of former Yugoslav republics, including most recently the case of Kosovo, are core to the US’s stability-seeking foreign policy. To undermine the US’s dominance in the Balkans, Russia proactively opposes Kosovo’s independence, and supports the nationalist leaders of Republika Srpska, an entity within Bosnia and Herzegovina which seeks greater autonomy and eventual separation. In turn, the US assertively opposes the independence of *de facto* states in Eastern Europe and South Caucasus, as it considers these breakaway territories to be threats to its foreign policy and Russian satellites. The US has thus coordinated its sanctions against Russia with the EU as part of a collective non-recognition policy against the annexation of Crimea in 2013 (see Newman and Visoka 2018). In turn, Russia tends to use these frozen conflicts as a buffer zone to prevent further expansion of the Euro-Atlantic community and liberal democracy.

The US accepts Morocco’s protracted occupation of Western Sahara despite the position of the UN, which has established legal grounds for determining the status of this territory. This support springs from close economic and geopolitical interests in the region. By opposing the recognition of Western Sahara, the US seeks to undermine the regional role of Algeria and Iran, which openly oppose US interventionism in the region. It also fears that support for Western Sahara would unravel new waves of secessionism across Africa, in separatist movements which have been long struggling through peaceful and violent methods to achieve independent statehood (see De Vries et al. 2019).

Although the US derecognised Taiwan in 1978, it has used this disputed territory as a space to challenge China’s geopolitical interests in Southeast Asia. In retaliation, through economic incentives, China has effectively managed to withdraw recognition of Taiwan in Latin America and expand its strategic relations with states hostile to US dominance in the region. For instance, when Panama, the Dominican Republic and El Salvador derecognised Taiwan and established diplomatic relations with China, the US considered this move a geopolitical threat to their regional interests. In an attempt to limit China’s expansive foreign policy, the US has proactively worked to preserve Taiwan’s current diplomatic allies.

Great power rivalry directly affects the chances of recognition-seeking entities for overcoming international contestation.

Coggins (2014: 452) finds that 'Great Powers ought to prefer coordinated recognition to maintain their social standing and security; to maintain international stability; and to reproduce the state-centric international order'. However, recent state practice suggests that coordination is more prevalent among likeminded powers rather than between competing ones. The US, the UK, France and Germany, along with many other European states, coordinated the recognition of Kosovo's independence, for example. Similarly, they jointly devised non-recognition policies on Abkhazia, South Ossetia and most recently Crimea. Such secessionist conflicts, the emergence of new aspiring states, and the demand for recognition represent moments for great powers to (re)assert their status in international system by using their influence in supporting or blocking the entry of nascent states into international society.

Normative contestation and international recognition

An important dynamic of the so-called transitional international order concerns the prospect of 'normative contestation' around the core norms and institutions which shape international behaviour. There is evidence that this contestation is relevant to evolving international recognition politics in a number of ways. In particular, it is interesting to consider if established 'liberal' powers are more likely to make decisions in favour of recognition following 'remedial' secession, for example where human rights abuse or the denial of democracy has been a factor in the attempt by a secessionist territory to gain independence and statehood. In contrast, in accordance with this theoretical scenario, it might be expected that the 'rising' powers, associated with more conservative notions of international order, are more likely to resist any evolution or widening of the norms regarding recognition, in the interests of territorial integrity and the norm of sovereignty. This question is posed against a historical backdrop. In the early 1990s, with the rise of the human rights discourse in global perspective, there was some hope that democratic legitimacy and justice-based norms would play a more prominent role in guiding international response to secession and recognition (Franck 1992; Murphy 1999).

Certainly, the contrasting discourse – if not necessarily the behaviour – of Western and BRICS states on international recognition seems to reflect the normative contestation around liberal and pluralist values introduced earlier. Brazil, Russia, India and China issued statements in relation to Kosovo – whose sovereign statehood none of them recognises – which underscore the importance of territorial integrity, international law, sovereignty, and the illegitimacy of unilateral secession without the consent of the 'parent' state (Embassy of the People's Republic of China in the UK 2008; Ministry of External Affairs of India 2008; People's Republic of China 2009; Russian Ministry of Foreign Affairs 2008). Most of them also emphasised the importance of legal norms for regional and international peace and security, and the 'very dangerous precedent for similar cases around the world' posed by Kosovo (Ambassador of India to Serbia 2008). None of them referred to or accepted any exceptions to these norms as a result of human rights or issues of democracy. As Brazil stated in relation to Kosovo, 'the principle of self-determination must not run counter to the principle of territorial integrity' (Brazilian Ambassador to ICJ 2009).

In contrast, the narrative of those – generally Western – states which led the promotion of Kosovo's independent statehood has been couched in unmistakably liberal terms. The US statement, following its recognition of Kosovo, referred to the background of 'brutal attacks

on the Kosovar Albanian population’, and praised the ‘democratic institutions’ that had emerged in Kosovo following NATO’s intervention (US Department of State 2001). It also highlighted Kosovo’s commitment to ‘embrace multi-ethnicity as a fundamental principle of good governance’. While the US observed that this is a ‘special case’ and indicated that ‘Kosovo cannot be seen as a precedent for any other situation in the world today’, the US justification clearly present a normative perspective that is distinct from that of the BRICS. The UK’s statements in support of Kosovo’s independent statehood were similarly framed with reference to Kosovo’s difficult recent history, the supervision of the international community, and the sensitivities of the region and the importance of minority rights within Kosovo – all of which reflects sympathy with the concept of remedial secession (FCO 2009). France also put its recognition of Kosovo into the context of the region’s conflicted past, and suggested that ‘Independence was achieved with respect for exemplary principles in relation to democracy, the rule of law, human rights and the rights of minorities, and without jeopardizing regional stability’ (Republic of France 2009).

On 8 October 2008 (in Resolution 63/3), the General Assembly asked the International Court of Justice to render an advisory opinion on the question ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’ The court’s advisory opinion, delivered on 22 July 2010, stated that ‘the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law’ (International Court of Justice 2010). This provided a further opportunity to test the discursive politics of great power rivalry, around a key case. The statements submitted by UN members in relation to this question give some support to the idea of normative contestation in relation to international recognition. Among these statements, countries in support of Kosovo’s independent statehood – of which Western states are well represented – were far more likely to underline the troubled history of the region, the abuse of human rights in Kosovo, and the importance of democracy in the region. Those opposed emphasised a strict interpretation of international law, territorial integrity, and the importance of (Serbia’s) sovereignty (International Court of Justice 2010). It is important not to extrapolate too much from the Kosovo case; the country’s supporters, in recognising its sovereignty, have clearly stated that they see the case as exceptional and not establishing any broader precedent. Indeed, aside from some rhetoric, international responses to new cases of state creation since then do not suggest that there is growing consensus in favour of the recognition of entities that may have democratic and justice-based grounds for statehood, when the independence of these entities would otherwise violate settled norms regarding state creation. Broad experience therefore demonstrates a conservative preference for stability over justice and democracy. Yet, divisions exist in terms of international recognition for Kosovo – led by Western supporters, with BRICS countries in opposition – and the manner in which the discourse used to support or deny the country’s statehood reflects a tension between a liberal and pluralist world view. In turn, this suggests normative contestation is linked to the changing international order.

Conclusion

This chapter has presented a number of links between the transitional international order and the evolving politics of international recognition. It has demonstrated that the renewed tensions and rivalries between established Western powers and some of the resurgent non-Western states – including some of the BRICS countries – have played a role in relation to

key cases, including Kosovo, South Ossetia, Abkhazia and Crimea. While this is, in many ways, a reflection of the historical continuities of great power politics, there is evidence that this is in part a reflection of the transitional international order of relative power balance changes. Powerful states have been willing to support unilateral declarations of sovereign independence, and others have justified their own support for contested territories by such declarations. At times, this has threatened a further fragmentation of the norms and rules relating to international recognition, and the possibility of an escalation of unilateral recognition for new, contested, states by great powers. In turn, it has aggravated sensitivities in the context of great power friction.

Simultaneously, some of the diplomatic discourse related to international recognition reflects the normative contestation that can be associated with the transitional international order. Liberal justifications for recognition – with reference to human rights and democracy – are in tension with more conservative principles which emphasise territorial integrity, respect for the sovereignty of existing states, and a strict interpretation of international law. From this latter perspective, recognition of new states where secession has occurred without the consent of the parent state is a violation of fundamental legal tenets of international order. Thus, to some extent, the discourse of international recognition debates *does* reflect normative contestation; Western democracies are more likely to at least make reference to liberal values in justifying recognition decisions, and key ‘rising’ powers such as China, India and Brazil provide a strict reading of international law around territorial integrity, with far less reference to ‘domestic’ issues.

However, the idea that international recognition is currently being shaped by normative contestation in the context of a transitional international order does not fit with some important empirical patterns. The politics of international recognition reflects a great deal of continuity, including the fundamental role of power politics and the driving force of great power preferences (Coggins 2014; Griffith 2016; Paquin 2010). There is also a general preference for stability which transcends post-Cold War great power rivalries. Russia, a key ‘resurgent’ state and a leading actor in non-Western groupings such as the BRICS and the Shanghai Cooperation Organisation, has not itself observed a conservative practice in relation to international recognition, as its support for South Ossetia, Abkhazia and Crimea demonstrates. Moreover, some liberal, Western states – such as Spain, Cyprus, Romania and Greece – are associated with a strict legal approach to international recognition, largely because of sensitivities about separatist political movements in their own countries and a desire to avoid any loosening of the norms governing the creation of new states. There are also numerous ‘deserving’ cases of entities aspiring to independent statehood according to liberal principles which are apparently ignored by Western states. To a high degree, therefore, states take decisions on the basis of their own interests, and thus the fragmented, ad hoc and political nature of international recognition continues as it has done in the past. The case of Palestine further supports this conclusion, where the division between those states which do and do not recognise Palestinian statehood does not reflect a neat division between Western and non-Western states. The BRICS countries have recognised Palestine, and the US, France and the UK have not, but there are other Western states which do so.

In addition, there has arguably not been an upheaval or transformation of international recognition practices or norms. Following Kosovo’s independence and recognition by a significant number of states, South Ossetia, Abkhazia and Crimea were recognised by Russia, but these latter three cases have received essentially no broader support for their change of status (including from allies of Russia). Except for a limited number of cases, international society remains essentially conservative in nature and reluctant to accept new states. Indeed, many states – whether ‘status quo’ or ‘resurgent’ – have separatist or potential

Table 9.1 State recognition and external relations: key 'Western' and BRICS states

	<i>Officially recognised</i>	<i>Not officially recognised</i>
Kosovo	France United Kingdom United States	Brazil China India Russia South Africa
Palestine	Brazil China India Russia South Africa	France United States United Kingdom ('non-member state status')
Abkhazia	Russia	Brazil China France South Africa United Kingdom United States
South Ossetia	Russia	Brazil China France South Africa United Kingdom United States
Nagorno-Karabakh		Brazil China France Russia South Africa United Kingdom United States
Transnistria		Brazil China France Russia South Africa United Kingdom United States
Crimea	Russia	Brazil China France South Africa United Kingdom United States

(Continued)

Table 9.1 (Cont.)

	<i>Officially recognised</i>	<i>Not officially recognised</i>
Turkish Republic of North Cyprus		Brazil China France Russia South Africa United Kingdom United States
Eritrea	United States	Brazil China France Russia South Africa United Kingdom
Western Sahara	South Africa	Brazil China France Russia United Kingdom United States
Somaliland		Brazil China France Russia South Africa United Kingdom United States
South Sudan	Brazil China France Russia South Africa United Kingdom United States	
Taiwan		Brazil China France Russia South Africa United Kingdom United States

separatist challenges, and they generally remain united in opposing a loosening of norms or practices of international recognition. Most of the cases presented in Table 9.1 have not changed in status in decades, and there are very few cases like Kosovo where the international community is so neatly divided in terms of recognition. New cases which have made political

claims for statehood – such as Catalonia and Iraqi Kurdistan – have found very little support internationally, in line with the conservative nature of international society.

In global perspective, however, it is still legitimate to question whether the influence and authority of the West is relatively declining in international recognition debates and decisions, a decade after it promoted – and helped to gather significant support for – Kosovo's independence. In future cases of contested recognition, in line with the changing international balance of power, the West may well be less able to hold sway compared to the immediate post-Cold War period. This may yet show how the changing international order may shape the politics of international recognition.

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PART II

Pathways to independent statehood

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10

PATHWAYS TO INDEPENDENCE AND RECOGNITION

James Summers

Introduction

A declaration of independence poses an immediate question for states. Do they accept this assertion of a new political community or reject it? If they accept the community they will extended recognition, an indication of their willingness to establish legal relations with this new political community as a state (Talmon 1998: 21–23). Conversely, they could adopt a specific position of rejection, non-recognition. This chapter will look at how international law creates three pathways to recognition or non-recognition. The first path is a fairly well established route facilitated by international law and, in particular, the right of self-determination. The second route is more uneven, where international law is purportedly neutral but progress on recognition is difficult. This applies outside the colonial context, where an independence movement cannot rely on a legal right of self-determination and must overcome the self-interested scepticism of states towards giving support for state fragmentation. The third pathway is a much tougher road where international law principles support non-recognition based on the inherent illegality of a new state-like entity.

Recognition has long been viewed as a discretionary political act. The essential characteristics of statehood – sovereignty, sovereign equality and independence – means that states have a freedom to choose how they relate to other states. Proposals for a duty of recognition, notably raised by Hersch Lauterpacht (1947: 32–33, 73–75), which could limit this freedom, have never gained traction (Dugard and Raič 2006: 97–98). Nonetheless, if recognition is ultimately discretionary, informed by political interests, and in at least in one case, Nauru, almost approached as a business (Barry 2009), it can also be determined by legal principles.¹ The significance of an act of recognition varies. It can provide evidence of statehood, though the significance of this can be emphasised or downplayed. Recognition has least value from the declaratory perspective, which holds that states exist as a matter of fact and law and that recognition is merely acknowledgement of this. This has attractions. It minimises the significance of any particular state or group of states extending recognition, protecting less powerful states. Latin American states, in particular, promoted declaratory recognition in Article 3 of the Montevideo Convention 1933² and the OAS Charter 1948 to prevent outside intervention based on non-recognition.³

However, downplaying recognition also minimises the role of legal principles that inform it in favour of the “facts” on the ground. This might appear to reduce the significance of international law, but actually the relationship is more complex. States upon independence inherit a framework of general international legal obligations under custom, general principles of law and possibly some treaties.⁴ The principles most likely to inform recognition are also conveniently established in general international law. Correspondingly, a declaratory position does not necessarily minimise their applicability. On the contrary, it holds that they apply regardless of whether states choose to extend recognition (Brierly 1963: 138–139; Talmon 2005: 102–105), separating international law from state discretion.

The constitutive position, by contrast, emphasises the value of recognition as an element in a state’s legal personality (Hillgruber 1998: 491–509; Grant 1999: 4–12; McWhinney 2007: 16; Vidmar 2011: 163–164). This enhances the importance of states’ discretion in statehood and by extension the legal principles that inform this, as they do not simply create obligations but determine a state’s existence. As such, it potentially shifts the emphasis from the “factual” basis of a state to its legality, as well as political expediency. The implications of this are not necessarily negative. Recognition may be used to accord the title of state to state-like entities, which have a right to statehood but lack the ability to effectively establish the necessary facts, owing to occupation or colonial rule (Vidmar 2012: 361–387).

The declaratory and constitutive approaches are not incompatible. The usual point of reference for addressing the criteria for statehood is Article 1 of the Montevideo Convention 1933. This regional American instrument provides at best a broad outline of what a state is – permanent population, defined territory, a government and a capacity to enter relations with other states. This last criterion, capacity to enter into relations with other states, shows how declaratory and constitutive approaches can be incorporated within the “facts” of statehood. If this “capacity” depends on recognition, then recognition is a factual basis for statehood. However, if “capacity” merely means “capability”, then recognition falls outside these facts. Nonetheless, as each of these four elements is open to interpretation, the line between a “factual” declaratory approach and a constitutive one collapses. Rights and obligations can inform the interpretation of how a government relates to a territory and population. A right to statehood might substitute a weakness of government control and effective control contrasted with an illegal basis for that control. If facts are informed by rights and prohibitions, then the difference between recognition and recognition of facts narrows.

A right to be recognised?

The first pathway is a positive one where international law actively supports or at least facilitates recognition. There is no specific duty to recognise states, but international instruments provide for realisation of the right to self-determination, which can lead to statehood. Article 1(3) of the Twin Human Rights Covenants 1966 proclaims that “States Parties ... including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination”. This highlights the responsibilities of states with colonial territories, but is not limited to them. The Human Rights Committee, which implements the Covenant on Civil and Political Rights, considered in General Comment 12 (1984) that Article 1(3) imposed: “specific obligations on States parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-

determination”.⁵ This is echoed in the Friendly Relations Declaration 1970, which provides that: “Every State has the duty to promote ... realization of the principle of equal rights and self-determination of peoples”.⁶ However, while self-determination can be realised through the establishment of an independent state, this falls short of a duty to recognise a state. The right of self-determination can be achieved in a variety of forms and statehood is only one. Even if a right to self-determination was narrowed to a right to independent statehood, states could still exercise their discretion by questioning whether a group is a “people” entitled to exercise the right. In fact, self-determination has only occasionally been linked to a duty to recognise states.⁷

The vague content of the right also means that realisation is difficult to pin down in terms of specific obligations. This can be seen in the ICJ in the *Wall in Occupied Palestinian Territory* Advisory Opinion (2004). The Court cited the Friendly Relations Declaration to support self-determination as *erga omnes*, establishing obligations for all states.⁸ The Court also elaborated on this obligation, which consisted of non-recognition and non-assistance to the illegal situation created by West Bank barrier, which severely impeded the exercise of Palestinian self-determination. However, a more positive obligation to assist was only vaguely expressed. States were to “see to it” that impediments to Palestinian self-determination were brought to an end, but this evidently gave considerable discretion to states on how they gave support.⁹ If a right of self-determination does not create a duty to recognise a state, it might still be useful in facilitating recognition, especially where a state-like entity falls short of a functional independent political community expected in the facts of statehood. A right of self-determination could substitute some of the deficiencies of an entity in meeting the statehood criteria or, at least, allow a more sympathetic reading of them. This trend can be seen in the post-war decolonisation process, which saw the most successful attempt to equate a right to self-determination with statehood, while simultaneously lowering expectations of what statehood entailed. Size, resources and developed institutions were downplayed. In the case of Guinea-Bissau the UN General Assembly recognised its independence from Portugal on 2 November 1973, despite its government lacking control of any major town in the territory.¹⁰

A contemporary example is Palestine, which claims to be a state despite its government, the Palestinian authority only governing isolated islands of territory in the West Bank and lacking control of its external borders (Watson 2000: 107–111). Nonetheless, despite this it has been admitted into UNESCO as a state, accorded “observer state” status in the UN General Assembly,¹¹ joined the International Criminal Court Statute and become party to other multilateral treaties only open to states. Nevertheless, it achieved this while explicitly falling short of the expected elements of a state. Palestinian president Mahmoud Abbas supported Palestine’s observer state status in the General Assembly by declaring that: “we have come to affirm the legitimacy of a State that must now achieve its independence”.¹² This is recognition of statehood as a tool to achieve effective statehood.

Nonetheless, the number of peoples entitled to claim an internationally recognised right of self-determination is limited. Non-self-governing territories (17 are listed by the UN)¹³ have been recognised to have a legal right to self-determination, as well as the Palestinians. However, even within this limited group there is controversy over the extent of such a right. The right to self-determination of Gibraltar and the Falkland Islands is contested (Fawcett 1967; Sanchez 1982–3) and, if either of those territories declared independence, states might not feel obliged to assist their right to self-determination, let alone recognise statehood. Western Sahara, a former Spanish territory occupied by Morocco, which has declared independence as the Sahrawi Arab Democratic Republic (SADR), has a recognised

right of self-determination. However, international recognition of the SADR has been limited. The SADR is a member state of the African Union, but not a member of the UN or even an observer state within the General Assembly. The positive right entailed by self-determination does not always have positive consequences for recognition.

Neutrality of international law on recognition

The second pathway is where international law is essentially neutral on the legality of a state-like entity, neither according it a right to independence nor precluding it. This is the case for states formed outside the colonial context, where there is no recognised right of self-determination entitling statehood. To underline this, the right of self-determination is normally paired in international instruments with the principle of the protection of the territorial integrity of states,¹⁴ with the intention to preclude any right to secede. As a consequence, the Canadian Supreme Court found in *Re Secession of Quebec* that:

[I]nternational law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.¹⁵

Some states would argue further that territorial integrity not only neutralises a *right* to exercise self-determination to establish an independent state but also prohibits such independence.¹⁶ Not every state, though, holds this position¹⁷ and it consequently suffers from a lack of consensus needed to be part of international custom.

Another ground for international law's supposed neutrality on secession is that the actors who might make a declaration of independence are not yet state actors. Obligations in international law, as opposed to rights, tend to be established between states. International law might be neutral simply because it is incapable of imposing obligations on non-state actors that prevent them from declaring independence.¹⁸ Nonetheless, this argument does not bypass the obligations for states in recognition. Respect for territorial integrity is an aspect of state sovereignty and an obligation that flows from this a duty of non-intervention in the internal affairs of states.¹⁹ Recognition of a region that splits from a state can be seen as support for that state's permanent dismemberment and interference in its internal affairs. For example, the EU Tagliavini Report in 2009 considered that recognition of Abkhazia and South Ossetia would constitute "unlawful interference in the sovereignty and territorial integrity of the affected country ... Georgia" (Council of the European Union 2009: I, 17).

Nonetheless, inter-state obligations to respect territorial integrity and non-intervention may not amount to a general duty of non-recognition of secessionist entities. States have a clear interest in not encouraging secession, but they also want to retain discretion in their recognition of new states, and may not want their options limited in all circumstances. This is reflected in practice, which shows that, while states have been generally unwilling to recognise new states formed from unilateral secession, there have been some exceptions. It is notable that the Court in *Re Quebec*, after emphasising that self-determination was exercised within a framework of territorial integrity, still appeared to support states' discretion in their recognition of a unilateral declaration of independence by Quebec.²⁰ Nonetheless, even if states are not prohibited as a matter of international law from recognising state-like entities formed from secession, independence movements still face a hostile political environment. This can be seen in the sharp contrast in the recognition of regions that separate with the agreement of a state's government and those that have done so unilaterally (Weller 2008: 70).

Consensual and unilateral secession

If a region separates with the mutual agreement of a state's government, there is no incentive for other states to resist the new state. International recognition in these circumstances is normally swift, sometimes within days. Singapore separated from the Malaysian Federation by agreement on 7 August 1965. It joined the United Nations a month and a half later on 21 September. Eritrea split from Ethiopia on 24 May 1993 following a UN-monitored plebiscite agreed with the government (Connell 1993; Clapham 1999: 84–99) and was admitted into the UN four days later. Similarly, South Sudan declared independence from Sudan on 9 July 2011 based on previous agreement with its government (Christopher 2011: 125–132; Medani 2011: 125–132) and gained UN membership five days later.

Unilateral secession, whereby part of a state declares its independence without the agreement of the state's government of that state, provides a clear contrast. The majority of entities that have made such declarations have either been completely unrecognised by the international community of states (they often recognise each other) or have been recognised by only a few. Katanga, which declared its independence from the Democratic Republic of Congo (Zaire) in 1960, failed to gain recognition from a single state (Buccheit 1978: 141–153; Heraclides 1991: 58–79). Biafra, which split from Nigeria in 1967, was recognised by only five (Ijalaye 1971: 553–554).²¹ Chechnya,²² Tamil Eelam (Stokke 2006: 1021–1040) and Anjouan and Moheli in the Comoros archipelago (Naldi 1998: 247–256) likewise failed to gain any international recognition. These secessions ultimately failed to maintain control of their territory, but other state-like actors which effectively control territory have not seen this authority translate into significant recognition. Somaliland (Carroll and Rajagopal 1993: 653–681), Transnistria and Nagorno-Karabakh have not been recognised by any state. Northern Cyprus has been recognised by one state (Turkey), and Abkhazia and South Ossetia by five.²³ South Sudan was quickly recognised by the international community with Sudan's consent but engaged for decades in an armed struggle to secede from 1962–1972 and 1983–2005 without international recognition. The declaration of independence in Catalonia on 27 October 2017 was likewise met with non-recognition (Saeed 2017).

There are two exceptions where states emerging from unilateral secession have gained either full recognition or at least substantial international recognition. The first was Bangladesh. Bangladesh was formerly East Pakistan or East Bengal, one of the two geographically separate “wings” of Pakistan, either side of India. Even though the majority of Pakistan's population lived in the East, the West dominated politically. Following a political crisis that led to brutal intervention by the Pakistan army, the East declared independence on 10 April 1971 as Bangladesh (International Commission of Jurists 1972; Sisson and Rose 1990). It gained no international recognition. The tide of the conflict in East Bengal later changed with India's intervention on 4 December and its recognition of Bangladesh two days later. The initial reaction from the UN to India's intervention was to call for a withdrawal that would have left Pakistan in control. However, Pakistan's capitulation and loss of control in the East on 16 December did change the climate towards recognition. From January 1972, in a little more than a month Bangladesh received recognition from a third of UN member states, including three P5 countries (Nanda 1972: 336). By November there was enough support among states to pass a UN General Assembly resolution that called for Bangladesh's early admission into the organisation. However, membership was blocked by Pakistan's ally China. Pakistan finally recognised Bangladesh in February 1974 and this act paved the way for its admission into the UN in September of that year.

Kosovo was an autonomous province of Serbia within the former Socialist Federal Republic of Yugoslavia (Malcolm 1998; Vickers 1998; Summers 2011), whose population was (77%) ethnic Albanian (Ramet 1992: 21). As an autonomous province of a republic, Kosovo, unlike the republics, was not entitled to recognition when the Yugoslav federation was determined to have been “dissolved” in 1992 (Radan 2002: 200). The territory was, however, placed under a UN administration (UNMIK) in 1999, following a conflict between Serbia and Albanian guerrillas, which drew in NATO and led to the widespread ethnic cleansing of the Albanian population (Weller 1999: 219–227; Judah 2008: 87). Despite its initial success in reconstruction and creating self-government, by 2004 UNMIK was considered to be losing viability.²⁴ A series of unsuccessful negotiations took place over a final status, which included a proposal by the UN secretary-general’s special envoy, Martti Ahtisaari, in 2007 for independence as the only option to avoid violence (UN Security Council 2007). This was opposed by Serbia, backed by Russia.

This impasse was broken by a unilateral declaration of independence in 2008 and managed independence, supported by Western states, most of whom extended recognition.²⁵ These states cited the unique nature of the situation in Kosovo, which allowed it to be distinguished from other separatist regions. Other states, though, were unconvinced, including NATO members with separatist or irredentist issues, such as Spain and Greece. Serbia, backed by Russia, refused to recognise Kosovo. It sought unsuccessfully to have Kosovo’s independence declaration declared contrary to international law in a 2010 ICJ advisory opinion.²⁶ Nonetheless, the ICJ’s opinion did not change the dynamic of recognition for Kosovo either. The pace of recognition had already slowed to a hesitant crawl.²⁷ Ten years later its statehood remains divisive, recognised by 116 of 193 UN members.²⁸ An attempt to follow Palestine into UNESCO in 2015 failed when it fell just short of the two-thirds of votes needed.²⁹ UN membership would be blocked by Russia and China. Yet, Serbia is under pressure to resolve its relations with Kosovo as part of its negotiations to join the EU, a key strategic goal, and this has led to increasing ties between the two.³⁰ The success of Bangladesh and partial success of Kosovo in gaining international recognition mark them as exceptions that prove a rule. Despite the supposed neutrality of international law, states are unlikely to extend recognition unless secession is achieved with consent. Nonetheless, there are two further issues that might bolster recognition – remedial independence and the *sui generis* argument.

Remedial independence

International law may be neutral on secession, but widespread oppression within a state has been seen as a possible factor that might lead to a shift towards a positive right. This idea of independence as a remedy is closely bound to a liberal concept of statehood as a political association established for the protection of the rights of their people. However, while this possibility is suggested in some non-binding instruments, most famously in the Declaration on Friendly Relations in Principle 5(7), a paragraph open to competing interpretations (Tomuschat 1993: 9–10; McCorquodale 1994: 879–880; Cassese 1995: 109–125; Vidmar 2013: 158–162), and some decisions,³¹ clear support is harder to find. The Canadian Supreme Court in *Re Secession of Quebec*, after raising remedial secession to underline the inclusive nature of the Canadian constitutional system, reflected that “it remains unclear whether this ... actually reflects an established international law standard”.³² The ICJ in Kosovo noted “a sharp difference of views” on the concept, which undermines its position as generally recognised custom.³³

Remedial arguments were raised by some states before the ICJ in the *Kosovo* opinion, though usually in tentative terms.³⁴ However, practice over Kosovo suggests that remedial considerations were secondary. The focus of a remedial claim is on the ethnic cleansing that took place in the province by Serbian forces in 1999 and left 1.3 million people (out of a population of 1.8 million) displaced,³⁵ though Kosovo Albanians emphasised a longer period of repression in the Yugoslav state (Rrecaj 2011: 109–124). Nonetheless, the international reaction was the Rambouillet Accords 1999, which provided for Kosovo's autonomy within the Federal Republic of Yugoslavia (FRY), and then the UNMIK administration in 1999, mandated to develop autonomy within the territorial integrity of the FRY.³⁶ The declaration of independence in 2008, while certainly made in a context of this experience of ethnic cleansing, was not a reaction to an immediate threat of violence (Müllerson 2009: 7; Oklopčić 2009: 688). Indeed, the circumstances of the declaration provided ammunition for opponents of independence. This included violence against Serb and Roma minorities within Kosovo (Goodwin 2007: 6). Also, within Serbia, the Milošević regime responsible for ethnic cleansing had been replaced by a democratic government, though questions remained over the effectiveness of the autonomy it offered Kosovo.³⁷ Lastly, the threat of violence supported Kosovo's independence, but it was a threat of violence against UN employees if their mandate ended with the return of the territory to Serbia.

Bangladesh likewise superficially appears a good support for remedial secession, but this is also undermined by the timeframe of events. The Pakistani military campaign in East Bengal that formed the context of Bangladesh's declaration of independence was exceptionally brutal. It is estimated that military action in the East from March until Indian intervention in December 1971 led to three million deaths and created almost ten million refugees (Kuper 1985: 48). India's intervention was crucial for the success of an independent Bangladesh (Heraclides 1991: 156–157). However, the immediate international response in UN General Assembly Resolution 2793, 7 December 1971, was to call on both sides to declare a ceasefire and withdraw to their own sides of the border. This would have left Pakistan in control of the East. Any assertion that this resolution was merely focused on the use of force is undermined by the states, who clearly understood that they were voting to frustrate Bangladeshi independence. Bangladesh did subsequently receive rapid international recognition, but it was only after Pakistan was defeated, with the unique geography of the two wings ensuring that it had no prospect of reasserting its control. A remedial right cannot be seen as the dominant consideration here. Overall, it is hard to make a case that remedial factors change the legal framework of recognition.

The sui generis argument

Another argument raised, in particular, to support recognition of Kosovo was that it was *sui generis*, a unique situation outside the normal legal framework (UN Security Council 2007: para. 15). This is less of a legal argument if international law is perceived to be neutral and does not prohibit secession as such. Rather, this is more of a political argument aimed at assuring states that the act of recognition can be isolated and not have destabilising consequences usually referred to as “Balkanisation” – an apt term in the case of Kosovo. Given the fear that one change of borders will inevitably lead to others, any argument that can distinguish a particular secession as limited to its own context is attractive. As a result, the argument is commonly made, which, in turn, undermines its currency. Claims of the special character of Bangladesh

were made at the time of its secession³⁸ and South Sudan was similarly described as a unique case that did not threaten Africa's borders.³⁹ Nonetheless, both *sui generis* and its converse 'the precedent' are political arguments which do not change the legal framework for recognition.

Legal restrictions on recognition

A third type of pathway is created where international law supports not recognition but non-recognition of a state-like entity. A duty of non-recognition could derive from two sources. The first is the principle of *ex injuria jus non oritur* (a wrongdoer cannot derive legal rights from an illegal situation).⁴⁰ This would mean that a state-like entity formed in violation of international law should not be recognised. The second is a peremptory (*jus cogens*) norm of international law, a norm with an elevated legal status. There is no agreed list of peremptory norms, rather some norms are widely accepted to have that status (prohibitions of genocide, torture, war crimes, crimes against humanity and illegal use of force), while others are more disputed (e.g. arbitrary deprivation of property rights).⁴¹ Article 40 of the International Law Commission's Articles on State Responsibility 2001 prohibits legal recognition of a situation created by a "serious"⁴² violation of a peremptory norm, and also rendering aid or assistance to maintain that situation. The creation of a state in violation of one of those norms might be considered serious because it gives a permanent effect to that violation.

There are two levels to a legal basis for non-recognition of secessionist state-like entities. The first, a general prohibition on the recognition of any form of unilateral secession based on territorial integrity and non-intervention cannot be seen as clearly established. The second, therefore, is an additional illegal act, which taints the secession process rendering the establishment of a new state-like entity contrary to international law entailing non-recognition. This position is supported by the ICJ in the *Kosovo* opinion, in which it referred to Security Council practice calling on states not to recognise declarations of independence by Southern Rhodesia, Northern Cyprus and Republika Srpska. The Court emphasised that this:

[S]temmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).⁴³

The first basis for a duty of non-recognition would be if a state-like entity was created in violation of the prohibition of the threat or use of force. This is clearly reflected in resolutions on non-recognition of Northern Cyprus⁴⁴ and Republika Srpska.⁴⁵ However, one inconsistency is that unlawful force might also apply to Bangladesh, which only secured independence with an Indian military action that arguably went beyond the parameters of proportionate self-defence. Second, states may be prohibited from recognising a secessionist entity built from the commission of international crimes – war crimes, crimes against humanity and genocide – or human rights abuses. UN Security Council Resolution 787 (1992) on the non-recognition of Srpska condemned ethnic cleansing by its forces.⁴⁶ The EU Council's Tagliavini Report 2009 specifically stated that Abkhazia should not be recognised as it did not "meet basic requirements regarding human and minority rights, especially because it does not guarantee a right of safe return to IDPs/refugees" (Independent International Fact-Finding Mission 2009: II, 135). Third, states may be prohibited from

recognising a secessionist entity that advances racial discrimination. Security Council Resolutions on Southern Rhodesia specifically called on states not to recognise the “illegal racist minority regime” in that country.⁴⁷ Fourth, a duty of non-recognition might flow from a denial of self-determination. This was most clearly expressed in the *Wall* opinion (2004).⁴⁸ It is also reflected in Security Council resolutions on Southern Rhodesia and Namibia.⁴⁹ A duty of non-recognition based on the denial of self-determination has also been affirmed by the Court of Justice of the European Union, in relation to Morocco’s annexation of Western Sahara.⁵⁰ However, these decisions relate to colonial territories and Palestine, which have a recognised right to self-determination. Outside the colonial context, an expression of the wishes of a people may be more a question of political legitimacy than legal rights. This may be seen in the Badinter Commission’s Opinion No. 4, in which it advised against recognition of Bosnia-Herzegovina until the will of its peoples to constitute a sovereign and independent state had been established.⁵¹ However, this was framed neither as an exercise of self-determination nor as a legal prerequisite for recognition.

Conclusion

This chapter has looked at three different legal pathways to recognition. The first was where a declaration of independence expresses an existing right to self-determination. This does not require states to recognise that entity, but can facilitate recognition if the government lacks complete or even substantial control of a territory. However, this situation is limited to a small group of territories and peoples who have a recognised right of self-determination. Second, independence may be declared outside the colonial context. International law is arguably neutral on recognition of such declarations. Territorial integrity and non-intervention do not form an absolute prohibition on recognition of unilateral secession. Nonetheless, such entities are still unlikely to gain recognition even without these limits. The most important determinant of recognition of secession is whether it is achieved with the agreement of the state concerned. If it does, recognition usually follows quickly. Aside from consent, there is little evidence that remedial factors have been decisive in shaping recognition and states have been capable of taking opposing views on the *sui generis*/precedent argument depending on their existing perceptions. Third, international law may prohibit recognition of secession and there are examples where UN Security Council or courts have established a duty of non-recognition, due to the illegality of a secession. This illegality is unlikely to come simply from a violation of territorial integrity, but from principles such as the prohibition on the threat or use of force, international crimes and serious human rights abuses, racial discrimination or the denial of self-determination if applicable.

Notes

- 1 Conference on Yugoslavia, Arbitration Commission, Opinion No. 10: “it [recognition] is nonetheless a discretionary act that other states may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law”. (1992) ILM 31: 1525–1526.
- 2 Article 3, Montevideo Convention on the Rights and Duties of States 1933:

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts ...

- 3 Article 13, Charter of the Organisation of American States 1948.
- 4 See comments by the Human Rights Committee on the continuing applicability of the International Covenant on Civil and Political Rights 1996, General Comment No. 26 (61), UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, para. 4.
- 5 Human Rights Committee, General Comment No. 12 (21), UN Doc. A/39/40, Annex VI, 142–143, 12 April 1984, para. 6.
- 6 Principle 5(2), Declaration on Principles of International Law concerning Friendly Relations, UNGA Res. 2625(XXV), UN Doc. A/RES/2625(XXV), 24 October 1970.
- 7 See Mr Prado Vellejo: “Federal Republic of Yugoslavia was violating the most basic right of peoples, namely, the right to self-determination, by refusing to recognize the legitimacy of the new States which formerly comprised Yugoslavia.” UN Doc. CCPR/C/SR.1202, 4 November 1992, para. 63. See also Turkey: “The recognition of Palestinian statehood is not an option but a moral, political, strategic and legal obligation for the international community.” UN Doc. A/67/PV.44, 29 November 2012, 11.
- 8 *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Rep. 199, para. 156.
- 9 Ibid. 200, para. 159.
- 10 UNGA Res. 3061(XXVIII), UN Doc. A/RES/3061(XXVIII), 2 November 1973.
- 11 UNGA Res. 67/19, UN Doc. A/RES/67/19, 29 November 2012.
- 12 See comments by Mahmoud Abbas to the General Assembly on Palestine’s observer state status: “We have come to affirm the legitimacy of a State that must now achieve its independence, namely, Palestine.” UN Doc. A/67/PV.44, 29 November 2012, 4.
- 13 “Non-Self-Governing Territories”, www.un.org/en/decolonization/nonselfgovterritories.shtml. Accessed 12 October 2018.
- 14 See, e.g., Principle 6, Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514(XV), UN Doc. A/RES/1514(XV), 14 December 1960; Principle 5(7), Declaration on Principles of International Law Concerning Friendly Relations, UNGA Res. 2625(XXV), UN Doc. A/RES/2625(XXV), 24 October 1970; Principle VIII, CSCE Helsinki Final Act 1975.
- 15 *Re Secession of Quebec*, 161 DLR 4th (1998) para. 122.
- 16 Written Statement of Argentina, 17 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [hereafter “Kosovo”] (Advisory Opinion), paras 75–82; Written Statement of Cyprus, 17 April 2009, paras 82–89; Written Statement of Iran, 17 April 2009, paras 3.1–3.6; Written Statement of Serbia, 15 April 2009, paras 431–491; Written Comments of Spain, 14 April 2009, paras 13–15; Oral Submission of Romania (Aurescu), CR 2009/32, 10 December 2009, paras 10–11.
- 17 See, e.g., Written Statement of the United States of America, 17 April 2009, *Kosovo* (Advisory Opinion), 69.
- 18 *Kosovo* (Advisory Opinion), [2010] ICJ Rep. 437, para. 80.
- 19 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), [1986] ICJ Rep. 106, para. 202.
- 20 “The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.” *Re Secession of Quebec*, 161 DLR 4th (1998) 449, para. 155.
- 21 Tanzania, Gabon, Ivory Coast, Zambia and Haiti.
- 22 See (1995) *US Department of State Dispatch* 6: 120–121; (1995) *British Yearbook of International Law* 66: 621.
- 23 Five states have recognised Abkhazia and South Ossetia: Russia, Nicaragua, Venezuela, Nauru and Syria.
- 24 Report on the Situation in Kosovo, UN Doc. S/2004/932, 17 November 2004, para. 14.
- 25 UN Doc. S/2008/211, 19 March 2008, para. 3.
- 26 UNGA Res. 63/3, UN Doc. A/RES/63/3, 8 October 2008.
- 27 UN Doc. S/PV.6025, 26 November 2008, 2.
- 28 A list can be found at the explicitly pro-statehood Kosovo Thanks You website. www.kosovothankyou.com/. Accessed 12 October 2018.
- 29 “Kosovo Fails in UNESCO Membership Bid” *The Guardian*, 9 November 2015, www.theguardian.com/world/2015/nov/09/kosovo-fails-in-unesco-membership-bid, visited 28 September 2018.

- 30 First Agreement of Principles Governing the Normalization of Relations 2013. See “A Breakthrough at Last” *The Economist*, 20 April 2013. www.economist.com/blogs/easternapproaches/2013/04/serbia-and-kosovo-0. Accessed 12 October 2018.
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- 35 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779, 12 July 1999, paras 8–9.
- 36 UNSC Res. 1244, UN Doc. S/RES/1244 10 June 1999.
- 37 European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia, CDL(2007)004, 19 March 2007, para. 87.
- 38 India: “Under the resolutions of the United Nations General Assembly there are certain criteria laid down concerning how and when an area can be regarded as non-self-governing. If we applied those criteria to East Bengal, and if we had a little more morality, we could declare East Pakistan a non-self-governing territory.” UN Doc. S/PV.1606, 4 December 1971, para. 185.
- 39 Solemn Declaration of the Assembly of the Union on Sudan 2011: “We acknowledge that Sudan represents an exceptional case, which, in no way, calls into question the sacrosanct principle of respect of borders inherited at the accession of African countries to independence.” AU Decl. 3(XVI) (2011).
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- 42 See Article 40(2), International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts 2001: “A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”
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11

DYNAMICS OF SECESSION AND STATE BIRTH

Ryan D. Griffiths

Introduction

Secession remains a prominent feature of world politics. Catalonia and Iraqi Kurdistan held controversial independence referenda in the closing months of 2017. Three years earlier, in September 2014, Scotland held a binding and state-sanctioned referendum that it narrowly lost. In 2019, Bougainville is scheduled to hold a referendum that may create the conditions for a successful split with Papua New Guinea. Meanwhile, there are more than 50 other contemporary secessionist movements that are striving to obtain independence via a referendum or otherwise. Such behavior does more than threaten to alter the world map; it creates conflict and risks violence as secessionists pursue the dream of sovereign statehood. Indeed, it is estimated that secessionist ambition has motivated roughly half of the civil wars since 1945, and is potentially the chief source of violence in the contemporary world (Fearon and Laitin 2003; Walter 2009; Sorens 2012; Griffiths 2016). How can we understand these dynamics, and what is the track record with respect to secession and state birth?

States and aspiring states

It is useful to begin by taking in the international system from a wide angle. Figure 11.1 shows the number of sovereign states and secessionist movements per year between 1816 and 2017. The upper line represents the annual number of states, with data pulled from the International System(s) Dataset project (Griffiths and Butcher 2013). The most arresting pattern to the number of states over time is the concavity. There were 135 states in 1816 and roughly that number for the next 45 years before a culling process began that reduced the set by more than 60%. The next half-century, from roughly 1860 to the eve of World War I, was the time of imperialism, state expansion, and the final enclosure of the international system (Lake and O'Mahony 2004; Butcher and Griffiths 2015; Griffiths 2016). Whereas previously the globe had consisted of loosely and/or unconnected political systems and unclaimed land, the entire land-mass of the Earth outside of Antarctica was legally integrated into one system by the first decade of the 20th century. The low point in this process of political aggregation was reached in 1912, when the international system was composed of only 51 states, an historical low point without

Figure 11.1 The number of sovereign states and secessionist movements (1816–2017)

precedent.¹ If the interwar period was one of instability with respect to the life and death of states, the post-1945 era has been dominated by state birth. There are now 195 states in the system, three times the number that existed at the end of World War II. This 70+ year process of state proliferation has been called the Age of Secession (Buchanan 1997; Griffiths 2016).

The trend line in the number of states is a function of what we might call the death rate and the birth rate. Much like a human population, states are born and states die. In the early 19th century these two rates were approximately equal, and there was a rough equilibrium at just over 130 states. That equilibrium was upset in the second half of the 1800s as the death rate exceeded the birth rate. The interwar period reached a new equilibrium, albeit one that began with a bump in state birth and ended with a surge in state death. Finally, the post-1945 period has been characterized by an asymmetry in the two rates. The rate of state death has gone down (Fazal 2007) just as the rate of state birth has increased (Griffiths 2016).

Let us define a secessionist movement as a “self-identified nation inside a sovereign state that seeks to separate and form a new [recognized] sovereign state” (Griffiths 2016: 205). This is a broad definition that includes modern democratized movements, cases of decolonization and dissolution, and instances of *de facto* statehood. Using the identification criteria from my 2016 book and updating the data through 2017,² I can showcase the number of movements per year since 1816 – shown in Figure 11.1 by the dashed line. On average, there have been 25 movements per year. However, unlike the trend in the number of states, the overall pattern is not concave but generally increasing. Secessionism was rare in the 19th century, though not completely absent.³ But it has been quite common in the post-1945 period, with an average of 52 movements per year. Indeed, as of 2017 there were 60 active secessionist movements in the world.

Secessionism represents a challenge to sovereign order. All of the active secessionist movements have communicated their desire to join the list of sovereign states, but most of them are unlikely to achieve their ends. Yet all of them are disruptive in one form or another, and some

of them are violent. To understand the relationship between states and those who aim to become recognized states, it is useful to break the problem into three component parts: the international recognition regime, the strategy of secession, and the response of states.

The international recognition regime

Since the mid-20th century the defining feature of becoming an internationally recognized sovereign state is obtaining a full seat in the United Nations General Assembly. That recognition bestows a legal identity, and it signals that the state is a member of the club. The UN membership process requires that the Security Council must approve applications before they are submitted to the General Assembly. Nine of the 15 members (60%) have to vote in the affirmative without any “no” votes from the five-permanent veto-holding members (the P5). An application that is approved by the Security Council is then subject to a vote in the General Assembly that has to secure at least a two-thirds majority. With sufficient support an applicant can then join the UN as a fully recognized sovereign state.⁴

The track record for this admissions process appears, at least on the surface, to be relatively harmonious. Crawford claims that only five states met with any objection between 1963 and 2005, and all were eventually admitted.⁵ But this seeming tranquillity is misleading because most of the action takes place earlier, and applications are only brought before the Security Council when confidence is high. Applicants are first screened by representatives of the UN Secretariat and Office of Legal Affairs, who are charged with determining whether the applicant counts as a state – a judgment that is made by reviewing the activities of the applicant and by consulting other states for their view. In practice, the applicants that are screened at this stage are usually considered too small and/or unviable. Importantly, there is an even earlier pre-application vetting process in which potential applicants dialogue with key actors to gauge how they would vote. A rejected application could be a blow for most aspiring nations, and it is for this reason that so many secessionist movements – from Catalonia to Iraqi Kurdistan – have not yet applied.

All of this begs the question: who counts? Put another way, what aspiring nations are eligible to become a state and how is that eligibility determined? The simple answer is that states decide; recognition rests in the hands of individual states. As Crawford (2007: 390) put it, “secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.” However, individual state decisions are influenced by a body of evolving norms, rules, and practices that determines which claimants can become independent states (Grant 1999; Fabry 2010; Coggins 2014). At the heart of this recognition regime is a basic tension between two prominent norms in international life. On one hand, there is the norm of territorial integrity, a sovereignty norm born out of the tumult of the world wars which treats borders as inviolable. On the other hand, there is the norm of self-determination, a liberal norm that now obliges the international community to assist nations in controlling their political destiny. One norm implies that borders should not be changed; the other implies that stateless nations should be able to change them. The resulting efforts to balance these competing demands can be summed up by the question: who counts for the fullest expression of self-determination, and who does not?

The answer to the question of “who counts” has been answered in various ways since 1945 (Grant 1999; Crawford 2007).⁶ The first and least controversial way to achieve independence is via state consent. This is where the central government removes the home state veto (Osterud 1997), permits the secession, and recognizes the aspiring nation (e.g., Montenegro). This is a relatively unproblematic path insofar as it requires little from third parties – the decision has

been worked out domestically – and it is an almost guaranteed ticket to independence.⁷ Ultimately, the state system is a conservative and status quo-biased environment where the recognition of states is concerned, and substantial weight in any particular case is given to the home state from which the aspiring nation wishes to secede. Thus, the response and disposition of the home state is arguably the single biggest factor in the drive for independence.

It is in the absence of state consent that other potential pathways to independence rise in importance. Importantly, all of these pathways can be seen as ways to generate sympathy and bring political and rhetorical pressure to bear on the home state to give its consent. Of these, the most concrete and transformative path was decolonization, the expansion and application of self-determination to colonized peoples.⁸ Of course, differentiating colonized peoples from noncolonized peoples was (and is) a fraught matter, and merely a more specific formulation of the general question: who counts? The answer in this case at least was to stress the colonial boundaries of overseas empires via the principle of *uti possidetis juris* (Jackson 1990; Ratner 1996; Bartos 1997; Shaw 1997; Crawford 2007; Fabry 2010; Sterio 2014). The reason was that administrative boundaries provided a clear solution where borders should be drawn. Unfortunately, the importance placed on colonial units via the principle of *uti possidetis* has created some ambiguity because many units were combined and divided over time and the status of some is debatable. For example, East Timor successfully argued for a colonial history that was different from the rest of Indonesia. Similarly, Somaliland has emphasized the fact that its colonial history was different from the rest of Somalia. Although West Papua has adopted the same strategy, it has so far failed to obtain international support. Essentially, the pathway of decolonization continues to shape the strategic playing field.

The third pathway is that of dissolution, a solution that was created during the Yugoslav and Soviet breakups. Like decolonization, this was in part a legal solution meant to create a conceptual distinction between cases of dissolution and other forms of secession. According to Bartos (1997: 75), “the [Badinter] Commission preferred to view the Yugoslavian situation as one of dissolution, refusing to set a precedent for the secession of national groups within existing States.” That is, the Badinter Arbitration Committee decided that Yugoslavia was in the process of dissolution. This removed the home state veto of the Yugoslav government, and nullified the obstacle that its territorial integrity would otherwise present to the emerging breakaway movements (Osterud 1997; Sterio 2013). Of course, the Yugoslav government saw things differently and fought a losing battle to retain its territory. This is highly political pathway and also one that is difficult to action from the perspective of the secessionist movement. After all, it requires that the larger state be perceived as dissolved by the international community. Until that happens, as the Somalilanders know, the central government of even a failed state like Somalia can continue to veto your independence bid.

The remaining pathways to independence are even more controversial in form, and although they lack the full acceptance of the international community, they do provide rhetorical and tactical guidelines for secessionists. Of these the most common is arguably the notion that there exists a remedial right to independence – that is, the right to secession as a remedy to human rights abuse at the hands of the state. Although this right has been advanced mostly by political philosophers (Norman 1998; Buchanan 2003), there is some reference to it in international law, however oblique.⁹ Another proto-pathway focuses on earned sovereignty: the notion that good governance and democratic values established standards that warranted status as a sovereign state – “standards before status” (Berg 2009; Caspersen 2015: 395–397). To some extent, this perspective resurrected the concept of *de facto* statehood that

was stressed in the 19th century (Fabry 2010). Another argument and potential pathway focuses on the right of an identifiable nation to choose its political fate via a democratic process. Known as choice theory or primary rights theory (Beran 1998; Pavkovic and Radan 2007), the argument has some resonance in democratic societies. The international recognition regime creates a kind of strategic playing field. To be sure, the rules are not as clear and codified as in soccer or chess, but they do shape the behavior of states and secessionist alike. The resulting set of norms, rules, and practices evolves as the international system evolves. It is set against this background that the dynamics of secession play out.

The strategy of secession

The strictures of the international recognition regime create a striking consistency in secessionist strategy. To a large extent, all secessionist movements employ the same basic strategy. That is, to gain recognition a movement must either: (i) convince their home state to permit independence or, (ii) convince the international community to either apply pressure on the central government or circumvent its wishes entirely by recognizing the aspiring nation. The first approach is where the movement removes the home state veto, the single biggest obstacle to obtaining independence (Osterud 1997). The second approach takes the form of the end run, going around the home state to bring the international community into the game. Although most movements use both approaches in tandem, the attractiveness and utility of the end run depends on the position of the home state; where the home state is willing to negotiate and, indeed, even permit an independence referendum, the end run becomes unnecessary; where the home state is uncompromising and potentially willing to suppress the secessionists, the end run rises in importance.

Although all secessionist movements use the same basic strategy, their tactical choices vary. Here, we can differentiate tactics of compellence from tactics of normative appeal. According to Schelling (1966: 71–73), compellence is a form of coercion that depends on the credible promise that punishment will follow if the target does not comply. Secessionist movements typically aim to compel the central government and/or international community to recognize them as an independent sovereign state. To bring about the desired change, the movement may engage in a set of tactics ranging from the use of outright violence to electoral capture to nonviolent forms of civil resistance that put pressure on the target to comply. The use of suicide bombers by the Tamil Tigers was an act that aimed to influence Sri Lankan state policy. The partial capture of the Catalan Parliament was viewed as a means to force the Spanish state to negotiate. The self-immolation of Tibetan monks is partly a form of protest that is designed to put pressure on the Chinese state.

The second type of tactic used by secessionists is to make a normative appeal to the population of the home state and the international community. Here, secessionists can pick from the menu of normative arguments that are resonant in international life. The Kanak separatists of New Caledonia are keen to remind the world that they are a colonized people. Although the Bougainvilleans failed to frame their cause as one of decolonization, they did garner substantial international attention and support by showcasing human rights abuse at the hands of Papua New Guinea. Similarly, the bloody conflicts in Kosovo and Bangladesh were instrumental in raising international support that paved the way for independence. The Catalans have repeatedly demanded that the Spanish state give them a referendum on independence, as a democratic principle, as the UK did with Scotland. Interestingly, nearly all secessionist movements engage in forms of showmanship and

paradiplomacy to portray themselves as viable and functional states (Bob 2005; Huang 2016; Coggins 2017). This is most evident in the case of *de facto* states like Somaliland and Nagorno-Karabakh, which try to show that standards have been reached in the hope of one day achieving the status of independence.

Tactics of compellence are analytically distinct from tactics of normative appeal. The difference is that normative appeal is aimed at preferences, while deployment is aimed at costs. The appeal to norms is designed to win the hearts and minds of target populations, bring them into the game in some cases, and make them more amenable to the secessionist cause. In contrast, compellence tactics are more directly confrontational; it takes preferences as a given and increases or decreases the costs of choosing particular actions. Tactics of compellence and normative appeal can be used in tandem and often complement one another. The Bougainvillean secessionists fought a guerrilla war against the Papua New Guinea state at the same time their Sydney-based diplomatic representative, Moses Havini, worked to raise awareness internationally of the costs of the conflict.

These tactical choices are determined by the context in which any given secessionist movement operates. Where compellence is concerned, a key factor is the institutional structure of the state. Both the Scottish National Party and the Catalan *independentistas* have harnessed the governmental apparatus to push their agenda. In doing so, they have increased tension with the central government in the hope that it would negotiate. Other movements from the West Papuans to the Karen have chosen instead to use violence and/or forms of nonviolent civil resistance (Griffiths and Wasser 2019). Of course, the menu of options varies for each movement because some lack the necessary democratic institutions and are forced to use other means. Some, like the Polisario Front, are forced to make the hard choice between violent and nonviolent extra-institutional means.

The importance of context also holds for normative appeals. As the Kanaks of New Caledonia know, getting on the UN List of Non-Self-Governing Territories was a victory because their struggle was then placed under the banner of decolonization, a development that subsequently paved the way for a referendum on independence. Although Catalan and Scottish radicals may think of themselves as colonized peoples, their leadership knows that such claims do not cohere with the way in which decolonization is currently understood. For groups that were once on the UN List, or whose history involved a European colonizer, pitching the decolonization argument is more sensible. Likewise, groups locked in a violent conflict with the state are much more likely to focus on human rights, just as secessionists in advanced democracies will be keen to remind all parties that they should have a right to choose their political fate. Tactical choices are shaped by context.

Critics may question the wisdom of secessionist strategy and tactics by pointing out that the odds are low that any one group will achieve sovereign independence. However, such criticism misses the point because groups are clearly willing to take their chances, whatever the odds, and the resulting actions have very real consequences for international politics. Still, the odds do not beggar belief. Putting aside the states born from decolonization, I calculate that nearly one in five secessionist movements have achieved independence in the post-1945 period.¹⁰ The chances are not great, but clearly good enough for some groups.

The response of states

The final component in these dynamics is the manner in which states respond. Sovereign states are the primary actors in international politics, the constituent members of the United Nations, and, effectively, the gatekeepers into the club. The response of the home state to

a secessionist bid is second to none in importance. To understand how states respond, it is useful to decompose the issue into the motivations of states and the tools they use. There is a kind of received wisdom that states are always dead against secession. Huntington said that “the bias against political divorce, that is secession, is just about as strong as the 19th-century bias against marital divorce” (Bahcheli, Bartmann, and Srebrnik 2004). With similar color, Hechter (1992: 277) wrote that if “there is one constant in history apart from the universality of death and taxes, it is the reluctance of states to part with territory” But this is not completely true because states do permit referenda (e.g., Scotland) and peaceful secession does occur (e.g., Montenegro). The processes of decolonization and dissolution transformed the international system and are two of the biggest reasons for the threefold increase in the number of states since 1945. But these events were merely secession by another name. Collectively, they illustrate that states and the international community are prepared, and sometimes even motivated, to permit secession under certain circumstances.

What motivates states to say no, and how to these motives vary? States may deny secessionist demands because of the strategic and/or economic value of the territory. For China, there is considerably strategic value in keeping hold of the Tibetan plateau. And, for Spain, the loss of Catalonia would hurt the economy. Furthermore, states may resist the exit of a region that carries symbolic value and is integral to the national myth, as Kosovo is viewed in relation to Serbian identity. These are all regularly given explanations for why states fight to deny secession and retain territory. However, it is only true part of the time, for states often fight long and costly wars to retain low-value territories, as the Russian government has with Chechnya, or permitted the independence of valuable regions, as the Czech government did with Slovakia, and as the British government was prepared to do with Scotland.

I have argued elsewhere that the issue of precedent-setting is a key factor in how states respond (Griffiths 2016). It explains why states will fight to retain a low-value territory and then turn around and permit the independence of a high-value territory. States permit secession if the loss of the territory does not threaten the core (Toft 2002; Walter 2009; Griffiths 2015, 2016). The precedent-setting problem is most salient when all of the potential secessionist regions are seen as like types – leading a given group to perceive that the permission for another group to secede can be extended to them. Apart from a blanket denial, there is only one way out of this problem for fissiparous states with many potential internal movements: to say that this nation is classified in a different way, that they have a special administrative status, that they alone can secede because of a conceptual distinction. The more salient that distinction in the eyes of the relevant parties, the more likely secession becomes. Although such distinctions nearly always coincide with administrative lines and categories, they can be bolstered through long conflicts that gradually create the impression that this region is different. Collectively, the precedent-setting problem combines with economic, security, and national-identity considerations to structure the response of states.

How states respond – i.e., the tools they use – brings us into the domain of strategy and tactics. Here, we can see that state behavior is in some ways the mirror image of secessionist behavior. Strategically, states need to thwart attempts at compellence and counter the related normative appeals. But, tactically, the means for achieving these ends vary in accordance with the setting. Strong states in less developed and/or democratic settings may resort to oppression. Indonesia has made it illegal to fly the independence flag (the Morning Star) in West Papua, and gatherings for independence purposes are routinely broken up, sometimes violently. Moreover, Indonesia has attempted to control information coming out of West Papua, and hide the issue from international attention. Although Papua New Guinea tried to quarantine the Bougainvillean crisis during the 1990s, it ultimately failed to prevent the

international media from learning about the human rights abuses that were occurring on the island. In some settings, violence and oppression are on the menu of options for states.

In other settings, the contest gives way to outright civil war. Although home states almost always have a military advantage and quite often win, as Nigeria did with Biafra or Sri Lanka did with Tamil Eelam in 2009, government victory is not a foregone conclusion. Bangladesh was able to win game-changing support from India, altering the course of the secessionist struggle. Bougainville was able to fight Papua New Guinea to a hurting stalemate, paving the way for a peace agreement. And, had it not been for a couple of close-run battles, the Confederate States of America might have achieved the same outcome.

In more democratized states the contest often takes a more institutionalized form. Once a referendum is on the table, the state and its supporters need to win the hearts and minds of the electorate, either by casting doubt on the potential functionality of the would-be state should it become independence, or by appealing to a shared sense of nationhood. In May 2018, French president Macron visited New Caledonia and told the population that it would be great sorrow to lose a part of France. In other cases where a referendum has not been given, such as Catalonia, the state has stood behind constitutional rulings and challenged the very legitimacy of a secession. Contests such as these can be difficult and hard-fought because there is no blueprint, let alone a legal guide, for how regions are supposed to formally separate from states.

Finally, states typically fight a diplomatic battle to prevent other states from even partially recognizing their breakaway territory. The Republic of Cyprus has gone to great lengths to make Northern Cyprus into a pariah. France tried (but failed in the end) to block New Caledonia from being placed back on the UN List of Non-Self-Governing Territories, because it knew that getting on the list would strengthen the Kanak cause. Somalia has the support of the African Union with respect to the secessionist aspirations of Somaliland, and, as a result, appears to be winning the diplomatic contest. In sum, stopping the end run is a key element in counter-secession strategy.

Conclusion

All of the Earth's landmass is part of the state system (notwithstanding the special status of Antarctica). Therefore, any new state constitutes a subtraction in territory from at least one existing state. The international recognition regime is a collective attempt to regulate that process, one that is mindful of competing normative demands but that is quite vulnerable to state interests. The result is a strategic playing field that changes over time as the international system evolves. States and aspiring states are players on that field. In general, the strategy for each side is clear, but the tactics vary depending on the setting. These are the dynamics of secession and state birth.

Notes

- 1 This claim should be qualified. Although there was certainly a higher number of state-like polities around the world in the preceding centuries, there is some point far enough back in human history where the number would be fewer than 51. That point is unknown and difficult to determine without the relevant data and ability to define and compare political systems over time and space. See Butcher and Griffiths (2017) for a discussion on this topic.
- 2 To count, the movement must last at least one week, include at least 100 people, lay claim to a territory not smaller than 100 square kilometers, possess a flag, declare independence, and claim territory that is contiguous with the larger state (Griffiths 2016: 205).

- 3 One could argue that the relative sparsity of secessionist movements in the 19th century is a function of how we conceive of secession. Perhaps breakaway groups in the 1800s used different language and frames to communicate their intentions and therefore do not show up in the data. This is possible, especially in regions that were less connected to the expanding international system. Still, as Armitage (2007) and Fabry (2010) recount, the language of self-determination and independence had been disseminating throughout the world since at least the American Revolution.
- 4 Although joining the UN as a full member is widely regarded as the hallmark of sovereign recognition, some applicants are prepared to settle for less and may even endure with a semirecognized status (e.g., Kosovo, Taiwan).
- 5 The United Arab Emirates was approved in 1971 with only one dissent (South Yemen). Belize was approved in 1981 even though Guatemala dissented. Oman was approved in 1971 with opposition from South Yemen, Cuba, and Saudi Arabia. Kuwait was initially vetoed by the Soviet Union in 1961 and had to wait two years to gain admission. Likewise, Bangladesh was initially vetoed by China in 1972, and had wait until 1974 for full admission. (Crawford 2007: 180–181).
- 6 Earlier periods answered the question of “who counts” differently. For a discussion on this topic see Fabry (2010) and Griffiths (2017).
- 7 It is quite rare for the international community to gainsay the recognition of a breakaway region by its central government. One of the most commonly given examples is the refusal of third-party states to recognize the independence of the Bantustans out of a concern that South Africa was merely creating client states and perpetuating a form of apartheid (Crawford 2007: 342).
- 8 Although the right of a people to self-determination was instantiated in the UN Charter, it was unclear what “people” counted. That changed with the passing of two UN resolutions in 1960 and two UN covenants in 1966, which collectively confirmed the full right of self-determination for colonized peoples (Sterio 2013: 11).
- 9 The 1970 Declaration on Principles of International Law Concerning Friendly Relations contains a savings clause specifying that self-determination should not subordinate the territorial integrity of a “government representing the whole people belonging to the territory without distinction as to race, creed or colour” (Sterio 2013: 20). Similar language was used at the 1993 United Nations World Conference on Human Rights, and in the 1998 Canadian Supreme Court case on Quebec secession (Crawford 2007: 118–119).
- 10 Using the data from Griffiths and Wasser (2019), 24 of 136 secessionist movements won independence.

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12

REFERENDUMS ON INDEPENDENCE AND SECESSION

Matt Qvortrup

Introduction

This chapter focuses on independence referendums and the factors conducive to recognising and winning them. Its key themes and debates are on issues of legitimacy, self-determination, and the idea of “popular” authority realised through these votes. Aligned to this are also issues of power politics, as referendums are never neutral and almost invariably rhetorical tools invoked as one of many means to achieving a particular goal. Preceded by a review of the history and theory of referendums on independence from Hugo Grotius to now, the chapter argues that independence referendums are most likely to be implemented when they are in the interests of the three Western powers on the UN Security Council. While there is a statistically significant correlation between the support for independence (the yes vote) and international recognition, this is much lower than the 100 per cent association between support of the three permanent Western powers on the Security Council and international recognition. Countries may cite legal, democratic and philosophical principles but the statistical and historical facts suggest these are of secondary importance when it comes to recognising states after independence referendums.

Referendums on independence must always be seen in the context of other developments. Kosovo is a case in point. In July 1990, the local parliament declared the seventh republic of the Yugoslav Federation. The government in Belgrade, headed by Slobodan Milošević, reacted immediately and rescinded its previous autonomy. The Kosovars responded by organising a referendum on independence. The following year, 99 per cent voted for independence. The legal basis for the referendum is debatable, but the vote sent a strong signal to the international community, which indirectly led to international recognition of Kosovo in the following decade, even if not all countries recognised the new state (Newman and Visoka 2018).

The Kosovan case was not unique. Almost 100 years earlier, relations between Norway and Sweden had come to a head. Norway was reluctant to pay roughly half of the costs of the joint consulates, especially as most of these were in countries Norway did not trade with. The Norwegian Stortinget passed a unanimous resolution on establishing separate Norwegian consulates. However, Swedish King Oscar II refused to sign the law. The Swedish government decided to call the Norwegians’ bluff, and challenged them to hold a referendum.

The Norwegian prime minister, Christian Michelsen, a political novice and former shipping magnate from Bergen, took up the challenge (Hegge 2010). On 13 August 1905, 99 per cent of Norwegian voters voted for independence. After a half-hearted attempt to seek reconciliation at the International Tribunal in The Hague, Stockholm and Oslo entered into negotiations in the Swedish border town of Karlstad on 31 August 1905. On 16 October, after two months of negotiations, the Swedish Riksdag approved a government resolution to annul the Act of Union (Wambaugh 1920: 168).

The context and development of independence referendums

Before looking at the factors determining the fate of independence referendums, it is necessary to distinguish three types of referendums (Swedberg 2018). The first is ad hoc referendums that seek to solve a perceived political issue through a democratic deliberation process. An example of an ad hoc referendum is British prime minister David Cameron's decision to hold a referendum on UK membership of the European Union 2016. The second type of referendum is initiatives, which entails votes initiated by a specified number of electors on (i) already-enacted legislation (as in Switzerland) or (ii) on new laws (as in Hungary). The third and final type of referendum is constitutional referendums, which entail public deliberation "on the approval of the constitution, on its revision, and on sovereignty issues (like the foundation of a new state)" (Morel 2012: 504). It is important to stress that these are ideal types and that there might be borderline cases.

While there has been a considerable debate on independence referendums and scholarly writings about them, only a small number of them have actually been held (Laponce 2010; Leduc 2003; Qvortrup 2014). Thus, out of the 1,200 nationwide referendums, only 62 (or 6 per cent) have pertained to independence, of which only three (or 3 per cent) have returned a "no" vote (Quebec in, respectively, 1980 and 1995 and in Scotland in 2014) – though other referendums have failed because they did not satisfy super-majority requirements (e.g. in Nevis in 1998 and in several referendums in Palau in the 1980s). Historically, the idea and the doctrine of independence referendums can be traced back to the beginning of the 17th century. No less a figure than Hugo Grotius (1583–1645) observed in *The Law of War and Peace* that, "in the alienation of a part of sovereignty, it is required that the part which is alienated consent to the act" (Grotius 1853: 108). Samuel Pufendorf (1632–1694), the other great theorist of international law, was even more explicit when he stressed that, "in the alienation of a part of the kingdom, there is required not only the consent of the people which continues to be with the old king, but the consent of that part too, especially, whose alienation is at stake" (Pufendorf quoted in Phillipson 1912: 234). And, the third of the great legal theorists of sovereignty, Emer de Vattel (1714–1767), roughly 100 years later, held that such fundamental changes had to be supported by the people "by a majority of votes" (Vattel 2009: 118).

At the time of the French Revolution it was acknowledged, at least at the theoretical level, that the people had a right of veto over territorial changes. Hence, it was not surprising that the Constituent Assembly in Paris passed a decree renouncing conquest and declaring that henceforth "the French nation renounces any *war of conquest*" (Duvergier 1824: 191, author's translation). In practice, however, the French were reluctant to put their subsequent conquests to a vote for understandable reasons. In 1802, the French organised a constitutional referendum in Switzerland. A majority voted "no". This unexpected outcome, perhaps, explains why the French were subsequently reluctant to organise sovereignty referendums in conquered territories (Rappard 1912). None of these earlier referendums were free or fair, and the votes were not secret. One can, therefore, question if they are relevant for the purposes of this chapter.

The first referendums on independence, in the form we know today, were held in the 1860s, when the US states of Arkansas, Tennessee and Virginia held referendums on independence following the election of Abraham Lincoln to the US presidency. All the referendums were won but no country recognised the results (Mattern 1921). The result of the referendum in Virginia is particularly noteworthy. Before the vote, representatives from counties in Western Virginia declared that, in the event of a “yes” vote for independence, they would establish a new state and that the constitution of this new state would be approved by voters in a referendum (Mattern 1921: 118). Virginia as a whole voted for secession: 21,896 were in favour; 16,646 were against. However, in the western counties, 8,375 out of the 9,758 votes cast were against secession (Mattern 1920: 120). The western counties sent delegates to a special convention, which declared the referendum in Virginia “illegal, inoperative, null, void and without force and effect” (Cited in Mattern 1920: 123). They then “passed an ordinance providing for the formation of a new state out of the portion of the territory of this state [Virginia]. This ordinance was to be and was submitted to a plebiscite” (Mattern 1920: 123). In total, 18,000 voted for, and 781 against, a new state (cited in Mattern, *ibid*). After the American Civil War, the US Supreme Court established in *Texas v White* that unilateral declarations of independence are unconstitutional, a case that was most recently used by the Alaskan Supreme Court in 2006 in *Kohlhaas v Alaska* to ban a constitutional initiative for independence for the state.

After the American secession votes there was gap of a few decades before the aforementioned Norwegian referendum occurred. Then a hiatus occurred again until the mid-1930s, when the number of independence referendums began to increase with the unrecognised, yet successful, independence referendum in Western Australia in 1933 – where despite the fact that 68 per cent voted in favour it was ignored as the secessionist party lost the state election on the same day (Qvortrup 2014: 29) – and the vote for independence for the Philippines in 1935. Especially after World War II, the referendum began to be increasingly used to show popular approval for decolonisation, though not all countries held plebiscites before they broke with their erstwhile colonial overlords (see Figure 12.1). After a drop in the 1970s, there was an explosion of independence votes in the years immediately following the fall of the Berlin Wall and the collapse of Soviet Communism.

Figure 12.1 Referendums on independence (1860–2017)

Based on Qvortrup (2014, 2017).

Note: This figure excludes the four multi-option referendums in Puerto Rico (1968, 1993, 1998 and 2012), which formally included “independence” as one of the options. However, the table includes the two-round multi-option referendum in Newfoundland in 1948 as independence was one of the choices in the run-off. The independence options lost to “statehood” and the former British territory became a Canadian province. (See Qvortrup 2014: 69)

The legality of referendums and state recognition

Not all independence referendums are comparable. Different historical and legal circumstances play a role. Further subdividing the independence referendums, we can distinguish between three forms, namely: post-colonial (e.g. Philippines 1935); by agreement (Montenegro and Bougainville); and unilateral (Catalonia, Quebec and Estonia) (see Şen 2017: 213). Despite their significance, not all of these different types of independence referendum have been equally conducive to the establishment of a new independent state. As Figure 12.2 shows, all the referendums in post-colonial territories (such as the Philippines in 1935, Micronesia 1983 and most recently East Timor in 1999) have been recognised. The same is true for referendums held following an agreement, such as in the cases of the Montenegro referendum in 2006 and the referendum in South Sudan in 2011. Indeed, in the Montenegrin case, President George Bush immediately contacted his counterpart, Filip Vujanovic, congratulated him on “Montenegro’s referendum on independence”, and proposed that “our two countries establish diplomatic relations” (Bush 2006).

It seems that the international community, which oversees these two types of referendums, have been keen to ensure that their endeavours have not gone to waste, though it should be noted that some international agreement on referendums have not resulted in actual referendums, such as the agreements on referendums to decide the future of Kashmir and Western Sahara. These two latter cases deserve to be mentioned even though – or perhaps because – no referendum has taken place in either of the jurisdictions. Thus, despite being condemned by the UN Security Council for its illegal annexation of Western Sahara, Morocco has delayed holding a referendum on the future status of the annexed area in flagrant contravention of international law owing to uncertainties over the electorate. Similar delaying tactics have been deployed by India over the disputed territory of Kashmir. The UN Security Council called for a referendum in Resolution 47, which stated that “A plebiscite will be held when it shall be found by the Commission that the cease-fire and truce arrangements set forth in Parts I and II of the Commission’s resolution of 13 August 1948”. That was 70 years ago, and a referendum is yet to be held.

However, when referendums are held with the consent of the parent state, the outcome is accepted by the international community, as was the case with Sweden and Norway in 1905

Figure 12.2 Types of referendum and international recognition
Based on Şen (2017) and Qvortrup (2017)

and Serbia and Montenegro in 2006. Indeed, even when the result of the referendum was not legally binding (owing to the doctrine of parliamentary sovereignty), the referendum outcomes have been ratified by parliaments. Thus, the parliament of Indonesia – after considerable pressure from the international community – recognised the outcome of the 1999 East Timorese independence referendum (Hohe 2002). The situation is markedly different for unilateral independence referendums, which constitutes the majority of the 42 independence referendums held since 1980, with 36, or 85 per cent, belonging to this category. Only in one of 12 cases was the referendum followed by international recognition of the new state. Why is it that some referendums – even unilateral ones – result in the establishment of a new state (such as in the case of Bosnia, Estonia and Ukraine) but not in other cases such as in Catalonia, Tatarstan and Somaliland? To answer this, we need to look at the legal aspects pertaining to what – misleadingly – is called the “right to self-determination” (Dobelle 1996).

Legal philosophers may disagree at the theoretical level on whether the law is the way to act or it should be pursued via the parliament, whether legal precedents are interpreted by the courts, or whether there is a higher legal principle, or natural law, that overrides “black-letter law”. Proponents of the latter view – such as Thomas Aquinas (1224–1274), but the doctrine can be traced back to Sophocles’ *Antigone* in the 5th century BC – hold that statutes and precedents at odds with natural law must give way. That is, “a legal norm fails to be valid if it goes against the human reason, regardless of the fact that it has been adopted by the state” (Thomas Aquinas, quoted in Şen 2015: 59). Whatever the philosophical merits of this view, courts and governments do not tend to be persuaded by legal theory or jurisprudence. Legal theorist Neil MacCormick, in the case of the United Kingdom, believed the question “Is there a constitutional path to Scottish independence?” could be answered affirmatively (MacCormick 2000). This is, however, very much a minority view among practising lawyers. Thus, while one may philosophically disagree with the ethical and moral tenets of legal positivism, this doctrine holds sway in practical politics. Hence, the following is based on a reading of the black-letter law pertaining to independence referendums.

The black-letter law of the “right” to self-determination referendums is, in a sense, very simple. In the words of James Crawford, “there is no unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory” (Crawford 2006: 417). Those who espouse a similar legal positivist approach will further stress that this is consistent with the jurisprudence of international courts. Thus, in *obiter dicta* in the *Kosovo* case, Judge Yusuf opined:

A radically or ethnically distinct group within a state, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral self-determination simply because it wishes to create its own separate state.

(Re Kosovo, 2010: 1410)

This view regarding the legality of independence referendums is nearly identical to the doctrine followed by domestic courts. In the Canadian case of *Bertrand v. Québec* (1995), it was held *per* Justice Robert Lessage that a referendum on a unilateral declaration would be “manifestly illegal”. This is still the legal position notwithstanding the reasoning in the much-cited (and often misunderstood) *Re Quebec*. Thus, the general rule is that referendums have to be held in accordance with existing constitutions (such a provision exists in Art. 39(3) of the Ethiopian constitution and was used when Eritrea seceded in 1993). Few other states provide for this possibility, the exceptions being Art. 74 of the Constitution of Uzbekistan, Art. 4 of the Constitution of Liechtenstein and, previously, Art. 60 of the Constitution of Serbia-Montenegro.

Another legal avenue to secession is after an agreement between the area that seeks secession and the larger state of which it is part (as occurred in the very different cases of East Timor in 1999, South Sudan in 2011, Scotland in 2014, New Caledonia in 2018 and a fortiori Bougainville in 2019) (Radan 2012: 14). Following this logic, it would seem that the referendums in Catalonia and Kurdistan, to take two recent examples, were both illegal and unconstitutional. Based on this reasoning the Soviet leader Mikhail Gorbachev was well within his right to claim that the Latvian, Estonian and Lithuanian referendums on independence in the spring of 1991 were illegal and that he was the guarantor of *Pravovoe gosudarstvo* – the equivalent of the rule of law in Soviet jurisprudence. Of course, some would say, previously, under the so-called Stalin Constitution 1936, individual Soviet states did indeed have the right to self-determination referendums under Art. 48. But this provision had been dropped in the Khrushchev Constitution of 1956. Consequently, the Baltic republics were in breach of it in the early 1990s. Some claim, however, that their annexation by the Soviet Union in 1939 was illegal and hence their declaration of independence was merely a statement of a reassertion of sovereignty. Where does this leave the Catalan and Kurdish cases? As the Iraqi and Spanish constitutions do not allow for independence referendums, the two referendums held in these two entities were, it would seem, *ipso facto* unconstitutional.

Admittedly, all other things being equal, a country only has a right if it follows the rules. However, when a region is part of an undemocratic constitutional order, matters are a bit more complex. Antonio Cassese (1995: 119–120) has argued:

When the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny them the possibility of reaching a peaceful settlement within the framework of the State structure ... a group may secede – thus exercising the most radical form of external self-determination – once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail.

As Iraq is not a well-functioning democratic state, it could be argued that Kurdistan meets these criteria. Again, the comparison with the Soviet Union is illustrative. Notwithstanding Gorbachev's reforms, the USSR was not a democratic regime, which, consequently, provided the Baltic States with a justification for holding referendums. But, given that Spain is a democratic state, this rule hardly covers Catalonia. While the Spanish government arguably acted in a way that appeared grossly disproportionate (to wit police violence and arrest of democratically elected politicians), the legal argument remains the same. Catalonia is not currently part of a non-democratic state. Based on the situation as it stands now, the Catalan referendum in 2017 was, from a purely legal perspective, extra-constitutional. In a legal system under the rule of law, the powers of state institutions have to be enumerated in law. The basic principle of *d'état du droit* is that citizens can do anything unless it is expressly prohibited. Public bodies or “emanations of the state” can only do things that are expressly allowed. Thus, the latter cannot, *legally* speaking, take actions that are not prescribed in enabling legislation. To pass legislation outside the boundaries of the constitution or enabling legislation is the very definition of being *ultra vires*.

But does the law have to be that inflexible? Not necessarily. In Canada, the two referendums held in Quebec in, respectively, 1980 and 1995 were not strictly speaking within the powers granted to the provinces by the Canadian Constitution (Şen 2015). Technically

speaking, the referendums were *ultra vires*. Yet, the Canadian judges, realising that legality ultimately rests on a modicum of legitimacy, followed a more pragmatic logic. In the celebrated case, *Re Quebec*, the Court was asked the question: “Under the *Constitution* of Canada, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?” The Court held that, while the “secession of Quebec from Canada cannot be accomplished ... unilaterally”, a referendum itself was not unconstitutional but a mechanism of gauging the will of the francophone province. Consequently, a referendum, provided it resulted in a “clear majority”, “would confer legitimacy on the efforts of the Quebec government” (*Re Secession of Quebec*, 1998: 385). In other words, a result in favour of secession would require the rest of Canada to negotiate with Quebec. Needless to say, this ruling does not apply in Spain. But the Canadian example suggests that other countries’ courts have shown a flexibility and appreciation of nuances that is conducive to compromises. These examples would seem to suggest that the international law pertaining to independence referendums is clear and simple. This is very far from being the case (for a more general discussion see Şen 2015: 77).

While governments may confidently cite principles, the practice of independence referendums seemingly owes more to national interest than to adherence to principles of jurisprudence. For example, the states of Western Europe readily recognised the secessions of several former Yugoslav republics in the early 1990s – although these new states did not adhere to the aforementioned legal principles. And, yet, in other cases international recognition has been less forthcoming even if the countries have seemingly followed the established norms. To wit, no state has to date recognised the outcome of Nagorno-Karabakh’s referendum in 1991, although Azerbaijan is very far from being a democratic state (the country has a Freedom House Score of 7 – the same as North Korea) despite greater freedoms for the citizens/inhabitants of the breakaway republic. Similarly, no state recognised the referendum in Somaliland even though this enclave is considerably more democratic, peaceful and respecting of the rule of law than Somalia, which at the time of the referendum was an archetypical failed state. Likewise, the conduct of the referendums seems to be of little concern. In South Sudan, the United Kingdom and the USA noted severe irregularities and ballot rigging (Christopher 2011), yet in the end welcomed the result of the referendum. The US president Barack Obama congratulated the people of Southern Sudan for “a successful and inspiring [referendum]”, and British prime minister David Cameron likewise welcomed the outcome (BBC World News 2011). For all the legal arguments, acceptance of referendum results is ultimately a political rather than a legal decision. In other words, are all these arguments just examples of what IR scholar Stephen Krasner (1999) aptly called “organised hypocrisy”? Or are states actually recognised if they follow the rules of the game? Or is it simply a matter of power politics?

Types of referendums and state recognition

Lawyers are interested in what is – or is not – legal and in accordance with more or less rigid rules. Political scientists, by contrast, are interested in what actually happens and the causes effecting this. Are there, from a political science or international relations point of view, causes and tendencies associated with recognition of referendum results? Or are independence referendums simply recognised when the rules are followed? Alternatively, do we now live in a democratic age in which the gold standard of legitimacy is popular support? And, if the answer to the latter question is in the affirmative, do independence referendums tend to be recognised when secession is supported by a large majority of the new *demos* on

a large turnout? Or is it all down to power politics? Politicians who are sure of the backing of the people often point to the legitimising effects of referendums (Papadopoulos 2001). This, indeed, has been characteristic of independence referendums since the earliest days. For instance, before the referendum in Toscana and Emilia in 1860, Cavour wrote:

I await with anxiety the result of the count, which is taking place in Central Italy. If, as I hope, this last proof is decisive (*questa ultima prova*), we have written a marvellous page in the history of Italy. Even should Prussia and Russia contest the legal value of universal suffrage, they cannot place in doubt (*non potranno mettere in dubbio*) the immense importance of the event today brought to pass. Dukes, archdukes and grand-dukes will be buried forever beneath the heap of votes deposited in urns of voting places of Tuscany and Emilia.

(Cavour 1883: 211)

At the time – over 150 years ago – democratic legitimacy seemingly had a legitimising effect. And this effect was even stronger a couple of generations later when the American political scientist Sarah Wambaugh observed, “There was not one of the great powers, not even Austria or Russia, which did not participate in those years [1848–1870] in some form of appeal to national self-determination to settle Europe’s numerous territorial questions” (Wambaugh 1933: xxxiii). In the light of the latter it would seem reasonable and plausible that outcomes of referendums on independence would have an even stronger legitimising force in an age where “democracy” – to use a term from analytical philosophy – is an illocutionary speech-act, a term that demands unconditional observance. Yet, from recent votes – such as the one in Kurdistan in 2017 – it seems that independence referendums, despite this near-universal acceptance of the rhetoric of democracy, only tend to lead to independence and recognition when this is in the national interests of major powers. Whether it is one or the other – or more likely a combination of the two – is an empirical question.

Since the 1980s there have been 44 referendums that resulted in independence (see Table 12.1). This analysis is based on the referendums held since the breakdown of the Soviet Union. Before that date there had been relatively few independence referendums (only a handful in each decade). The first independence referendums were held in the US Confederate states of Texas, Virginia, Tennessee and Arkansas, where narrow majorities voted for independence in 1861. Other independence referendums include Norway (1905), Iceland (1944), Jamaica (1961) Algeria (1962) and Malta (1964). For a discussion of these referendums see Qvortrup (2014) and Şen (2015). Of these, 16 (or 36 per cent) have resulted in the establishment of a new state. Often, factors associated with recognition are the legal ones highlighting that the seceding entity was part of a non-democratic state. But there are also more factors such as a high turnout and a massive yes vote. And then there is the factor, which I think is the most important one – whether the new state has the support of the international community – or, more specifically, that of the three “democratic” permanent members of the UN Security Council.

The following multiple logistic regression analysis, a method which measures the strength of different givens behind a phenomenon, examines the statistically significant factors conducive to state recognition. Such a statistical analysis needs to be complemented by detailed case studies, but, as an indicator of trends, a quantitative analysis is indispensable. The dependent variable is whether the state was recognised and took up a seat in the UN. The independent variables are the official yes vote, the turnout, the Freedom House score of the country from which the entity sought to secede and, lastly, a dummy variable for

Table 12.1 Successful independence referendums (1980–2017)

<i>Parent country</i>	<i>Seceding entity</i>	<i>Year</i>	<i>Turnout %</i>	<i>Yes vote %</i>
USA	Micronesia		64	77
United Socialist Soviet Republics (USSR)	Lithuania	1991	91	84
USSR	Estonia	1991	77	83
USSR	Latvia	1991	74	88
USSR	Georgia	1991	98	90
USSR	Ukraine	1991	70	85
Georgia	South Ossetia	1991	98	90
Georgia	Abkhazia	1991	99	58
Yugoslavia	Croatia	1991	98	83
Croatia	Serbs	1991	98	83
Yugoslavia	Macedonia	1991	70	75
USSR	Armenia	1991	95	90
Bosnia	Serbs	1991	90	—
Serbia	Sandjak	1991	96	67
Serbia	Kosovo	1991	99	87
USSR	Turkmenistan	1991	94	97
USSR	Uzbekistan	1991	98	94
Macedonia	Albanians	1991	99	93
Moldova	Transdnistria	1991	97	78
Azerbaijan	Nagorno-Karabakh	1991	80	99
Russia	Tatarstan	1992	82	67
Yugoslavia	Bosnia	1992	99	64
Georgia	South Ossetia	1992	N/A	N/A
Bosnia	Krajina	1992	99	64
USA	Palau	1993	64	68
Ethiopia	Eritrea	1993	99	98
Bosnia	Serbs	1993	96	92
Georgia	Abkhazia	1995	96	52

(Continued)

Table 12.1 (Cont.)

Parent country	Seceding entity	Year	Turnout %	Yes vote %
Indonesia	East Timor	1999	78	94
Somalia	Somaliland	2001	99	97
Yugoslavia	Montenegro	2006	55	86
Sudan	South Sudan	2011	97	98
Ukraine	Donetsk Oblast	2014	32	89
Iraq	Kurdistan	2017	99	72
Spain	Catalonia	2017	43	90
France	New Caledonia	2018	43	80

whether there was support for secession among the five permanent members of the Security Council (in practice the US, the UK and France).

As Table 12.2 shows, Security Council Support from the three permanent Western powers is the key determining factor (statistically significant at $p < 0.01$). None of the other variables was statistically significant. Whether the country was part of a democracy or not (i.e. if the vote was held under the rules prescribed by the legal norms) is statistically speaking irrelevant. While the direction of the statistical correlation is negative as expected (a high Freedom House score indicated less democracy), the margin of error is several times bigger than the conventionally accepted measures. Likewise, whether the turnout was high or low had no impact at all on whether a state was recognised or not. Some countries with low turnout, such as Bosnia, became independent while others, such as Tatarstan, did not (Rodeback 1994). Whether the support (the yes vote) was high or low was equally academic. Indeed, the yes vote in Somaliland (1999) and Krajina (1992) both had very high yes votes and both remain unrecognised. This brings us back to the only statistically significant factor, the support of the UK, France and the US. Much as there has been a development towards requiring democratic support for declarations of independence, this is not sufficient. Great powers are normally reluctant to admit to *Realpolitik* considerations, yet there are examples of statements which, perhaps inadvertently, admit to this. For example, in a statement in the wake of the East Timor referendum in 1999, President Bill Clinton, after he observed that the “people of East Timor voted overwhelmingly for independence”, immediately went on to say that the US would intervene to support the result because this was “in America’s interests” (White House: President’s Statement on East Timor, Thursday, 16 September 1999).

Thus, creating new states upsets the political system, and powerful countries – their espousal of democratic and legal principles notwithstanding – seem to carefully consider the power politics or *Realpolitik* implications before they endorse the outcome of affirmative votes for secession. In many ways, *plus ça change, plus c’est la même chose* – the more things change the more they stay the same. Establishing new states requires support from powerful members of the international community – perhaps more than it requires popular consent. Indeed, the break-up of Czechoslovakia was not preceded by a popular vote, yet the two new countries (respectively Slovakia and the Czech Republic) were immediately recognised by the international community. And,

Table 12.2 Logistic regression: determinants of recognition of successful independence referendums

<i>Variables</i>	<i>Model 1</i>
Security Council Dummy	4.258*** (1.778)
Freedom House Score	-.298 (.742)
Turnout	.100 (.90)
Yes Vote	.055 (.065)
Negotiation/Constitutional Provision	1.054 (2.35)
Constant	-15.134 (9.709)

R; Squared: .72 (Nagelkerke): .52 N: 38

* p<.1, ** p<.05, *** p<.01

in this particular case, there were strong indications that a majority would have voted “no” to the “velvet divorce” if they had been given the chance (Ulc 1996: 331).

Conclusion

Legal theorists, from Grotius and onwards, have generally held that the people have a right to decide on their future status – though generally as a veto-player and not as an initiator of change. However, in practice, power politics has been more important than jurisprudence. Not all independence referendums are equal. There are three basic forms: referendums in post-colonial states (e.g. the Philippines in 1935), referendums following an agreement (Eritrea in 1993), and unilaterally declared independence referendums (e.g. the Baltic republics in the early 1990s). Whereas *all* the referendums in the two first categories were recognised by the international community and duly led to the establishment of new states, the same is not true for unilaterally declared independence referendums. Less than half of the latter were recognised. What determines this low success rate? The answer is that the factors that determine the success or failure of an independence referendum are not whether the entity is part of a non-democratic regime (as legal theory would have us believe), nor the turnout and the yes vote (as democratic norms would suggest), but above all if secession is supported by (and in the interests of) the UK, France and the US.

The fact is that it was not in the interest of these democratic countries to recognise Kurdistan, Tatarstan, South Ossetia or Catalonia. The great democratic powers’ arguments for not doing so might be legalistic or even philosophical but the statistical evidence suggests that these factors rarely are adhered to in practice; ultimately, what matters is the elusive and yet very real “national interest”. Recognising new states and their “right” to hold referendums on independence is statistically and empirically unrelated to high theory and owes a lot to power politics and *Realpolitik*. This is not a comfortable conclusion in an age of democracy, nor is it one that will appeal to those who espouse theories of natural rights in the sphere of democracy. But as political scientists we are bound to describe the world as it is not as we would like it to be. Only a “realistic” appreciation of the existing practices will enable us to challenge these – if we so wish. But overall it is imperative that we acknowledge how difficult it is not just to hold a referendum on

independence but also to ensure that the result is implemented. The lesson for those who espouse statehood and independence, and those who contemplate holding independence referendums is: make sure you have strong international backers before you initiate the vote.

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13

RECOGNITION OF UNILATERAL SECESSION

Aleksandar Pavković

Introduction

Unilateral secession is the withdrawal of a territory and its population from the jurisdiction of a state without the consent of the government of the state (or of the government which claims to represent the state) (Anderson 2013: 353); such a withdrawal breaches the territorial integrity and political unity of the host state. Since the host state opposes the withdrawal, unilateral secession, by definition, creates a conflict between the host state and the secessionists who are carrying out the withdrawal. If both sides in the conflict deploy armed force against each other, the conflict becomes an intra-state war.

A declaration of independence, issued by the secessionist authorities, is a public announcement of the withdrawal of the territory and the creation of a new state on the withdrawn territory (or, more rarely, of the re-establishment of a previously independent state). Most declarations of independence also indicate the grievances or perceived injustices that motivated the secessionists to withdraw from the state in questions. Like other secessions, unilateral secessions are motivated by a variety of grievances; one of the grievances may be the lack of sovereign state or statelessness which a unilateral secession is expected to remedy by creating a new state. Whatever their grievances, by declaring independence, the secessionists hope to gain recognition by other states of their new state that would protect them from the hostile takeover by their former host state. They may also hope that in time they would gain wider international recognition, the recognition of the former host state as well as admission to the membership of the UN. Whether or not these hopes for recognition are realized is most often beyond their control.

While a unilateral secession, by definition, lacks consent of the state from which the withdrawal is made, it may have support – and thus ‘consent’ – of other states in the region or in the world at large. The supporting or ‘sponsor’ state may provide a refuge to the secessionist politicians and population fleeing the conflict as well as diplomatic and military support to the secessionists; eventually such a sponsor state may formally recognize the new state in spite the lack of recognition or consent from the state from which the state initially seceded.

In contrast to unilateral secession, a consensual secession is the withdrawal of territory to which the government of the host state agrees or gives consent. Since a host state is in effect ceding its territory to a new state and recognizing it as an independent state, consensual secession

involves no breach of territorial integrity. And when a consensually seceded state is recognized by other states, the recognition is bestowed on an independent state which is already out of the 'internal sphere' of its previous host state. In this sense, consensual secession is similar to decolonization: former colonies most often have gained recognition as independent states, once their colonial master states granted or recognized their independence (Crawford 2006: 417). In cases of decolonization, it is not a territory of a state but its overseas colony that is leaving its jurisdiction, hence in such cases there is no breach of territorial integrity of the state.

Since 1945, UN member states have consistently recognized any new states created through decolonization or through consensual secession (Crawford 2006: 417). The UN Charter (Article 4) protects the territorial integrity and political unity of the members states and the UN Declaration on the Granting of Independence to Colonial Countries and Peoples proclaims 'any attempt aimed at ... disruption of the national unity and the territorial integrity of a country' as 'incompatible with the purposes and principles of the Charter of the United Nations' (UN General Assembly 1960). In view of the UN protection of territorial integrity of its member states, one could have expected the UN member states to consistently *refuse* to recognize any new states arising from the breaches of the territorial integrity of other member states. But, while consensual secessions have been consistently recognized, there was no such consistency in non-recognition of unilateral secessions. Instead, some UN member states have recognized only some unilateral secessions but not others; some UN member states have recognized unilateral secessions that other member states pointedly refused to recognize; and some unilateral secessions were recognized by no UN member state. In response to this inconsistency, scholars have attempted to find a pattern or common practice of recognition of unilateral secessions which would indicate the existence of a norm or rule which is followed in granting recognition to states arising from secession (Crawford 2006: 417–8; Sterio 2013: 60–7; Reigl and Doboš 2017: 86). The issue of norms or rules governing international recognition of seceded states is addressed elsewhere in this handbook. The present chapter will consider only several cases in which unilateral secessions were or were not bilaterally recognized by other states.

Why not recognize a state created by unilateral secession?

The government of a state can extend bilateral recognition to a territorial entity that claims to be a state whether or not that entity fulfils *all* the usual criteria for statehood. This form of recognition enables the recognized state to enter a bilateral diplomatic state-to-state relation but does not oblige the recognizing state to send its diplomatic representatives to the newly recognized state (Ker-Lindsay 2012: 9). While it appears to be virtually costless to the recognizing state, this type of recognition brings substantial gains to the recognized state (Ker-Lindsay 2012: 17).

Given its costless nature, why *do* states *not* recognize any new state, whether unilaterally seceded or not, that declares independence and requests recognition? A simple reason, perhaps, is that unilateral secession is, by its definition, an internal affair of an existing state: it is the territory *of* an existing state, a UN member state, that is being unilaterally withdrawn from that state. The state which is recognizing the independence of a unilaterally seceded state is, *eo ipso*, asserting that, in its view, the conflict between the existing state and the secessionists is not an internal affair of the host state but an inter-state conflict. In a sense, bilateral recognition of a state created by unilateral secession aims to transform the secession from an intra-state into an inter-state affair. Moreover, the recognizing state is denying the host state's claim to the sovereignty over the withdrawing territory and is siding with the latter's opponent, which is breaching the host state's territorial integrity.

Most states have no reason to interfere in the internal affairs of others states which are not their rivals or with which they have no disputes. In fact, such an interference can provoke a response from the existing state and/or its allies that may make recognition of unilateral secession costlier than its non-recognition. Moreover, many governments or states may see non-recognition of unilateral secession, as a form of general protection of the territorial integrity of states, in part because they may need such protection against future or present secessionist challenges. States whose minority populations may, at some point, be inclined to support unilateral secession often do not recognize unilateral secessions from other states. For example, Spain and the People's Republic of China have consistently refrained from such recognition.¹ In order to explain the general disinclination of states to recognize unilateral secession, it is not necessary to posit states' 'innate aversion to unilateral secession' (Ker-Lindsay 2012: 24).

In some cases, the benefits of recognition of a unilateral secession and of supporting a secessionist movement may outweigh the costs, if any, of any such act. If the state subject to a secessionist challenge is considered an adversary² or a rival then withdrawing a part of its territory may weaken that state and reduce its capacity to act adversely (Saideman 2011: 277). Further, the new state, resulting from the unilateral secession, may offer to the recognizing state military and other strategic facilities that its previous host state would not offer. Recognizing independence of a unilaterally seceded state may be viewed as part of a wider strategy of enhancing the geopolitical or strategic position of the recognizing state.

Unilateral secession by outside military intervention

The military interventions in Bangladesh (1971), Northern Cyprus (1974), Kosovo (1999) and South Ossetia (2008) all resulted in a unilateral secession which created a de facto state: the intervening military forces took control over the seceding territory from the host state and then enabled the secessionist movement to establish or re-establish its own state institutions on the territory. In spite of the support in training, equipment and sanctuary they received from the intervening powers prior to the intervention, the secessionist movement and its military forces were unable to achieve this on their own: the outside military intervention was necessary for the success of these unilateral secessions. In all four cases, the intervening power was either the first or among the first to recognize the independence of the new states. The latter was lacking in the case of Katanga's secession from Congo in 1960: although the Belgian military forces initially assisted its secession, neither Belgium nor any other UN member state recognized Katanga's independence. In 1962 the UN forces sent to Congo to suppress the secession reintegrated Katanga into Congo (Gérard-Libois 1966 [1963]). Similarly, in 2014–2015 the Russian Federation provided military support to the secessionists in eastern Ukraine but did not recognize the unilateral secession of the Lugansk and Donetsk republics proclaimed in April 2014 (Sakwa 2015: 503–25); under which conditions, if at all, will these two be reintegrated into Ukraine is, at the time of the writing, unclear.

Bangladesh

The independence of Bangladesh (East Pakistan) from Pakistan was proclaimed by the Bengali leader, Sheik Mujib Rahman, on 25 March 1971 and reiterated by an assembly of Bengali politicians on 17 April. As the Bengali secessionist forces, armed and supported by the Indian

government, were unable to gain control over East Pakistan, India's armed forces crossed the border into East Pakistan on 12 November 1971; the Pakistani army surrendered to the Indian army on 16 December. During the fighting, on 6 December, the Indian government officially recognized the independence of Bangladesh (Raghavan 2013: 273). The USSR, an ally of India, and its East European allies, followed soon after. The US initially opposed the Indian military intervention but recognized Bangladesh once the Indian army left its territory in April 1972. Once the Pakistani officers accused of war crimes in Bangladesh were returned to Pakistan without trial, in February 1974 Pakistan also recognized Bangladesh.

India's recognition signalled that India's military intervention did not aim at territorial annexation but at establishing a state friendly and allied to India. In its official recognition, in the midst of war against Pakistan, the Indian government proclaimed the new state and its people 'partisans in the same cause', the cause of fighting their common enemy, Pakistan, and its army (Statement in the Parliament 1971: 588). By eliminating Pakistan, India's principal adversary, from its entire eastern border, the unilateral secession of Bangladesh greatly enhanced India's strategic position in its continuing conflict with Pakistan.

Turkish Republic of Northern Cyprus

On 15 July 1974, a Greek Cypriot faction in the capital of the Republic of Cyprus staged a military coup, supported by the military government in Greece; this faction supported the unification of Cyprus with Greece. On 20 July military units from Turkey landed in Northern Cyprus; Turkey was one of the three guarantors of Cyprus's territorial integrity and independence (Meyer n.d.: 1). After the talks on the new constitutional arrangements in Cyprus broke down, in August 1974 Turkish forces expanded their area of control to 37 per cent of the island's territory. On 15 November 1983, the Turkish Cypriot Parliament issued a declaration of independence of the Turkish Republic of Northern Cyprus, which Turkey recognized the next day. On 18 November the UN Security Council resolved that the declaration was 'legally invalid' and asked UN member states not to recognize the new state (UN Security Council 1983: 541); all the UN member states, with the exception Turkey, complied.

Turkey's recognition, like India's, signalled that its military intervention and continuous military presence in Northern Cyprus was not aiming at its annexation to Turkey. Moreover, by recognizing the new state, Turkey ceased to recognize the government in Nicosia, the capital of Cyprus, as representing the whole island. Turkey does not recognize the Republic of Cyprus, although the latter is a member of the UN and of the EU. The unilateral secession of Northern Cyprus curtailed any future attempts to unify Cyprus with Greece and secured an unimpeded maritime access of Turkey to the Mediterranean, thereby enhancing Turkey's strategic position in its continuing disputes with Greece (Meyer n.d.: 7).

South Ossetia

In September 1990 the South Ossetian Supreme Soviet repudiated the jurisdiction of Georgia, then still a union republic of the USSR, and proclaimed South Ossetia a union republic within the USSR. In December 1990 the Georgian government attempted to take control of this region by armed force; this led to a protracted armed conflict, which ended in June 1992 with an agreement on 'the principle for the settlement' of the conflict between the president of Georgia and the Russian president, Boris Yeltsin. As a result, peacekeeping forces including Russian army units were deployed in South Ossetia. South Ossetia proclaimed independence from Georgia in December 1991, while its capital was under siege

from Georgian armed forces, and reissued the declaration on 28 May 1992, on the eve of the conference which led to the above agreement (Summut 2008: 8–10).

On 8 August 2008 the Georgian armed forces, trained and equipped by the US, entered South Ossetia; the Russian military also moved in and expelled the Georgian army from South Ossetia. After the ceasefire negotiated by the EU, on 26 August the Russian Federation formally recognized the independence of Ossetia as well of Abkhazia, another region of Georgia that proclaimed its independence from Georgia in July 1992 (see the section below on recursive secessions). These two states are also recognized by Nicaragua, Venezuela, Syria and Nauru (Vanuatu and Tuvalu rescinded their initial recognition) (BBC 2018).

Russia's recognition of the two states signalled that it is not annexing them and that for Russia these two territories have been now permanently removed from Georgia's jurisdiction. Following the recognition, Russia signed agreements with both states establishing military bases on their territory (Gerrits and Bader 2016: 305); these military bases enhanced Russia's capacity to contain Georgia, an ally of the US that aspires to NATO membership.

Kosovo

Kosovo's Albanian majority deputies in its regional assembly declared independence from the SFR Yugoslavia in October 1991; as a result, a parallel Kosovo Albanian state was peacefully established in Kosovo. In 1998, the Kosovo Liberation Army, an armed faction independent of that parallel state, led a large-scale armed insurrection, engaging the armed forces of FR Yugoslavia (Serbia/Montenegro). In January 1999 the US and its NATO allies unsuccessfully attempted to negotiate a consensual secession of Kosovo from Serbia/FR Yugoslavia; at the negotiations the Yugoslav government refused to agree to NATO's forces having unimpeded access to the whole of Yugoslavia (Ker-Lindsay 2012: 45). In response, in March 1999 NATO started a bombing campaign of FR Yugoslavia; the bombing ended in June 1999 with a negotiated agreement to withdraw all Yugoslav forces from Kosovo and to replace them with a UN civilian administration and a NATO-commanded multinational force (including a Russian army unit). The negotiations between Serbian and Kosovo Albanian representatives under UN auspices, carried out from 2005 to 2008, failed to find a mutual agreement on secession, and in February 2008 Kosovo unilaterally declared independence. The US recognized its independence the next day and most (but not all) of its NATO allies followed; Albania had done so already in 1991. With the US lobbying other states to recognize Kosovo (Ker-Lindsay 2012: 212), at the time of the writing over 110 UN member states have recognized Kosovo. Apart from Serbia, the UN Security Council permanent members, Russia and China, as well as India, Indonesia and Spain, among others, oppose recognition. Once Serbia recognizes Kosovo, it is likely that these states would follow suit and that Kosovo would be admitted to the UN.

In October 2000 the regime of Slobodan Milošević in Serbia, regarded as hostile to NATO, was replaced with a more cooperative regime. In 2005 the new regime granted NATO unimpeded access to its territory (Informer 2016) but remained opposed to Kosovo's secession from Serbia. As its swift recognition of Kosovo's independence in 2008 indicated, the US's support for Kosovo's secession remained unchanged too. The largest US military base built in Europe since the Vietnam war, Camp Bondsteel, is located in Kosovo; its strategic role is to 'ensure stability in the region', which is allegedly exposed to Russia's systematic endeavour at destabilization (U.S. Europe Commander 2018; Camp Bondsteel, n.d.).

In all four cases, the unilateral secession, carried out by an outside military intervention, enhanced the strategic position of the state which carried out the military intervention; without the secession, the intervening state would not have gained the military facilities it sought or, in the case of India, would not have removed its principal rival from an important theatre of their ongoing conflict.

Unilateral secessions carried out by secessionists alone

In all the above four cases of secession, during the armed conflict between the secessionists and the host state forces, non-combatants were forcefully displaced from their homes in large numbers and were subject to indiscriminate mass killing. Mass violence against non-combatants was also a feature of the following four cases of unilateral secession as well as of the unilateral recursive secession to be discussed next. But, unlike the preceding four secessions, the following four unilateral secessions were carried out by the secessionists alone: they established their state institutions on the seceded territory without outside intervention and their armed forces (supported, in some cases, by foreign volunteers) fought against the host state military.

- Biafra (1967)³ from Nigeria. Lasted: 1967–1970.
- Chechnya (1991) from the Russian Federation. Lasted: 1991–2000.
- Nagorno-Karabakh/Artsakh (1992) from Azerbaijan. Continuing.
- Tamil Eilam (de facto 1990) from Sri Lanka. Lasted: 1990–2009.

The unilateral secessions of Transdniestria and of Somaliland (discussed below) were also carried out by the secessionists alone; unlike the above four, these two unilateral secessions did not involve large-scale prolonged warfare. None of these unilaterally seceded states, except for Biafra, was recognized by any UN member state. The UK's and the USSR's military aid to the Nigerian military government enabled its forces to defeat, after three years of fighting, the Biafran army. Although Biafra acquired armaments from Israel, South Africa, France and PR China, none of those states recognized its independence. The states which recognized Biafra – Tanzania, Gabon, Ivory Coast, Zambia and Haiti – were not in position to provide military support necessary to prevent Biafra's defeat (St. Jorre 1972: 180–5, 210–20). The recognition of Biafra did not yield any obvious strategic advantage to the states which recognized it. Unlike the Biafran army, Chechen forces acquired arms, including heavy armaments, primarily from the retreating Soviet Army units in 1991. In 1999 the Russian army invaded Chechnya for the second time (its first invasion in 1994 failed), defeated the secessionist forces, reintegrated Chechnya into the Russian Federation and replaced the secessionist regime with a pro-Russian Chechen regime (Bakke 2011).

In Nagorno-Karabakh, its sponsor state Armenia provided the ethnic Armenian forces with arms (acquired mainly from Russia) which enabled them to resist the Azeri military. Tamil Eilaam forces in Sri Lanka acquired arms from the central government forces which they fought and through international black/grey markets. In spite of the protracted fighting and large civilian casualties, no outside state had sent its military forces to intervene in these conflicts, except early in the conflict in Sri Lanka. In 1987 the government of Sri Lanka agreed to the deployment of an Indian peacekeeping force into the northern and eastern provinces of Sri Lanka, an area of growing conflict between the secessionist Tamil forces and the Sri Lankan army; the secessionist forces of the Tamil Tigers then attacked the peacekeepers as well. The departure of the Indian peacekeeping force in 1990 enabled the Tamil

Tigers to establish a de facto state in those provinces of Sri Lanka. The Indian peacekeeping intervention thus neither contained the violent conflict nor provided support to the secessionist movement. In 2009 the Sri Lankan army crushed the Tamil Tiger's remaining forces, killing its leaders, and regained control over territory that the latter controlled for two decades (Feith 2013).

Recursive secession: unilateral secession from a seceding state

Consent to a secession may be refused not only by the host state, from which the new state is seceding, but also from a segment of the population living on the territory to be seceded. The segments of population which refuse consent to secessions are minorities of a nationality different from that of the majority population; they are unwillingly 'trapped' in a new state by its secession (Pavković 2011). Unilateral secessions by trapped minorities are recursive: these are secessions from secessions. The (unrecognized) unilateral secessions of Transnistria and Nagorno-Karabakh, discussed in the next section, were also recursive in this sense. The recursive secessions from Georgia, on one hand, and from Croatia and Bosnia and Herzegovina, on the other, illustrate the role of bilateral recognition in the success of recursive secession.

Following the victory of a pro-independence party in Georgia (a federal unit of the USSR) in 1990, on 9 April 1991, its parliament unilaterally declared independence from the USSR. The region of South Ossetia declared its independence from Georgia in December 1991, while Georgian armed forces were besieging its capital, in their attempt to integrate South Ossetia into Georgia. And, in July 1992, the parliament of Abkhazia, a coastal region in Georgia, declared its independence from Georgia; this led to a war with the invading Georgian forces, in which the Abkhazian forces were able to regain control of the whole territory of this region (Pavković 2011). The Ossetians and the Abkhazians are national groups distinct from and unrelated both to the Georgians and Russians; their armed forces, assisted by Russian-supported militant organizations, were initially able to repulse the Georgian military and establish de facto states on their territory. As mentioned above, in 2008 the Russian military thwarted the latest Georgian attempt to reintegrate South Ossetia into Georgia; following their recognition by the Russian Federation in 2008, Russian armed forces remained stationed in both states.

Following Croatia's secession from Yugoslavia in June 1991 (reiterated in October 1991), in December 1991 municipalities with the Serb majorities within Croatia declared independence from Croatia as the Republic of Serb Krajina. In 1992 a UN peacekeeping force was sent to these areas, while the former Yugoslav army units left for Serbia. In August 1995 the Croatian army, equipped and trained by the US, reintegrated these territories into Croatia by force (Pavković 2011). Following reiterated declarations of independence of Slovenia and Croatia, on 10 October 1991 the Bosniak (Muslim) and Bosnian Croat deputies in the parliament of Bosnia and Herzegovina passed a resolution seceding this federal unit from SFR Yugoslavia. On 7 April 1992, following the US and the EC member states' recognition of Bosnia and Herzegovina, the deputies of Serb majority areas declared independence of the Serb Republic from Bosnia and Herzegovina; the war among the Bosniak, Bosnian Croat and Bosnian Serb forces followed. In September 1995 a combined operation of the Bosniak armed forces, the Croatian army and the NATO air force and artillery forced the Bosnian Serb military to retreat from the territories they had occupied and forced their political leaders to agree to a negotiated settlement. According to the settlement negotiated in Dayton, Ohio, USA, the Serb Republic was reintegrated, under its original name,

‘Republika Srpska’, as one of the two autonomous entities which comprised the reconstituted Bosnia and Herzegovina (Burg and Shoup 1999: 337–73).

Unlike the two recursive secessions from Georgia, the recursive secessions from Croatia and from Bosnia and Herzegovina gained no recognition from any state. Their sponsor state, Serbia (under the Milošević regime), provided the two *de facto* states neither recognition nor protection by its armed forces. Under the pressure of international sanctions, the Serbian government appears to have acquiesced to their reintegration, by military force, into their former host states (Burg and Shoup 1999: 333).

Unilateral secession: independence without recognition

In contrast to Croatia and Bosnia and Herzegovina, some states appear to have acquiesced to the *de facto* independence of the states which had previously unilaterally seceded from them. Transnistria, Nagorno-Karabakh (Artsakh) and Somaliland are three *de facto* states which have not been recognized by any UN member state; at the time of the writing, they have remained independent from their former host states for almost three decades. Transnistria unilaterally seceded from Moldova on 25 August 1991, while Moldova declared independence from USSR on 27 August. Once admitted to the UN, in March 1992, Moldova made an attempt to reintegrate, by armed force, Transnistria into Moldova but was met with resistance not only from the local forces but also from the Russian army stationed there. A ceasefire signed in June 1992 in Moscow between Moldovan and Russian presidents is still holding: Moldova has made no further attempt to reintegrate Transnistria by armed force.

Following a referendum in 1991, in January 1992 Nagorno-Karabakh, a territory in Azerbaijan populated by Armenians, declared independence from Azerbaijan; in response, Azerbaijan, a former union republic of the USSR, attempted to reintegrate the territory by military force. The Azeri military, after prolonged fighting, was repulsed by the Armenian and Nagorno-Karabakh forces and a *de facto* state was established on the territory (Ker-Lindsay 2012: 56). As in Transnistria, in 1994 the Russian Federation negotiated a ceasefire which, while being intermittently and briefly breached, is still holding.

Following the collapse of Siad Barre’s dictatorial regime in January 1991, Somalia fell into a protracted civil war, which it has not ended as yet; in May 1991, Somaliland, comprising the territory of the former British colony of Somalia, declared independence from the Republic of Somalia (Sturman 2011). No attempt has been made to reintegrate the *de facto* state of Somaliland into Somalia: at present there is no government in effective control over the remaining Somali territory. Each of the three *de facto* states has a sponsor state or a friendly state which provide some degree of support but, partly due to the lack of international recognition, each of them may be subject to an armed takeover by its former host state. Their former host states are unlikely to formally recognize their independence; consequently, it is not likely that these unilateral secessions will be transformed into consensual ones (Caspersen 2012: 126).

Another universally non-recognized *de facto* state is Kurdistan, a self-governing region in northern Iraq with its own armed forces. Although the central Iraqi government exercises no control over it, Kurdistan has not (as yet) declared independence; its authorities conducted two independence referenda, in 2005 and in 2017, which both returned huge majorities for independence. Its principal sponsor, the US, has supported the removal of Iraqi military forces from Kurdistan since 1991 (Farkas 2003: 21–2) but has repeatedly warned that it will not support nor recognize Kurdistan’s unilateral secession. In contrast to its 1999 military intervention against Serbia, US invasion of Iraq in 2003 was not undertaken in support of the unilateral secession of Kurdistan or any other part of Iraq. Since its initial military

engagement in Iraq in 1991, the US has been consistently supporting the territorial integrity of Iraq (Farkas 2003: 23–35). Until the US policy changes, it is not likely that Kurdistan will unilaterally secede (declare its independence) from Iraq and seek recognition from other states.

Unlike the first three unilateral secessions, Catalonia's unilateral secession from Spain did not lead to the creation of a *de facto* state: the central Spanish government retains control over the region and the regional government of Catalonia lacks any armed forces to contest it. But, like the first three, the Catalan secession was also met with universal non-recognition. The declaration of Catalonia's independence in October 2017, by a slim majority of the secessionist deputies in Catalonia's parliament, appears to be a forceful demand to negotiate a consensual secession of Catalonia rather than an attempt to create a *de facto* independent state.

From unilateral to consensual secession – or, alternatively, to a state dissolution

A unilateral secession, as we have seen so far, can result in:

- bilateral recognition by other states (not by the host state); or
- non-recognition by any UN member state; or
- reintegration into the host state by armed force

There is also the fourth option: the transformation of a unilateral secession into a consensual secession. Once the former host state consents to secession and recognizes the independence of the seceded state, a unilateral secession is transformed into a consensual one. From the point of view of states which are inclined to recognize the new state, this is a preferable solution: once the host state consents to a secession, it ceases to be an internal affair of that state and other states can recognize the seceded state as an already independent state.

States often respond to unilateral secession by refusing to recognize it until it is transformed into a consensual secession. This was the initial response of the UK and other European states to the unilateral secession, on 7 June 1905, of Norway from the United Kingdoms of Sweden and Norway. Having secured no recognition of its unilateral secession, Norway conducted a plebiscite on independence (as demanded by the Swedish monarch) and negotiated a consensual secession with the Swedish government; this resulted in its recognition by most European states (Pavković with Radan 2007: 72).

The response of the US and European states to the unilateral secession of Lithuania from the USSR on 11 March 1990 was quite similar. The US and EC refused to recognize its independence and recommended that its declaration of independence (or of the re-establishment of statehood) be suspended; faced with the sanctions from the USSR, in June 1990 the Lithuanian parliament placed a 'moratorium' on its implementation (Lieven 1993: 240). Following the failed Moscow coup against President Gorbachev on 20 August 1991, on 6 September 1991 the USSR recognized the independence of Lithuania as well as Latvia and Estonia (which both unilaterally declared their independence on 20 August). The Soviet recognition transformed these three, initially unilateral, secessions into consensual ones.

An armed rebellion against the central government, initially aiming at unilateral secession, may also result in a consensual secession. The second armed uprising in South Sudan, which started in 1983, ended with a negotiated peace agreement in 2005 which envisaged an independence referendum in 2011 (De Kock 2011). Following the referendum and South Sudan's declaration of independence in July 2011, Sudan, its former host state, recognized

its independence. Likewise, an armed rebellion in Eritrea, a province of Ethiopia, which started in 1961, ended in 1991 when the Eritrean rebels joined their Ethiopian counterparts to overthrow the Ethiopian Marxist regime. Following a UN-supervised independence referendum in 1993, the new regime in Ethiopia recognized Eritrea's independence (Iyob 1995). In both cases, a secessionist rebellion against the central government resulted in a consensual session, validated by a referendum, and not in a unilateral secession. A rebellion on the Pacific island of Bougainville, governed by Papua New Guinea, resulted in its declaration of independence in 1990 and was followed by low-intensity warfare; the peace agreement which ended the war in 2001 also envisaged a referendum on independence to be held by 2020; this referendum may result in a consensual secession as well (Baar 2017).

Like Lithuania's initial unilateral secession, Slovenia's and Croatia's initial unilateral secessions from SFR Yugoslavia on 25 June 1991 were also met with non-recognition and a short moratorium. In a peace agreement among the parties in the Yugoslav conflict, which the European Community (EC) negotiated on 7 July 1991, Slovenian and Croatian authorities agreed to place a three-month moratorium on their declarations of independence. At that time, the EC also established the Peace Conference on Yugoslavia involving all six federal units of Yugoslavia, which debated various proposals for a consensual dissolution of the existing Yugoslav federation; in a sense, the Conference's task was, apart from managing the conflict, to transform the two unilateral secessions (which were suspended) into consensual secessions. Although the Conference failed in this task, its Arbitration Commission, presided over by the French jurist Robert Badinter, in its first opinion of 1 November 1991 proclaimed federal Yugoslavia to be 'in a state of dissolution' as of 8 October, the date of Slovenia's and Croatia's reiterated declarations of independence (Trifunovska 1995: 473). These reiterated declarations of independence were no longer acts of seceding from a state but 'a product of the dissolution of the State' (Crawford 2006: 400).⁴ The three newly seceded Baltic states were first to recognize the two new states; on 23 December 1991 they were followed by Germany and then on 15 January 1992 by all other members of the European Community; the latter was an exercise of collective recognition.⁵

The concept of a state in dissolution, initially conceived by the Badinter Arbitration Commission, in effect dispenses with the concept of secession, unilateral as well as consensual. Even if a new state unilaterally declares independence from its host state (as Croatia and Slovenia did), this declaration, according to the Badinter Commission, need not be an act of secession but only a 'product of the dissolution of that state'. Since the dissolution of SFR Yugoslavia was non-consensual, one can then argue that, in the view of the EC Arbitration Commission, the initial unilateral secessions of Slovenia and Croatia on 25 June 1991 were later transformed into 'products' of a non-consensual state dissolution; no transformation into consensual secessions was possible because, according to Opinion No. 1 of the Commission, there was no longer a host state capable of giving consent.

Unilateral secession: is non-recognition a (serious) problem?

As we have seen, a significant number of unilateral secessions have, in particular since 1990, resulted in *de facto* statehood which has been maintained in spite of the lack of recognition by other states or the recognition of only a few states. These *de facto* states were, however, not completely isolated from other states. Already in the process of seceding, they received support from one or more states which had thus become their 'sponsor' states through which contacts with other states were established and maintained. A few *de facto* states such as Tamil

Eilam and Chechnya had no state sponsor of this kind and were later reintegrated into their host state by military force. But, in order to maintain independence from a former host state, it is not sufficient (as in the case of the Serb Republic of Krajina) nor necessary (as in the case of Somaliland) for a seceded *de facto* state to have a specific state sponsor.

Apart from the sponsor states which provide principal support to unrecognized states, other states, including the permanent members of the UN Security Council, engage with them in various ways. This kind of engagement without recognition ranges from the contacts with lower-level officials in regard to specific issues such as security or conflict management to the contacts with the diplomatic representatives or the highest office holders of a *de facto* state (Ker-Lindsay 2015). The objectives as well as the level of engagement with unrecognized states often depend on great power relations (primarily, the US–Russian rivalry) (Pegg and Berg 2016). Yet, engagement without recognition with seceded *de facto* states seems at present to be a systemic and pervasive feature of world politics (Pegg and Berg 2016). In view of this, one could argue that, unless the great power relations substantially change, the unrecognized *de facto* states are likely to remain part of the global state system. It would be, of course, difficult to predict whether their number is likely to increase, i.e. whether unilateral secessions will, in the future, result in more unrecognized *de facto* states.

Be that as it may, the threat of non-recognition presents no effective deterrence to attempts at unilateral secession for at least three reasons: first, various states (including some permanent members of the UN Security Council) continue to support unilateral secession in various ways, including military intervention, and are ready to recognize states created by unilateral secession; second, at least some non-recognized states, created through unilateral secession, continue, with the support of their sponsors, to function as *de facto* independent states; and, since a unilateral secession may be transformed into a consensual one (or into a ‘product’ of state dissolution) initial non-recognition of a unilateral secession may prove to be only temporary. In short, while all secessionist states aspire to gain widespread bilateral recognition, the failure to gain it does not necessarily signal the failure of secession (see also Caspersen 2012: 127–8).

As the above survey of unilateral secessions suggests, in the post-1945 period the number of states that unilaterally declared independence and have retained it until the present is greater than the number of states that unilaterally declared independence but lost it through the reintegration into the host state. However, most of the unilaterally seceded states have gained limited or no recognition; only those unilateral secessions which were transformed into consensual secession – and which thus gained recognition from their former host states – were admitted to the United Nations. The ‘products’ of the dissolution of SFR Yugoslavia were treated the same way as consensual secessions.

The transformation of a unilateral secession into a consensual one appears to be the most certain path to the widespread recognition and admission to the UN. As the cases of Bangladesh and Kosovo show, a unilateral secession, on its own, has little prospect of gaining widespread international recognition unless its sponsored by a major power (such as India or the US) which is capable of lobbying other states to secure its recognition.

Notes

- 1 Saideman (2011: 277) argues that countries vulnerable to separatist challenges often support secessionist movements in rival states in order to weaken them.
- 2 A state may regard another state as an adversary if it has an unresolved dispute or disputes which occasionally lead to confrontation or conflict.
- 3 The year in which the independence was unilaterally declared.

- 4 Radan (2002: 204–16) rejects the arguments put forward by the Badinter Commission and concludes that SFR Yugoslavia was ‘a state whose existence was beyond doubt’ and not in a state of dissolution.
- 5 Bosnia and Herzegovina and Macedonia, the federal units which seceded, respectively, in October and September 1991, applied for recognition by the EC at same time as Croatia and Slovenia but had to wait longer to be recognized. The EC and the US recognized Bosnia and Herzegovina in April 1992 but Macedonia was admitted to the UN as the ‘Former Yugoslav Republic of Macedonia’ only in April 1993 and was recognized by the EC member states (except Greece) and the USA, in 1994 (Radan 2002: 195).

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14

REMEDIAL SECESSION

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Introduction

The present chapter provides a characterization of the remedial theory of secession, or just cause theory. It is the theory according to which secession must be justified by a just cause, one that relates to past injustice. I shall distinguish this theory from other accounts and then describe it as it is discussed by its main advocate, Allen Buchanan (see Brilmayer 1991; Buchanan 1991, 2004; Norman 1998; Christiano 2006). I shall then formulate a certain number of criticisms that stem from what international law has to say about secession. Finally, I shall consider an alternative version of the theory. The main objective of the chapter is to recast the remedial theory of secession in the broader context of the exercise by a people of its right to external self-determination. The right to secede is just a particular instance of this right. Another instance is the right of association, that is the right of a people to associate with an already-existing neighbouring state. It also involves the violation of the territorial integrity of the parent state, but it does so in such a way that the territory it occupies now becomes part of the neighbouring state. Even more importantly for our purposes is another instance of external self-determination which amounts to the right of a sovereign people to own the state that it already possesses. The remedial theory of secession should then be reformulated in a way that incorporates general normative conditions for having the right to determine one's sovereign state. It would be an account saying that no people has a primary right to determine its own sovereign state, not even those who already have a state. Thus, all theories of secession must be formulated within the framework of a normative approach that also takes into account the rights and obligations of the encompassing people formed by all the citizens of the parent state. A prejudice in favour of existing nation states would be inconsistent, or at the very least imply a tension that must be resolved, with the idea that no people has a primary right to determine its own sovereign state.

The remedial theory of secession is the normative account according to which unilateral secession should not in general be permitted unless some past injustice has been perpetrated by the parent state, whether through colonization, oppression or violation of the right to internal self-determination. It is a theory that must first not be confused with accounts that describe what happens in the case of sovereign states in which the constitution contains a special provision stating that some or all its subunits are entitled to secede. There are

certain constitutions around the world (for instance, the old USSR, Ethiopia, Saint Kitts and Nevis, Liechtenstein, Moldova and Denmark) that contain this kind of provision. The remedial theory considers the more general case where no such special arrangement appears.

The remedial theory of secession must also not be confused with accounts that describe the conditions under which a negotiated secession could take place. The reference case on the secession of Quebec produced by the Supreme Court of Canada (1998) offers such an alternative account. It mostly provides a recipe for achieving successfully a negotiated seceding process. However, the theory we wish to examine considers cases where secession is unilateral and thus performed without the consent of the parent state, whether or not negotiations took place before secession.

Our topic must also not be confused with what international law has to say about a population that would successfully achieve secession by being able to control its territory after a declaration of independence. A seceding population may have recourse to the effectivity principle in the course of a power struggle with the parent state. The seceding population may turn out to be able to successfully achieve secession since various conditions have been met, including democratic approval, protection of minorities, recognition by the international community and control over territory. International law may then adopt a realistic approach toward secession when all these conditions have been achieved and thus, when secession is a *fait accompli*. The remedial account, by contrast, is a normative account that determines the moral conditions that would justify secession, whether or not it can be achieved through a power struggle. It must not ignore power struggles, but it must not base its normative account by relying solely on such considerations. In a way, it reflects on the normative conditions that must obtain even before engaging in any seceding process.

Finally, the account must not be confused with an argument purporting to show how beneficial secession would be for the development of one's language or one's culture, or for any other advantages such as economic growth and international influence. These are certainly good normative arguments to consider, but those that concern the remedial account deal with norms referring to the presence of past injustice perpetrated by the parent state. As a normative account of the general conditions for unilateral secession, the remedial theory provides an argument showing that a population must not secede without moral justifications for doing so. However, it is not the only theory of secession available on the market that deals with normative issues pertaining to the more general case, that is, unilateral secession. Its main opposition is the primary right theory of secession. This alternative view stipulates that a population could in general be entitled to secede even in the absence of past injustices. It may be interpreted as simply contradicting the remedial account.

What would be the justifications for the suggestion that populations may be entitled to secede from a parent state and thus violate the territorial integrity of the state without any moral justifications such as the invocation of a past injustice? It may be useful to ask that question in order to underline the differences between primary and remedial accounts, and thus shed additional light on the latter. One initial argument in favour of a primary right to secede could be the old nationalist principle according to which all peoples must have their own sovereign state. Even if many authors adopt this definition of nationalism (Mill 1861; Gellner 1983; Hobsbawm 1991), very few would still base the primary right theory on the nationalist principle. A more modest claim would be just to argue for an initial democratic justification. Certain populations would have the right to secede if there were a democratic support for doing so and if no other moral conditions would override the initial right. It is a different justification that must be contrasted with the traditional nationalist principle. After all, we all have a right to eligibility but very few among us exercise that right. In

many cases, it is perhaps even better not to try getting elected. It is something that one should not do although one has the initial right to do so. Similarly, even if a population has a primary right to secede, it does not mean that it should, much less that it must, exercise that right. It could be better to simply avoid doing so if other moral issues were to come into play. Although it may have a primary right to secede, it does not mean that this is the best thing to do. The account may even include a proviso to the effect that a people *should* perhaps have good justifications for seceding. It is better to be in a position to claim that it has suffered injustices. Nevertheless, saying that a population *should* have moral justifications such as having been subject to a series of injustices perpetrated by the parent state does not mean that it *must* have such moral justifications. It may have the right to secede and be entitled to sovereignty even in the absence of any injustice whatsoever. By contrast, remedial secession means that there is no legitimacy in secession if it cannot be justified by the perpetration of an injustice committed by the encompassing state.

If we follow Allen Buchanan's typology, there are at least two alternative versions of the primary right theory. The first one is solely based on the democratic principle. If a population concentrated on a particular portion of territory democratically decides to secede, then it should be entitled to do so. Harry Beran (1984) and Carl Wellman (1995) are the main advocates of this position. The other account suggests that the subject of the primary right is a people and that, as cultural entities, peoples have special features on which one can rely in order to justify secession. This more popular account has initially been argued by Margalit and Raz (1990). It has then been developed by David Miller (1995, 1997), Margaret Moore (2001) and Kai Nielsen (1998). These accounts have the advantage of narrowing down the set of candidates for secession, stipulating that only national groups are entitled to do so. If Margalit, Raz and Nielsen identify peoples or stateless nations as the main subjects of the right, Moore also considers kin minorities (extensions of neighbouring nations) as subject to the right, even if these are only minority fragments of peoples and do not constitute a people all by themselves.

Buchanan's remedial only theory of secession

Buchanan (1991; see also 2004: 220) first introduces two initial justifications for secession: the systematic violation of human rights, as with the Kurds in Iraq, who were the victims of genocidal attacks by Saddam Hussein's army, and the annexation of territory, as with the Baltic states, which were sovereign states before being 'conquered' by the USSR. Buchanan then adds two further normative justifications. If the state systematically violates intrastate autonomy agreements, such as the autonomy that Kosovo had enjoyed within Serbia and that was removed in 1989 by the Serbian government, then this would constitute a further justification for secession. If an already granted autonomy were after a while systematically violated, this could rightfully lead the cultural group to secession (Buchanan 2004: 221–2). Buchanan (2004: 223) also considers permanent minorities, which, despite being included in the democratic process, find themselves systematically unable to influence decisions on fundamental issues regarding the polity of which they are a part.

There is another feature that must be underlined and that usually goes unnoticed in Buchanan's theory. He refuses to circumscribe in a restricted way the list of candidates for secession. International law stipulates that the right to secede, defined as a specific right to violate the territorial integrity of state, is a right that can only be exercised by a people. It is certainly very difficult to define what a people is, but it cannot refer to the vast category of cultural groups. According to Buchanan, all sorts of cultural groups must be considered.

Religious groups, ideological groups, immigrant groups, linguistic minorities, kin minorities and of course stateless peoples are all on an equal footing. As a matter of fact, there is nothing special about nations (Buchanan 1998). There is no such thing as a right that stateless peoples would have but that other cultural groups would not have. There is no right to secede (and much less a primary one) that peoples would have and that other cultural groups would fail to have.

The first point that must be made is that any normative theory about the general case of unilateral secession must first be an account concerning the groups that are entitled to secede and that can own the right. We saw that, in the case of a particular version of the primary right theory, national groups were those that own a right to secede. In the case of Buchanan's theory, all sorts of cultural groups could under certain circumstances be entitled to do so. Why should this be? It may at first glance look quite controversial, but it becomes a little less so when we ponder the fact that the argument is much more complex than that. First, cultural groups acquire a certain value as soon as their members treat them as valuable. No cultural group has intrinsic value and if moral individualism is accepted, then the value of any group is contingent on the rational preferences of individuals. Now, even if the justification is individualistic, and cultural groups have value only derivatively, the state owes them respect. If the state does not, then intrastate autonomy arrangements might be justified toward those groups, as a means to repair the damage caused by the failure of the state to recognize them.

It is important to notice that there is another motivation that could lead to specific intrastate arrangements for different sorts of groups. Prudential considerations could influence the state in affording such arrangements even in the absence of past injustices. This is what Buchanan calls 'the isolate and proliferate strategy' (Buchanan 2004: 401–2). It means that a restrained unilateral right to secede may count as an incentive for the proliferation of intrastate autonomy arrangements. However, it would still not be on the basis of a primary right held by those groups. It would be guided only by prudential considerations. According to Buchanan, it is better for the state to do so in order to prevent escalation from taking place or in order to ease down the tensions that would have already occurred.

No matter which justification is invoked, once these institutional measures are implemented we find ourselves in front of cultural groups enjoying intrastate autonomy arrangements. Now if after having granted such arrangements the state then systematically violates them, this becomes a moral justification for secession. However, whether intrastate autonomy arrangements are put in place on the basis of remedial or prudential motivations, one thing is clear. Buchanan does not recognize the existence of a general primary right to self-determination, not even for peoples. It is obvious in the case of secession, or external self-determination, given his endorsement of the remedial theory, but it also appears to be true for him even in the case of internal self-determination. By internal self-determination, we refer to a right that peoples would have to develop themselves economically, socially and culturally, and the right to determine their political status within a larger sovereign state. Since, according to Buchanan, there are no specific rights that apply only to peoples and no primary right at all for cultural groups, not even for peoples, there is no general primary right to internal self-determination for peoples or for any other cultural groups. There are only remedial rights or special prudential rights to internal self-determination, and these could be enjoyed by any cultural group. Examples of particular (remedial or prudential) intrastate autonomy rights are those that relate to language, religious institutions, culture, self-government, asymmetric federalism and special juridical status.

In the preface to the Spanish translation of his very first book, Buchanan now argues that the refusal by Spain to grant more autonomy to the Catalan people could constitute

a strong justification for secession.¹ He thus now argues that Spain's consistent refusal to concede adequate autonomy constitutes the best argument that the Catalanian people can invoke in favour of secession. Would they then even have a moral right to unilateral secession? This may at first appear to be so, but it would run counter to his previous theory. Indeed, Spain is wrong to persistently refuse granting Catalonia suitable autonomy within the Spanish state. But why is it so? The only reason seems to be that such refusal violates the right of the Catalan people to internal self-determination, and that right may as a matter of fact be a primary right. However, the theoretical resources mobilized by Buchanan do not clearly allow him to argue in this way. If granting autonomy to a cultural group is most of the time based on prudential considerations only, it is hard to see why the refusal to grant them such an autonomy could become an argument of the Catalan people for secession. Perhaps, the reasoning is as follows. Since Catalans cannot invoke the four conditions that Buchanan is willing to accept, the refusal by the Spanish government to grant them a new autonomy status is for them the 'best justification' at their disposal. It does not mean that such a refusal is a just cause. The Spanish state is perhaps, according to Buchanan, still not compelled from a moral point of view to grant more autonomy to the Catalan people, but it is perhaps something that the state should do for the sake of political stability. In other words, although Catalans do not have the moral right to secede, secession is an option that one can understand they might want to consider. The intransigence of the Spanish state may very well become the best argument that they have, although it is not sufficient as a moral justification since the Spanish state is not compelled to do so. The legitimacy of the seceding process would rest on the failure of the state to adopt a prudential approach. If Buchanan were to argue in this way, his account would come close to an endorsement of the primary right theory, for he would be willing to give credence to a process of secession which would not be based on what for him counts as an injustice.

Be that as it may, it is very important to underline a crucial dividing line that separates Buchanan's theory from those theorists who defend the existence of a primary right to secede for peoples. It may at least at first appear to be crucial for the following reason. If one confines the right to secede only to peoples, it may support the idea that intrinsic features belonging to peoples call for such a right. Indeed, if only peoples are entitled to secede, there must be some characteristics belonging to them that justify secession and these are not moral issues involving past injustices perpetrated by the parent state. It then becomes also very natural to accept that peoples should have a primary right to self-determination on the basis of that very feature. Conversely, if only moral issues are at play and only just causes to be invoked, then the intrinsic features of the group are not relevant and secession may be granted to any cultural group. So, either we confine the right to peoples, and this gives credence to a primary right to self-determination, or else we refuse such a primary right and insist on moral conditions, but then it appears that any cultural group may under certain circumstances benefit from a similar right.

We therefore see why it is important to raise the issue concerning the owner of the right. It is perhaps the most important difficulty that confronts Buchanan's theory and, for that matter, any remedial account of secession. The difficulty can be framed in the form of a dilemma. Either we restrict the right to secede to peoples and then the right to secede appears to be justified on the basis of features held by peoples, or else we give priority to just causes and remedial justifications, but then the right to secede can be enjoyed not only by peoples but also by all sorts of cultural groups. This difficulty may look insuperable for the remedial account, because it is *prima facie* quite counterintuitive to acknowledge rights to secede to any cultural groups. Indeed, most historical cases of secession, if not all, involve

peoples and not cultural groups. Furthermore, international law allows for the right to self-determination only to peoples and not to all cultural groups. Cultural groups have rights, but these do not include the right to secession.

In any case, the most salient features of the theory are those that I have already underlined. Secession is not an act that can be performed only by a people. It can be performed by all sorts of cultural groups. Second, as a corollary, peoples and, for that matter, all cultural groups do not have a primary right to external self-determination, and not even a right to internal self-determination. The intrastate autonomy arrangements that they might enjoy are not the result of the exercise of internal self-determination. As we saw, these arrangements stem from remedial or prudential considerations alone. Therefore, as a logical consequence of those initial premises, Buchanan cannot accept that the violation of a right to internal self-determination held by peoples should constitute an acceptable moral justification for secession. However, the suggestion that all sorts of cultural groups may be entitled to secession is not acceptable. This problem can be solved only if one can argue that only peoples have the right to self-determination. This means that there is after all a specific feature held only by peoples. It is the fact that they are the only entities that enjoy a primary right to internal self-determination. As far as external self-determination is concerned, it is an entirely different matter. Secession must be based on a just cause. Now, the violation of the basic right to internal self-determination should count as such a just cause. If we follow such a line of argument, we are able to reconcile the remedial account of secession with the idea that only peoples are the subject of the right. Indeed, they may be the only entities to enjoy the primary right to internal self-determination, but they cannot perform external self-determination unless there is a just cause to be invoked. If the parent state refuses to allow a people to exercise its internal self-determination, then it has the right to secede.

Conformity with international law

The theoretical stance adopted by Buchanan contrasts quite a lot with the dispositions that one can find in international law (see Weller 2009). Of course, there is no primary right to external self-determination in international law. However, the United Nations (1945) Charter stipulates that all peoples can dispose of themselves as they wish. Indeed, the very first article states that one of the purposes of the United Nations is:

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

(UN Charter 1945: Article 1)

Articles 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (United Nations 1966a, 1966b) also states that ‘all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ The same remarks are made in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (United Nations 1970), which stipulates that:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to

determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

(United Nations 1970)

The right to self-determination is also affirmed in Organization for Security and Co-operation in Europe (OSCE) (1975), where we can read:

The participating States will respect the equal rights of peoples and *their right to self-determination*, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

(OSCE 1975, *emphasis added*)

Even as late as in the Vienna Declaration and Programme of Action (United Nations 1993), the common Article 1 of both of the two above-mentioned covenants (United Nations 1966a, 1966b) is reaffirmed. In all those documents, the right to self-determination applies to peoples and only to peoples. It is not a property held by all cultural groups. We are also told in all these documents that peoples have a right to self-determination. As a matter of fact, the right to self-determination is present in so many UN documents that the list of all its occurrences would be fastidious (Supreme Court of Canada 1998: para. 117). Moreover, it has now become more than just a convention (Supreme Court of Canada 1998: #114). It seems to be a primary right that all peoples can enjoy. And, since it is a right that is still reasserted in more recent UN documents, it cannot reasonably be claimed that the peoples in question are only those that have experienced colonialism. Finally, by peoples, the Supreme Court of Canada acknowledges that we do not necessarily mean the whole population of a country (Supreme Court of Canada 1998: #124). It may be just a subgroup within the whole population. Thus, all peoples, whether colonized or not, whether oppressed or not, whether they form the whole population of a country or just a subgroup, have a right to self-determination. Furthermore, states have the obligation to comply with this right.

So, it is fair to say that self-determination looks very much like a primary right. However, since at least 1970, this primary right has been subordinated to the right that the states would have to preserve their territorial integrity. This is precisely what has led to the sharpening of the distinction between internal and external self-determination. Therefore, the universality of the right to self-determination is to be understood as applying at the domestic level to stateless nations respecting the territory of sovereign states. Internal self-determination appears to be a primary right enjoyed by all peoples. By contrast, when it is understood as secession, external determination seems to be restricted only to those peoples that suffer injustice committed by the parent state. The United Nations (1995) emphasizes the right to self-determination by providing that the UN's member states will:

1. Continue to reaffirm the right of *self-determination of all peoples*, taking into account the particular situation of peoples under colonial or other forms of alien

domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination.

(United Nations 1995, emphasis added)

So, it is clear that secession is not explicitly legal in international law unless some remedial considerations prevail. The reason why there has to be remedial considerations involved in support of the seceding process seems to be because the people belonging to the country as a whole has a right to maintain its territorial integrity. This is not necessarily a matter of somehow giving priority to the authority of the state. It must be understood as respecting the identity of the people belonging to the country as a whole. The usual excerpt invoked in support of the idea that the right to territorial integrity overrides the right to external self-determination is to be found in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (United Nations 1970):

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

(United Nations 1970)

A similar statement is made in the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (United Nations 1995). There are however at least two ambiguities involved in this statement. The first one relates to the claim according to which the violation of territorial integrity is not acceptable when the state behaves in an appropriate way. One interpretation suggests that stateless peoples are being targeted, but the very same clause may instead be one that targets foreign countries. It would be unacceptable for a foreign country to intervene in the domestic affairs of a state that would behave in accordance with the respect for the equality and self-determination of peoples. So, the dilemma is this. The primacy of territorial integrity may be understood as overriding the right to external self-determination of the internal minority people, or it may be understood as imposing a limit on the external intervention of a foreign country.

However, this debate is perhaps not that important for our purposes. Supposing that the clause targets foreign countries and not internal stateless peoples, the legitimacy that is granted to the state when it complies with the principles of equality and self-determination of peoples must be one that also affects the behaviour of internal stateless peoples. In short, if territorial integrity must be maintained for states that treat with respect their own internal minorities, the respect for territorial integrity is a norm that surely does not only apply to foreign countries. It also has implications for internal minorities.

The second ambiguity is more important. How are we to understand the phrase that follows 'and thus'? There are at least two opposite interpretations. One of them supposes that the phrase that follows defines what occurs before it. If so, then the respect of equal rights and self-determination amounts to nothing more than the existence of a government representing the whole population. According to a second reading, it is supposed that the definitions of self-determination and equality have already been established and it is claimed that,

if they are respected, a certain consequence follows. The government will then legitimately be described as representative of all the population. In this latter case, political representation is no longer claimed to be the definition of equality and self-determination. It is, if you will, a side-effect of securing equality and self-determination.

As regards this second ambiguity, the dominant view appears to be the first interpretation. It is claimed that, in those clauses, self-determination amounts to nothing more than political representation. What follows after 'and thus' is a definition, not a consequence of a term already defined. If a stateless people elects some of its members and these can play a major role in the government of the central state, then we can safely conclude that the people in question is self-determining itself within that state. We may not be too impressed by this very narrow and restricted interpretation. It is one that would tremendously constrain the scope of internal self-determination. This is especially so if we agree that international law must constantly change and adapt itself to new realities. As we shall see, there are various other instances of internal self-determination in addition to securing political representation. Moreover, these other instances are recognized by international law. As we hope to show, it is obviously wrong to reduce self-determination to political representation. In any case, the most important thing to notice in the above passage is the following. It is apparently claimed that if the violation of territorial integrity cannot be accepted when the state respects self-determination, the converse may also seem to be true. A failure on the part of the state to comply with the principle appears to justify a violation of its territorial integrity.

After all, as we saw, it is stated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (United Nations 1970) that all peoples have a right to self-determination and states have the obligation to comply with that right. Furthermore, in the Supreme Court of Canada's *Reference re Secession of Quebec* case (1998: #134), the judges also consider this third justification for secession. In addition to colonization and oppression, it asserts that some jurists have claimed that the violation of internal self-determination could be another justification for seceding. These very brief remarks concerning the status of self-determination in international law reveal many differences with Buchanan's account. It appears that, according to international law, peoples do after all enjoy rights that other cultural groups do not enjoy. They have the right to self-determination. It also appears that they have a primary right to internal self-determination and that states must comply with that right. Finally, it can be argued that a failure on the part of the state to respect internal self-determination provides a justification for unilateral secession, in addition to the already established justifications (colonization, oppression). These features show that Buchanan clearly finds himself in opposition with the essential principles contained in international law, but they also indicate the path that one can take in order to circumvent some of the most important difficulties that plague the remedial account. Indeed, the usual criticism raised against Buchanan's version of the remedial theory is that it is biased in favour of already-existing nation states (Catala 2013). Secession is justified only under extreme circumstances like colonization, oppression and the violation of basic human rights. We now see that a further justification may be invoked on the basis of statements contained in various UN documents like those published in 1970, 1993 and 1995.

Of course, it cannot be claimed that international law incorporates a remedial account of secession. The fact of the matter is that the criteria of justification for secession has never been established in the form of a complete list. Nevertheless, international law is at the very least compatible with the remedial account. The three criteria of justification for unilateral secession that have been mentioned (colonization, oppression and violation of

internal self-determination) can easily be incorporated into a remedial account. However, as we saw, international law also acknowledges the creation of a new state that follows secession as a *fait accompli*. That is, it treats secession as a political reality and specifically as the result of applying the effectivity principle. It is as though the process of secession was treated as at least in part a political process, and not one that must entirely be under the jurisdiction of international law. The effectivity principle is neither legal nor illegal, for it lies outside international law.

For proponents of the remedial account, this fact should not be interpreted as bad news because admitting that some secessions do not fit with the actual accepted criteria may be interpreted as an acknowledgement that the list of remedial justifications is incomplete. And as long as the list remains incomplete, it is impossible to adopt the remedial theory instead of the primary right theory. If this interpretation of the actual state of international law is accurate, then not only is international law compatible with the remedial account, it can also be interpreted as already favourable to it, since it is adopting the effectivity principle as a provisional condition that must be adopted until we achieve a more comprehensive list of justifications. The remedial account would then be the *telos* of international law as far as secession is concerned. It tells us the direction we should be taking. And, even if a final list of justifications were never to be completed and effectivity were here to stay, we should perhaps always be striving to achieve a more complete list. International law is perhaps always late when compared with actual reality, but it is perhaps also our responsibility to close the gap as much as possible (see Seymour 2007).

Peoples as owners of the right to self-determination

The version of the remedial account we are considering supposes that peoples have a primary right to internal self-determination. Now, even if international law contains what appears to be such a principle, it does not mean that it is a sound one. In this section, I wish to explain very briefly why peoples have a primary right to internal self-determination. We must also determine what distinguishes peoples from other cultural groups like social interest groups, religious groups, LGBTQ, women, unions, clubs, political parties, teams and orchestras. Why are they so unique among all other groups and the only ones deserving to be candidates for collective rights? In order to answer these questions, we accept the corporate view of peoples developed by Peter Jones (1999) and also suggested by John Rawls (1999) in the context of his discussion of his political conception of peoples, according to which peoples basically have an institutional identity. They form 'societies' or, as Kymlicka (1995) would put it, encompassing societal cultures. As we shall now see, we must accept that, as such, peoples understood in the corporate or political sense have a primary right to internal self-determination.

Why should we say that these groups have a primary right to internal self-determination? The answer to this question should perhaps go along the following lines. As societal cultures, peoples form a fairly large complex of economic, social and cultural institutions that are in constant transformation, given the dynamic character of their identity. In addition, we note that some peoples may benefit from governmental organizations while others do not. Be that as it may, if they deserve respect, we should allow them to decide whether or not they wish to benefit from such institutions and we should also let them decide what these would look like. In short, if we respect peoples, we should allow them to develop themselves economically, socially and culturally and let them determine their political status. Now this is precisely the right to self-determination.

This argument should please primary right theorists, for we are able to derive a primary right to internal self-determination. This however does not tell us yet why they are special when compared to all other cultural groups. Here is an attempted solution. As 'societal cultures' (Kymlicka 1995), peoples are also special and this is so in many objective and subjective ways. From an objective point of view, they are as a matter of fact potential sources of cultural diversity. They first provide internally a context of choice and an institutional framework that can, in principle, welcome different cultural (religious, linguistic, immigrant, ethnic, ideological) groups and, in that sense, they can play a role in creating internal cultural diversity. Of course, they will be able to do so especially if the society is a democratic one, but, as Mill has often pointed out, societal cultures also play an essential role in the implementation of democratic ideals. In addition, peoples have a role to play at the international level in preserving external cultural diversity. As located into a unique crossroads of cultural influences coming from close neighbours, powerful countries or countries that speak the same language, they have a distinct historical experience that shapes a distinct cultural structure on a specific territory. This is what can be said from an objective point of view.

From a more subjective perspective, we can say at least three things. First, if we model the rational preferences of group affiliation in terms of a mental chart of group allegiances and affiliations, it can be claimed that peoples are present in the mental charts of everyone. This is true even for those who feel no attachment whatsoever to, and no identification with, a particular national affiliation. This kind of person is one that has many different national affiliations, that has no preferences among them and that locates them at the bottom of her mental chart of group allegiances. Still, national affiliation is present even in the minds of these stateless individuals. Second, it can be said that the existence of a societal culture is responsible for the very possibility of having a mental chart of group affiliation. In other words, it would not be possible to entertain a mental chart of group affiliations if societal cultures did not, in the first place, provide contexts of choice in which different cultural groups are in principle able to flourish. Finally, if one can imagine oneself outside of all associations, it is impossible to imagine oneself outside of all societal cultures. The only way to remove oneself from our own societal culture would be to enter a new one. This process can last an entire lifetime.

These are some of the reasons for saying that peoples, understood as societal cultures, are special and cannot be assimilated to any other cultural groups. However, the crucial point of difference with primary theorists is this. As we just saw, we owe respect to all peoples and these should include those peoples who already own a state. If some peoples do not enjoy self-government, and if others do benefit from a government that is not sovereign, there are also peoples who do have a sovereign self-government. Now, since all peoples have a right to internal self-determination, this is also true of those populations that compose an entire country. If the whole population of a country owes respect to stateless peoples that occupy a portion of its territory, this must also be true of the stateless peoples themselves. They must also respect the encompassing peoples of which they are parts. There has to be reciprocal recognition between all peoples, including between those that have a state and those that do not enjoy statehood. It could then very well be that the way to show respect to stateless peoples is to grant them a right to internal self-determination, and, in a similar fashion, it should also be the way to show respect for the people that compose the entire country. This is why the primary right to self-determination enjoyed by stateless peoples must, initially at least, be just a right to internal self-determination.

That being said, those who are sceptic about the remedial theory of secession will not find it easy to swallow the hard pill of an apparent asymmetric relationship between these

two kinds of peoples. If respect is owed to those peoples who own a state, why not similarly require respect to peoples who wish to have a state? Indeed, why not then allow them to enjoy also a right to own a state? There are many answers that can be given to this serious objection. First, we must realize that the vast majority of citizens belonging to a state see their nation as their country. Their people include the whole population of the nation state. Therefore, any violation of its territorial integrity is in some ways a violation of their own identity. Primary theorists face this immediate aporetic challenge. If one grants a primary right to secede to a minority people in the name of preserving its identity, one immediate consequence is that it also affects the identity of the encompassing people. This happens even when the minority people is concentrated on a separate part of the territory, for, in general, the national majority located on the remaining part of the country does not see itself as forming a separate nation. Most of the time (an exception being perhaps the Flemish majority in Belgium), the population of the national majority sees its national identity as one that encompasses the entire country. Thus, a seceding process taking place on the territory of its nation state is perceived as affecting the national identity of the nation as a whole. To put it differently, the majority of the population in the country as a whole may oppose its primary right to own a state to the primary right that the minority people wants to claim for itself. The easy way out of this dilemma of course is to oppose the self-representation that the national majority has of itself. The theoretician may indeed be tempted to impose upon the national majority the view that it constitutes a separate nation on a distinct part of the territory. In this way, instead of having one people that encompasses a minority people in a part of a whole relationship, we would have two peoples on separate parts of the territory of a sovereign state. Leaving the sovereign state, for the minority people, would be leaving with a part of the territory that the other people does not occupy, thereby respecting both primary rights to own a state. Unfortunately, this way out will not do, because it rests on a disrespectful violation of the self-representation held by the national majority.

Second, it is not clear that the advantages of the minority people is to go its own way as a separate entity. Its cooperative venture with the national majority may be beneficial to both of them in many different ways. If we make a comparison with a couple engaged in a love relationship that is not perfectly equal, supposing that one member is richer and enjoys more power and prestige than the other, it may sometimes nevertheless be profitable and advantageous for both members to remain together. So, it is not clear that they will enjoy more freedom by going their separate ways instead of cooperating with one another. Even more importantly, however, is the fact that the version of the remedial theory I wish to espouse is one that places a very heavy burden on the sovereign state. The recognition that is owed to the minority people requires that it allows the stateless people to exercise its right to determine its own political status within the sovereign state. This is an essential part of the right to internal self-determination. As we shall now see, there are many different ways by which a people might want to exercise its right to internal self-determination, and the state has the duty to comply with any of these demands.

Varieties of internal self-determination

According to the Supreme Court of Canada, internal self-determination amounts to political representation. If a people is able to elect representatives coming from the people and if those play an important role in the central institutions of the country, then we can conclude that the people is in a position to internally self-determine itself (Supreme Court of Canada

1998: #135, #136). This is quite restrictive, because it is not the only way for a people to determine its own political status. We should therefore enlarge the list of rights that are entailed by the very existence of a right to internal self-determination. In addition to the right to political representation, one could add the right to self-government, as well as the right to participate in constitutional revision, since these two rights are mentioned in the United Nations Declaration on the Rights of Indigenous Peoples (2007). The right to internal self-determination should also include the right to have one's own internal constitution. This is precisely what the Catalan people tried to do with the new Statute of Autonomy of Catalonia of 2006 that was rejected by the Constitutional Tribunal of Spain in 2010. Of course, an internal constitution must conform to the constitution of the country as a whole, but we should not assume that this conformity has to be reached without any amendment to the constitution of the country. This is why a fifth application of the right must include the right to be recognized formally in the constitution of the country (along with a set of institutional rights such as special status, asymmetric federalism, collective linguistic rights, opting out rights etc.). This is a right that aptly characterizes Quebec's historical demands.

In addition to these various ways in which internal self-determination can be exercised, there are also as we saw different ways of exercising external self-determination: secession and association are common forms. I have however also insisted on there being another way of exercising sovereignty. It is by exercising the right to have the state that one already possesses. A population may illegitimately own a state. It is not because it already has a state and sees itself as part of that state that it automatically has the right to own that state. This third form is crucial for an argument that seeks to espouse a principle of reciprocal recognition among peoples. The people of a sovereign state can only have the right to that state if it complies with the right of internal self-determination of the minority peoples occupying the same territory.

We have considered an argument justifying a restricted right to self-determination on the part of stateless peoples, as a matter of respect for the people encompassing the population of an entire country. If all peoples are to respect each other, stateless peoples should not seek to violate the territorial integrity of the state since they only have a primary right to internal self-determination. The flip side of this coin is that the encompassing people must also recognize the right of the stateless people to internal self-determination. If one or many of the conditions listed as ways of exercising internal self-determination were repeatedly requested by the minority people and systematically not met by the parent state, it could be legitimate for the stateless people to exercise a right to external self-determination. There are two correlates to that claim. If a people who owns the state fails to comply with its obligation to respect the right to internal self-determination, then it loses its own right to have a state whose jurisdiction would include the stateless people. The second correlate is that a people that already owns a state and that does respect the right to internal self-determination of its own stateless peoples is entitled to have that state. Therefore, it can exercise its right to external self-determination. By contrast, in such a case, the stateless people does not have the right to secede.

Conclusion

It has often been argued that Buchanan's theory shows a bias in favour of already-existing states. It is almost as though they have a primary right to own a state. They could lose this right only if they were to engage into colonization and oppression, or if they were to

systematically violate already-existing intrastate autonomy arrangements. The alternative remedial account that we have considered does not fall prey to this kind of accusation. Like any other people, the people that already owns a state will have to comply with norms of justice in order to enjoy that right. It will not be entitled to that state if it does not comply with its obligation to allow for the exercise of internal self-determination of the stateless people. I have listed five modalities by which a stateless people could want to exercise its right. These give substance to the idea that stateless peoples have a right to determine their own political status within the sovereign state. Stateless peoples have the rights of political representation, self-government, participation in constitutional conversations, internal constitution and formal recognition in the constitution of the country as a whole. A refusal on the part of the country as a whole concerning any of those modalities amounts to a violation of the right held by stateless peoples to determine their political status within the sovereign state. This argument fits in nicely with what international law has to say concerning self-determination. It captures an insight of the primary account and it repairs the defects of Buchanan's account. By broadening the spectrum of internal and external self-determination and producing a theory that applies to all peoples, we are able to formulate an account that takes into consideration peoples that own a state and not only stateless peoples. Both kinds of peoples have rights and responsibilities.

Notes

- 1 See Buchanan (2013). The same point of view was expressed in an interview: 'the strongest argument that would justify the right to the unilateral secession of Catalonia would be Spain's consistent refusal to concede adequate autonomy', Online. Available at: <www.collectiuemma.cat/article/1658/recommended-allen-buchanan-catalonia-should-ask-the-un-to-mediate-if-spain-shows-disdain-f> (25 November 2018).

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PART III

Actors, forms and the process of state recognition

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15

BILATERAL RECOGNITION OF STATES

Brad R. Roth

Introduction

Although often discussed as a wholly discretionary matter of diplomatic prerogative, bilateral recognition of states interconnects in complex and contested ways with a range of issues at the heart of the international legal order. Recognition discourse frequently neglects to spell out these interconnections, resulting in confusion about which recognition-related issues lie exclusively within the political realm and which constitute questions of law. The legal obligations and consequences pertaining to an overt act of recognition need to be understood in light of the distinction between formal recognition (*vel non*) of an entity and conduct that expressly or impliedly acknowledges (or denies acknowledgment to) the entity's legal status. 'Recognition' of a state here will denote any overt governmental expression of acceptance of an entity's status as a state. Such an overt expression may consist of, *inter alia*: (i) a declaration of recognition directed at the global diplomatic community; (ii) a certification of recognition directed at municipal courts, (iii) the opening of full diplomatic relations; or (iv) a vote in favor of the entity's admission to an international organization as to which full sovereign status is understood to be a requisite.¹

Formal recognition is typically a sufficient, though not a necessary, indication of a government's assessment of the legal fact of the matter; any of these overt acts manifests an acknowledgment of an entity's international legal status as a state. Such an attribution of international legal personality may be objectively erroneous (assuming that objective truths exist in this realm) or, more practically speaking, contrary to the internationally prevalent legal judgment. Where the recognizing government goes on to undertake substantive conduct based on a legal conclusion at odds with that of the international community, it risks being found to have run afoul of an international legal obligation. Thus, wrongful recognition, even if not itself an international delict, augurs subsequent unlawful conduct.

There remains, however, considerable doubt about the distinctive legal ramifications of the express recognition as such. In particular, when, if ever, does a state have a distinct legal duty to refrain from conferring upon an entity the imprimatur of formal recognition as a fellow sovereign state? The two putative strictures on such verbal conduct would preclude (i) 'premature' recognition of a seceding entity and (ii) recognition of the fruits of a peremptory norm violation. Although these norms govern the question of the entity's

international legal personality, there remains substantial controversy about whether, in the absence of a Security Council directive, any self-executing legal doctrine renders the mere expression of recognition a breach of legal obligation in either of these circumstances.

The balance of the evidence of state practice and *opinio juris* suggests that at least in regard to fruits of peremptory norm violations, the nonrecognition norm has the status of customary international law. A doctrinally based duty of nonrecognition in those circumstances does not preclude interactions that acknowledge patterns of *de facto* control in the territories at issue – so long as the interactions are no greater than necessary to protect legitimate interests and do not imply a conferral of *de jure* status on the *de facto* arrangements. The wrongfulness appears to lie, at least in part, in the misattribution of legal status *per se* – a delict that can be accomplished by mere declaration.

Beyond these two standard prohibitions, there have been recent collective efforts to withhold formal recognition from entities that have established international legal personality, pending improvement in or assurances about the emergent states' human rights performance. Whatever may be said for these efforts, they have not thus far developed into a legal norm that would place human rights conditions on recognition of concededly extant states. Thus, prematurity and *jus cogens*-violative establishment remain the only two legal bars to formal recognition of the statehood of an emergent entity.

Aggregated bilateral recognitions and the establishment of international legal personality

In most international law literature, recognition is treated as a stand-alone topic.² The phenomenon's fixed and formalistic definition thus conceptually precedes the notorious question about its legal consequences: is recognition 'constitutive' of the entity's international legal status as a state, or is recognition merely 'declaratory' of a legal status that is established on an independent basis? This question has given rise to a voluminous discourse that is ultimately unilluminating, because the question is ill-posed. A more systemic approach to international legal regulation would invert the order of the inquiry. It would ask how the international legal order ascribes statehood status to an emergent entity, and would then coin a term for the conduct of the international community's members that gives legal effect to – by taking cognizance of – that status.

Because the literature does not proceed in this manner, it is necessary to designate two separate terms for closely related, but analytically distinct, phenomena. 'Recognition' refers to a government's formal promulgation of acceptance of the foreign entity's statehood status – a decision that typically derives from a mixture of political and legal decisions. In contrast, what might be called 'acknowledgment' consists of any manifestation, express or tacit, of a government's legal ascription of statehood to the foreign entity.³

Statehood is not an empirical fact, but rather a legal status. This obvious point tends to be obscured by the literature's endless repetition of the definition of statehood contained in the 1933 Montevideo Convention on the Rights and Duties of States.⁴ The archetypical state possesses a generally delimited territory, a relatively stable permanent population, a government exercising long-term effective control over all or most of the territory and population, and a capacity for foreign relations that is not subordinated to any other state.⁵ Yet these aspects do not collectively represent the necessary or sufficient conditions of the legal status. A state cannot be equated with 'such territory and population as are found under the stable control of an independent government,' nor is an entity automatically disqualified when it fails to conform to the archetype (Ryngaert and Sobrie 2011: 470).

Rather, statehood is a status ascribed through the application of (potentially controverted) doctrinal criteria to (what are deemed to be) legally relevant facts.⁶

Statehood status, in turn, is best understood as a specified package of rights, obligations, powers, and immunities. It is to that package that international law reduces ‘sovereignty’ – though in other discourses, ‘sovereignty’ implies extralegal capacities. As states remain the international system’s primary objects of legal regulation, an elemental task for the international legal order is to identify the bearers of this package, distinguishing them from pretenders. A second elemental task, no less important, is to identify for each state the institutional apparatus that bears the legal capacity to assert rights, incur obligations, exercise powers, and confer immunities on the state’s behalf. If ‘recognition of states’ and ‘recognition of governments’ appear to be marginal, principally political phenomena that may or may not be subject to international legal regulation, this is only because ‘recognition’ has been defined as a formal act (Roth 1999: 124–9). Whether express or tacit, ascription *vel non* of the statuses of state (to a territorially delimited political community) and government (to the institutional apparatus bearing, for the time being, the legal capacity to act in the political community’s name) plays a critical role in determining what count as international legal obligations.⁷

The international system’s great problem in this regard is that it lacks an established collective process to determine definitively, in contested cases, which entities count as states and which apparatuses count as the governments of those states. United Nations processes for the admission of states and the credentialing of governmental delegations have come to play a crucial role in these determinations, as have the counterpart processes of regional intergovernmental organizations. However, these processes are not designed to provide a comprehensive set of answers to these questions of legal status. Most notably, whereas an entity’s admission to the UN is nowadays (in contrast to the organization’s early period) understood to be a sufficient indicator of statehood status, it is not at all a necessary condition. Whereas successful accession to UN membership refutes any remaining legal objections to the entity’s status as a state, failure to achieve membership may be attributable to purely political considerations. Whatever clever attempts there may be to engineer consideration of an entity’s status by an international adjudicative body (such as the International Court of Justice or the International Criminal Court),⁸ adjudication of such questions remains elusive.

What remains, then, is a decentralized system in which individual states make their own assessments of the situations at issue. They may announce these assessments directly, as in declarations of recognition, or they may, in seeking to ascertain their own rights and obligations vis-à-vis the rights, obligations, powers, and immunities of other states, draw conclusions that imply an assessment of an entity’s claim to statehood.

Beyond legal assessments, recognition decisions reflect diplomatic considerations. In some cases, formal recognition will be all but precluded by the political weight of an objecting state, even where a breakaway entity is understood to possess the rights, obligations, powers, and immunities unique to statehood. Thus, nonrecognition of entities such as Taiwan and Somaliland, which may function as states not only internally but also in aspects of their external relations, does not conclusively establish that the entities are perceived to lack international legal personality (Roth 2009). Conversely, some recognitions, such as of Abkhazia by allies of Russia, may have the transparent purpose of currying favor with a powerful state that is widely deemed to have created the entity illegally, and thus may not reflect any authentic legal judgment.

The 1987 Restatement (Third) of the Foreign Relations Law of the United States reflects the relationship between political and legal aspects of interaction with the entity in question:

‘a state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting’ the international legal criteria of statehood (American Law Institute 1987: §202).⁹ Thus, state practice leaves a trail of ‘treatment as a state’ of entities considered to be possessed of that status, as well as a trail of support or criticism of the counterpart conduct of other states. Moreover, as it is generally recognized that ‘every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country’ (United Nations 1970), support for a seceding entity represents a violation of another state’s right against intervention in its internal affairs, until and unless the secessionists have succeeded in their quest for coequal sovereign status. Here again, controversies will give rise to traceable legal judgments on the part of an external affairs ministry (or, more rarely, a municipal court), both with respect to its own state’s conduct and with respect to foreign-state behavior, the legality of which is either accepted or rejected.

The ultimate question concerns the role that these legal judgments of individual governments play in the international system: are they ‘declaratory’ or ‘constitutive’ of the entity’s status? Clearly, any individual state’s assessment can be no more than declaratory; otherwise, that individual state would be the authoritative interpreter of the scope of its own legal obligation – a kind of voluntarism incompatible with the modern conception of international legal regulation. But in the aggregate, individual state assessments will determine, as a practical matter, whether the entity is accorded or denied the benefits of statehood. Moreover, absent any other source of legal judgment generally available to the decentralized international system, the aggregation of individual state assessments may, where relatively uniform, amount to a collective *opinio juris* that dictates the legal outcome. This aggregation of judgments may thus be regarded as constitutive of the entity’s statehood.

The alternative view – that statehood is an objective matter, established by the application of doctrinal criteria to empirical realities, irrespective of the subjective legal assessments even of a vast majority of states¹⁰ – lacks persuasiveness.¹¹ First, the insistence on objectivity neglects the role of *opinio juris* in the development of the applicable international legal norm itself; although the application of a norm is conceptually distinct from the norm’s development,¹² each instance of authoritative application represents an interstitial extension of existing norms.¹³ Second, and perhaps more compellingly, the insistence on objectivity here would imply that the international community as a whole might in some instance be deemed to violate customary international law, where the international order’s instrumentalities and a vast majority of member states would act in furtherance of the independence of a seceding entity that failed to meet preexisting doctrinal requisites of statehood. Such a conclusion would not be literally inconceivable, but it would be manifestly impractical. Thus, it is difficult to escape the conclusion that states’ aggregated legal judgments are constitutive of a given entity’s status as a state *vel non*.¹⁴

Bilateral recognition of states thus contributes to collective determination of statehood status. Embedded in bilateral recognition practice is a legal judgment about the permissibility of recognition. Where a decision is taken not to recognize an entity as a state, there may be nonlegal explanations for that decision, and therefore no expression of *opinio juris* can immediately be deduced. But where the recognition decision is an affirmative one, it typically implies a legal judgment about the entity’s status. Although there is no accepted formula for ascribing statehood status on the basis of some particular number of recognitions,¹⁵ the aggregation of such judgments is inevitably the critical determinant of whether an entity will count as a state for purposes of international law.

Legal limitations on bilateral recognition: ‘premature’ entities and entities born of *jus cogens* violations

Bilateral recognition of states is problematic where it ascribes international legal personality to an entity that the international order authoritatively deems to lack such personality.¹⁶ Such cases fall into two categories: (i) cases of ‘premature’ recognition, where a seceding entity fails (thus far) to meet the legal criteria of statehood; and (ii) cases where the emergent entity’s *de facto* existence is owing to the violation of a peremptory norm (*jus cogens*). In either of these circumstances, recognition is, at minimum, a likely precursor to further actions by the recognizing state that will breach an international legal obligation. The obligation at issue is most often owed to the state from which an entity is seeking to secede; additionally, the obligation with respect to a ‘situation’ created in violation of a peremptory norm may be owed to the international community of states as a whole. What is less clear is whether, in either instance, the breach of obligation lies only in the further actions presaged by improper recognition, or whether – absent a Security Council nonrecognition directive – the improper recognition by itself breaches a legal obligation.

The doctrine of premature recognition

The first category of cases arises when international law regards the territory and population of a seceding entity as continuing to be integral to a foreign state. Recognition in such a circumstance is ‘premature’; recognition flouts the internal law of the foreign state that continues to assert jurisdiction over the territory, and events have not (yet) reached the point where that foreign state’s assertion is moribund. Although no norm of international law precludes the eventuality of the seceding entity’s achievement of statehood status,¹⁷ international law cannot in the meantime countenance disrespect for the foreign state’s claim to territorial integrity and political unity.¹⁸

The doctrine of premature recognition belies the notion that statehood is merely a matter of empirical fact as to the prevailing pattern of effective control. The ‘prematurity’ formulation implies that the boundaries of the ‘internal’ are independent of the boundaries of effective control, until and unless the latter somehow ‘mature.’ Insofar as effectivity is a relevant feature, it is subject to a ‘first-in-time’ rule, where a past pattern of effective control continues to dictate recognition practice until and unless the secessionists demonstrate their victory to be complete and irreversible.¹⁹ Even total and long-term collapses of effective governmental authority, with different factions establishing regional zones of *de facto* control, have not led to any revision of recognized state boundaries. Beyond this, the same strong presumption against fragmentation was applied to the new states emerging from colonialism, even where those states had as of yet failed to establish effective control throughout their delimited territories.²⁰

Moreover, state practice evidences even more rigidity than the doctrine suggests: for the most part, only the formerly encompassing state’s formal relinquishment of the seceding territory has sufficed to bring about widespread acknowledgment of the seceding entity’s statehood.²¹ Thus, putting aside decolonization (where the territories in question were not regarded as integral) and the *sui generis* case of the nonconsensual dissolution of the Socialist Federal Republic of Yugoslavia (SFRY),²² recognition patterns in the UN era generally reflect a freeze on the boundaries of preexisting states, subject only to the preexisting state’s acknowledgment (albeit grudging) of a formerly integral territory’s independence.²³

Kosovo's 2008 unilateral declaration of independence (UDI) marks the most direct challenge yet posed to the rigid application of the rule against 'premature recognition.' Although authoritative instruments have reconciled the self-determination of peoples with the territorial integrity of such states as are 'possessed of a government representing the whole people belonging to the territory without distinction' (United Nations 1970), there remains a live question as to whether this qualification – originally intended to carve out an exception exclusively for the vestiges of overseas colonialism – implies a doctrine of 'remedial secession' where the state inflicts severe and persistent oppression on the bulk of the population of an integral territory (Roth 2010: 415–21). Although many states supportive of Kosovo's position characterized the case as *sui generis*, thereby withholding overt support for a doctrinal shift,²⁴ the preponderant (though far from universal) recognition of Kosovo, over Serbia's vociferous objection, may portend a softening of the traditional insistence on respect for territorial integrity.

In its Advisory Opinion on Kosovo's UDI, the ICJ contrived to sidestep this question. It limited itself to noting that states had expressed 'radically different views' on the doctrinal issues central to determining Kosovo's status: (i) '[w]hether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation, the international law of self-determination of peoples confers upon part of the population of an existing State a right to separate from that state'; (ii) 'whether international law provides for a right of "remedial secession" and, if so, in what circumstances'; and (iii) 'whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo' (International Court of Justice 2004: para. 82). This noncommittal approach may indicate that, in some circumstances where recognition would have hitherto been condemned as 'premature,' the international system will tolerate some diversity of governmental assessments of a territory's legal status.

Where the international system has thus far unambiguously withheld acknowledgment of the entity's statehood status, any action favorable to that entity that rises to the level of inadmissible intervention in the encompassing state's internal affairs – including, but not limited to, supply of arms, training, or logistical support to secessionist forces – would violate international law. Nonetheless, many actions that may reflect sympathy for the secessionist cause – including, but not limited to, a cut-off of economic assistance to the foreign state as a means of pressing for cessation of a counterinsurgent campaign in the breakaway region – would not count as inadmissible intervention. In between these examples lies a gray area in which what counts as (presumptively) prohibited intervention is not well settled.

In particular, it is not fully clear whether a declaration of recognition of the seceding entity, out of step with the legal position of the international community, by itself rises to the level of unlawful intervention. Although commentators frequently speak of premature recognition as a violation of international law (Lauterpacht 1947: 94–5), the record of collective state practice is short on evidence that a premature declaration of recognition, without more, incurs adverse legal consequences. Moreover, 'premature' is a characterization that pertains, at least in principle, to a state of affairs in constant flux. Legal judgments across the international community about such matters may shift within a short timeframe. Since a declaration of recognition is among the few available devices by which the legal question of an entity's statehood status can be raised for the international system's consideration, it seems dysfunctional to the system for a member state to be legally condemned for being 'out in front' in giving voice to its legal judgment.²⁵

In sum, recognition that is premature is problematic for being a flawed guide to lawful action, potentially auguring acts that are unlawfully prejudicial to the territorial integrity and

political unity of the encompassing state. It is nonetheless difficult to conclude definitively that a mere declaration of recognition, (thus far) out of step with the international community as a whole, violates international law.

The doctrine of nonrecognition of the fruits of peremptory norm violations

The second circumstance arises where the attempt to establish a new state violates not merely the internal law of a foreign state but international law. Whereas a region's attempt at secession against the will of the encompassing state – even where pursued by force of arms – does not itself transgress international law, and may 'mature' into statehood, other scenarios involve 'illegal situations' incompatible with the international rule of law. Where the international order attributes an effective secession to a foreign state's use of force, direct or indirect, against the encompassing state's territorial integrity, the separation is regarded as the poisonous fruit of a peremptory norm violation. Additionally, where a colonial settler regime implements an independence scheme designed to thwart rather than to realize a subjugated people's right to self-determination (e.g., Rhodesia and the Bantustans), the *de facto* arrangement resulting from the peremptory norm violation constitutes an illegal situation.²⁶

This nonrecognition norm has its roots in the Stimson Doctrine, so named for the early 1930s efforts of the United States Secretary of State to mobilize opposition to the recognition of Manchukuo. Stimson asserted that a foreign state's unlawful intervention – in that case, Japan's invasion of the northern Chinese province of Manchuria in violation of the 1928 Kellogg–Briand Pact of Paris – could not be allowed to yield a successful secession (Shaw 2003: 390–1). The Stimson Doctrine remains relevant to this day, and has precluded almost all states from recognizing breakaway regions of Georgia (Abkhazia and South Ossetia, unlawfully sponsored by Russia) (Borgen 2009), Moldova (Transnistria, unlawfully sponsored by Russia) (Borgen 2007), Azerbaijan (Nagorno-Karabakh, unlawfully sponsored by Armenia),²⁷ and Cyprus (the Turkish Republic of Northern Cyprus, unlawfully sponsored by Turkey).²⁸

According to the International Law Commission's (2001a and b) Articles on State Responsibility, 'no State shall recognize as lawful a situation created by' a 'gross or systematic failure by the responsible State to fulfil' a peremptory obligation, nor may it 'render aid or assistance in maintaining that situation' (2001a and b: Arts. 40–1). This formulation expands substantially on the language of the UN General Assembly's (1970) Friendly Relations Declaration, which provided that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal' (United Nations 1970). The ILC's more broadly framed obligation of nonrecognition of unlawful situations, whatever its other debatable applications, is clearly intended to apply to 'legal claims to territory' (Kooijmans 2004: 43–4).

What is less clear is whether the ILC regarded this obligation as a congealed norm of customary international law, or as a proposal for the progressive development of international law.²⁹ Although the UN Security Council has repeatedly exercised its Charter authority (whether under Chapter VII or under Articles 24 and 25)³⁰ in service of this principle, there remains controversy as to whether, independent of such an extraordinary directive, a self-executing legal obligation yet exists.³¹ It should be noted, however, that the International Court of Justice, in further application of the principle in its *Israeli Wall* opinion, interposed no prerequisite to the norm's operation:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the

illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.

(*International Court of Justice* 2004: 159)

While doubters persist,³² it is difficult to gainsay the accumulation over the last two generations of unqualified authoritative articulations of the imperative to deny recognition to unlawful dispositions of territory.

The phrasing of the obligation not to recognize these illegally created situations ‘as lawful’ is pointedly qualified. The device of ‘*de facto* recognition’ has traditionally allowed states to protect their legitimate interests and those of their nationals with respect to foreign territories subject to the effective control of insurgents and unlawfully-installed regimes, while withholding any acknowledgment of the legality of that effective control (Lauterpacht 1947: 348). Stefan Talmon (2005: 110) notes that, when the matter was debated during the drafting of the Friendly Relations Declaration, ‘absolute non-recognition – refusing recognition both to the legality (i.e. *de jure* recognition) and the factual control of the administration of the State in breach (i.e. *de facto* recognition) – was ... unacceptable to the Western States whose view finally prevailed.’

Still, as Talmon stresses, the obligation extends beyond withholding of formal recognition to refraining from any acts that would imply a conferral of international legal status on the *de facto* arrangement. As evidence of practice supporting this proposition, he cites ‘the cases of Rhodesia, the South African presence in Namibia, the Bantustan States in South Africa, the Turkish Republic of Northern Cyprus and the Iraqi annexation of Kuwait’ (2005: 112).

The international system places a premium on its members signaling that unlawfully created circumstances, even if not reversible in the foreseeable term, are not being accepted as established by prescription. As a result, mere declarations take on legal significance. Whereas *de facto* entities that have yet to establish international legal personality are merely ‘unrecognized,’ *de facto* entities established in breach of *jus cogens* are collectively ‘nonrecognized,’ rendering declarations of recognition a direct affront to the international rule of law.

The withholding of recognition pending the fulfillment of human rights conditions

Even where an emergent entity’s international legal personality is acknowledged, international law leaves the issuance of formal expressions of recognition to the discretion of individual states. The entity may be acknowledged to possess the rights, obligations, powers, and immunities of statehood, and may yet not enjoy the courtesies associated with diplomatic recognition, including membership in intergovernmental organizations. The withholding of these courtesies may occur for parochial reasons (e.g., Greece’s objection to the name chosen by the Macedonian entity that emerged from the dissolution of Yugoslavia), but it may also occur as a result of a coordinated effort of one or more intergovernmental organizations to extract guarantees of the new state’s compliance with international norms – in particular, human rights obligations.

An example can be found in the detailed opinions of the EC’s Conference on Yugoslavia Arbitration Commission, known by the name of its chair, French Constitutional Council

president Robert Badinter (Badinter Commission 1992, 1993). Opinion No. 1, of November 29 1991, insisted ‘that the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory; [and] that the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority’ (Badinter Commission 1992: 1495). The Commission (on highly debatable grounds beyond the scope of this chapter) found the Yugoslav state to be losing its international legal personality, with the six republics collectively succeeding to that personality (1500). Opinions Nos. 2 and 3, issued on January 11, 1992, affirmed the territorial integrity of the entities emerging from the dissolving federation, thereby ascribing to the Republic of Croatia sovereign rights against incursion by the armed forces of the formerly encompassing Yugoslav federation. Thus, the Commission implicitly acknowledged Croatia’s statehood status as of that moment. Indeed, the Commission subsequently determined October 8, 1991 (the date of the renewed effect of Croatia’s ‘suspended’ June 25 declaration of independence), to have been the date on which Croatia had succeeded to its share of the SFRY’s legal personality (Badinter Commission 1993: 1588).

Despite having already affirmed in Opinion No. 1 that international legal personality did not depend on recognition, on January 11, 1992, the Commission issued Opinion No. 5, speaking to the further question of whether the Republic of Croatia was yet fit for recognition for the EC and its member states. Here, the Commission sought to serve as a brake on recognition, pending a reform of the Croatia’s Constitutional Act to incorporate EC-recommended minority rights protections (Badinter Commission 1992: Opinion No. 5, 1505).³³ As it happened, the Commission’s attempted constraint did nothing to hold back EC recognition, which followed on January 15, 1991.

The Commission’s unsuccessful effort to forestall the imminent formal recognition of Croatia was in service of a policy that the EC had articulated the prior month, in regard to recognition of states emerging from both the consensual dissolution of the Soviet Union and the nonconsensual dissolution of the SFRY.³⁴ That policy established the following criteria for recognition:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers, which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear nonproliferation as well as to security and regional stability commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

(European Community 1991)

Although criteria such as these may prove helpful in incentivizing law-abiding conduct among emergent states, there is no indication of any global trend toward limiting recognition in this way. States and intergovernmental remain free to use recognition as a discretionary tool of diplomacy in the regard to such ends.

Conclusion

Recognition identifies territorial political communities that (at least in principle) enjoy the prerogatives of full membership in the international system. Established members of this ‘club’ judge, albeit through somewhat haphazard processes, candidate members to have fulfilled agreed-upon criteria of membership. These members include both the principals, which are essentially abstractions, and the concrete institutions that serve as those principals’ presumed agents: that is to say, territorially based political communities (‘states’) that bear ‘sovereignty’ (a term of variable content, but identified with the aspects in which all states have coequal standing in the global order) and ruling apparatuses (‘governments’) that take action, both internally and externally, in the name of that sovereignty.

A foreign state (or international organization) may acknowledge (or take cognizance of) the entity’s legal status, even while being unwilling to make what looks like a political statement in the entity’s favor. Formal gestures nonetheless typically represent *sufficient* indications – even though not *necessary* concomitants – of a legal consciousness that the entity bears statehood status. The manifest legal consciousness may be constitutive of international legal personality, even while formal recognition is merely ‘declaratory.’ On the other hand, formal recognition of the statehood of an entity authoritatively deemed to lack that status is prejudicial to the territorial integrity of the encompassing state, and in some cases at odds with the international system’s interest in upholding its fundamental norms. At least in that latter set of cases, formal recognition may by itself breach a self-executing norm of the international legal order.

Notes

- 1 For an historical treatment of the phenomenon that extends into the post–Cold War era, see Fabry (2010).
- 2 Most literature on recognition in international law operates within an intellectual framework established in two studies, published at the inception of the United Nations era, that reflected back on practices within a less coordinated international legal order (Lauterpacht 1947; Chen 1951). Although there have been many significant studies in the meantime, most have sought to elaborate on and extend the earlier findings rather than to reconceptualize the topic (Dugard 1987; Menon 1994).
- 3 For an illustration of how such acknowledgment might operate in the absence of recognition, see Roth (2009).
- 4 Article 1 famously reads: ‘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’ (Montevideo Convention 1934).
- 5 The meaning of the fourth Montevideo criterion, ‘capacity to enter into relations with the other states’, is somewhat obscure. It cannot be understood to refer to recognition by other states, since Article 3 insists that ‘[t]he political existence of the state is independent of recognition by the other states’ (Montevideo Convention 1934). It appears to mean that a state ‘has competence, within its own constitutional system, to conduct international relations ... as well as the political, technical, and financial capabilities to do so’ (American Law Institute 1987: § 201, comment e; Carolan 2000: 455). It thus serves to exclude entities whose international relations are confessedly subordinate to another state – i.e., units of federal states (e.g. Michigan, Tasmania) and territories that have full internal self-governance but are dependent in external affairs (e.g. ‘associated statehood’ arrangements, such as the relationship of the Cook Islands to New Zealand).
- 6 The ‘idea of “statehood as a fact” seems to confuse facts with law – *ex factis jus non oritur*’ (Ryngaert and Sobrie 2011: 470).
- 7 James Crawford notes that although the traditional constitutive theory correctly ‘draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on “fact,” [it] incorrectly identifies that cognition with diplomatic recognition, and fails to consider the possibility that identification of

new subjects may be achieved by way of general rules, rather than on an *ad hoc*, discretionary basis' (Crawford 1979: 4).

- 8 Palestine, which holds observer state status in the United Nations General Assembly, has attempted to attract the attention of both courts. In 2018, it instituted proceedings in the ICJ against the United States, invoking the Vienna Convention on Diplomatic Relations as a basis for challenging the US relocation of its embassy in Israel to Jerusalem (Kattan 2018). A central goal of the litigation is evidently to obtain a favorable ICJ ruling on the threshold question of Palestine's capacity to sue.
- 9 Section 202 reads as follows:

(1) A state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of Sec. 201 [an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities], except as provided in Subsection (2).

(2) A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.

(American Law Institute 1987: sec 202)

- 10 That this is not an entirely moot question is demonstrated by Robert Sloane's inventive argument about Tibet. Sloane attributes Tibet's pre-1950 lack of international recognition wholly to the combination of Tibet's peculiarly unassertive leadership and the crassly political decisions of the very few interacting states. He contends that China's control of the territory to this day represents an illegal occupation of a Tibetan state that maintains an objective legal existence (2002: 135–51).
- 11 James Crawford articulates the standard orthodoxy that 'an entity is not a State because it is recognized; it is recognized because it is a State' (2006: 93). He nonetheless concedes that recognition can: 'have important legal and political effects. Recognition is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or "recognize" entities the status of which is doubtful; depending on the degree of unanimity and other factors this may be evidence of a compelling kind' (Crawford 2006: 27).
- 12 Crawford rejects this reasoning on the ground that in international law generally, neither individual nor collective determinations of states have definitive legal effect (Crawford 2006: 20). But the notorious puzzle of the role of *opinio juris* in customary law formation is precisely this: that a legal duty is constituted, in part, by the widespread state perception of the existence of the duty. The anomaly seems no worse in the application of norms than in their formation.
- 13 Jörg Kammerhofer, a leading expert on the international legal scholarship of Hans Kelsen, goes so far as to say that all subsumption is inherently legislative in nature (Kammerhofer 2011: 121).
- 14 According to the most celebrated publicist of recognition practice, Sir Hersch Lauterpacht (writing in 1947), the view of recognition: 'approximating most closely to the practice of States and to a working juridical principle is: (a) that recognition consists in the application of a rule of international law by way of ascertaining the existence of the requisite conditions of statehood; and (b) that the fulfillment of that function in the affirmative sense – and nothing else – brings into being the plenitude of the normal rights and duties which international law attaches to statehood' (Lauterpacht 1947: 73).
- Thus, members of the international community (either separately or in coordination) have a duty to recognize as states those entities that qualify for the status under applicable legal criteria, but it is only their implementation of this duty that brings statehood into being. Lauterpacht expressed the point as follows: '[T]he full international personality of rising communities ... cannot be automatic. ... [A]s its ascertainment requires the prior determination of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty' (Lauterpacht 1947: 55).
- 15 As Ryngaert and Subrie note, 'the constitutive theory has some serious drawbacks, especially when an entity has been recognized only by part of the community of states. At a very concrete level, questions arise as to how many recognizing states are needed before an entity "transforms" into a state' (Ryngaert and Subrie 2011: 469).

- 16 The discussion herein is not intended to do justice to the topic of the legal requisites of statehood. These are covered in other chapters of this volume, as well as in other work of this author (Roth 2010: 396–421).
- 17 '[T]he scope of the principle of territorial integrity is confined to the sphere of relations between States' (International Court of Justice 2010: para. 80). Where unilateral declarations of independence have been authoritatively condemned as illegal, the Court explained, the illegality 'stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)' (International Court of Justice 2010: para. 81).
- 18 Some interactions with effectively distinct territories can occur without prejudice to the question of the formally-encompassing state's territorial integrity. The territory may hold membership in multilateral working arrangements that do not presuppose statehood, or may even, with the assent of formally-encompassing state, be granted membership in a more traditional intergovernmental organization under special conditions. Thus, Taiwan is party to the World Trade Organization as a 'Separate Customs Territory' and to the Convention for the Conservation of Southern Bluefish Tuna as a 'Fishing Entity'; it retains membership alongside China, in the Asian Development Bank, an organization for which statehood remains a nominal membership requirement, but as 'Taipei, China' (Crawford 2006: 203–4, 219–20). Moreover, foreign governments may, without the assent of the encompassing state, interact with the effective authorities of a territory to the extent strictly necessary to secure their interests and those of their nationals, so long as this '*de facto* recognition' is crafted to avoid implying an ascription of international legal personality to the territorial entity (Lauterpacht 1947: 348).
- 19 The Brierly (1963) treatise explains the rule's contours as follows: 'It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence of the old state in a struggle that has obviously become hopeless is not a sufficient cause for withholding it' (Ijalaye 1971: 558). Lauterpacht went a bit further to say that 'the sovereignty of the mother country is a legally relevant factor so long as it not abundantly clear that the lawful government has lost all hope or abandoned all effort to reassert its dominion' (Lauterpacht 1947: 45–6, quoted in Ijalaye 1971: 558).
- 20 For a study of the international system's attribution of sovereign prerogatives to post-colonial states that lacked effective governance capacities, see Jackson (1990).
- 21 According to Crawford: 'Since 1945 no state which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor state. By contrast there are many examples of failed attempts at unilateral secession, including cases where the seceding entity maintained *de facto* independence for some time' (Crawford 1998: 92). See also his summary of nonrecognition practice (1998:116).
- 22 'The breakaway republics of Slovenia and Croatia won recognition of their independence Wednesday from the 12-nation European Community, and about 15 other nations followed suit. The Yugoslav government denounced the actions as a violation of international law' (Moseley 1992). For a detailed analysis and critique of the concept of nonconsensual dissolution invoked by the EC's arbitral commission (the 'Badinter Commission'), see Roth (2015: 394–403).
- 23 For example, Eritrea, despite far earlier establishment of the 'facts on the ground' achieved international recognition only after Ethiopia's formal relinquishment (Crawford 1998: 106–7). Bangladesh is largely an exception (Islam 1985), though it did not achieve UN membership until late 1974, after Pakistan had conceded its existence as a state (Weinraub 1974).
- 24 According to Marko Milanovic, of the 43 states submitting memorials to the ICJ on the lawfulness of Kosovo's UDI, 14 expressly embraced the principle of remedial secession, whereas 14 rejected it and 25 remained neutral (Milanovic 2015: 43).
- 25 The problem is especially acute in cases such as that of Kosovo, where global recognition practice leading up to the 2010 ICJ Advisory Opinion was sharply divided (and indeed, has remained so since). Interestingly, the precise question posed to the ICJ (deliberately, it seems) did not extend to the broader legal consequences of the Kosovar Unilateral Declaration of Independence (which was deemed not itself to violate international law), and so the Court was able to avoid addressing even the entity's legal status, let alone the legality of the recognition practices of the states recognizing, respectively, Serbian and Kosovar authority in the territory. The Court noted only that states had expressed 'radically different views' on the substantive questions bearing on Kosovo's status (International Court of Justice 2010: 82).

- 26 Security Council Resolutions 216 and 217 of 1965 denied recognition to Southern Rhodesia and called on the United Kingdom to 'quell the rebellion of the racist minority'. General Assembly Resolution 3116A of 1976 denied recognition to Transkei, in part because it was established to perpetuate *apartheid*.
- 27 Security Council Resolutions 822, 853, 874, and 884 of 1993 called for withdrawal of Armenian troops.
- 28 Security Council Resolution 541 of 1983 proclaimed the TRNC's declaration of independence 'invalid'.
- 29 As Alison Pert notes, 'The ILC commentary on the draft article did not say whether this obligation was regarded as customary international law. It said, somewhat ambiguously, that the obligation 'finds support in' the 1970 Friendly Relations Declaration, Security Council and General Assembly resolutions relating to Rhodesia and the Bantustans, and the ICJ Namibia decision, and cited the ICJ's view in the Nicaragua case that the "validity of the rule[s]" in the 1970 Declaration was accepted by UN member states at the time of the Declaration's unanimous adoption' (Pert 2013: 11, footnotes omitted).
- 30 '[W]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision' (International Court of Justice 1971: paras. 115–6).
- 31 Compare Pert (2013: 12–16), arguing that 'only the resolution of an organ such as the Security Council, or the ICJ when called upon, can provide the necessary detail of what the obligation practically entails in any given situation', with Talmon (2005: 100–4), treating the norm as established in, at minimum, circumstances involving the results of illegal uses of force.
- 32 The International Law Association's Committee on Recognition/Non-Recognition in International Law, in its final report to the 2018 biennial ILA meeting, was unable to reach a consensus among its national branch representatives on this point (International Law Association 2018).
- 33 This contrasted with Opinion No. 7, January 11, 1992, favoring recognition of Slovenia (Badinter Commission (Conference on Yugoslavia Arbitration Commission) 1993: Opinion No. 7, 1517).
- 34 For a detailed history of these events, see Fabry (2010: 179–202).

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16

RECOGNITION OF GOVERNMENTS

M.J. Peterson

Introduction

In international law the term ‘recognition’ denotes an actor’s acknowledgment that some entity or situation exists and intention to respect the legal consequences of that existence. Identifying which territorial entities qualify as states and which set of persons are a state’s government pose the most politically significant recognition questions because they focus on identifying what remain the most significant actors in world politics. Thus, political leaders, international lawyers, and international relations scholars have all paid attention to how these recognition questions are addressed. This chapter focuses on recognition of governments, a process closely related to but distinct from recognition of states. Though international lawyers outline rules that should guide decisions about recognition of governments and seek to expand the area of consistency in state behavior, the actual practice of individual states and groups of states is perennially inconsistent because political considerations weigh heavily in decisions about who should be accorded that status when. The interplay of political considerations inclining governments to maintain discretion and international lawyers’ efforts to limit discretion through general rules will be examined in three parts. The first specifies the legal connection between a state and its government that gives recognition of governments its basic significance. The second identifies the occasions when a new government’s status can be questioned and the arguments that have been made about when and for what reason states can accept or decline to accept a new set of rulers coming into power in another state as its government. The third addresses the political and legal effects of according or denying recognition as a government to the current rulers of another state for relations with the rulers and for the situations of private persons living in a territory affected by arguments about whether its rulers deserve to be regarded as the government of a state. A concluding section considers the analytical advantages of combining the perspectives of international lawyers and scholars of world politics for understanding recognition of governments.

States and their governments

International law rules clearly define the close relationship between a state and its government. States are entities possessing what remains the most comprehensive form of legal personality in international law – they have the broadest range of legal rights and legal duties as well as the

widest capacities to act (Nijman 2004). However, states are collective entities incapable of acting for themselves; each needs human agents to act in its name and on its behalf. As the Permanent Court of International Justice emphasized in *German Settlers in Poland* (PCIJ 1923: 22), ‘states can act only by and through their agents and representatives.’ A state’s central (national) government provides those agents and representatives, who are empowered under international law to assert the state’s legal rights, ensure fulfillment of its legal obligations, and handle its relations with other states and the various types of nonstate actors in the international system.

This close connection is emphasized in definitions of the qualifications for acceptance as a state. Many writers follow the three-element list originally specified by Georg Jellinek (1900: 355–93): a population, living in a particular territory, and organized under an effective public authority. Later formulations sometimes used slightly different wording (e.g., Oppenheim 1992: 120 substituting ‘sovereign government’ for ‘effective public authority’), but its relevance was reaffirmed in the Badinter Commission’s Opinion No. 1 (1991: 165): ‘the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority.’ In the Western Hemisphere the Montevideo Convention on Rights and Duties of States (1933: Article 1) laid out a four-element definition of a permanent population, a defined territory, a government, and ability to enter into relations with other states. The two definitions are not as different as a literal reading might suggest because Jellinek defined ‘an effective public authority’ as including both an internal aspect of being able to maintain order within the territory and an external aspect of being legally and factually independent of any public authority in another state. Yet, as Stefan Talmon (2004: 116–7) argued, the drafters of the Montevideo Convention did introduce some confusion by defining that external aspect of rule as the ‘ability to enter into relations with other states.’ Since the existence of such relations depends on other states’ acceptance of the new state as a peer, the ability to enter into them is a result of, rather than a precondition for, acceptance as a state.

Whatever the words used to define the external aspect of possessing ‘an effective public authority,’ both legal traditions emphasize that a territorial entity claiming status as a state must have a set of identifiable human agents who will act internationally in its name. Thus recognition of a territorial entity as a state logically entails recognizing as its agent whatever central ruling authority it has at the time. Yet such is the room for discretion in recognition decisions that even this obvious logical implication has sometimes been ignored. The USA recognized Algeria as a state in July 1962 but did not recognize anyone as its government until September (USA 1962). The Organisation of African Unity declared that Angola (at the time a Portuguese colony) deserved recognition as an independent state in June 1971 without accepting the self-designated leaders of the anticolonial struggle as its government (Talmon 1998: 304). Yet, in the overwhelming majority of instances, recognition as a state does include accepting the current ruling group as its government.

Changes of government in existing states

International law allows states to change their human agents by accepting a new government whenever they choose, using whatever process they choose. A change of government does not affect the state’s existence, its rights, or its obligations under international law. A change of government will impede a state’s ability to assert its rights, fulfill its obligations, and interact with other states if the governments of other states refuse to accept the new government as a peer. This does not mean treating the state as nonexistent, but – as noted in the next section – does limit the range of state-to-state interaction with any government of another state that is withholding recognition.

Changes of government can occur in several ways: (i) according to the procedures defined in state's own constitution, domestic law, or settled domestic practice, (ii) through a coup d'état or a rebellion initiated by political actors within the state, or (iii) through armed intervention or wartime military occupation by another state. The second and third ways involve a break in legal continuity between governments that creates opportunities for questioning the status of the affected state's new rulers and rejecting their claim to being that state's government. Except in the cases of immediately successful coups, internal conflict or external action also mean that more than one set of self-described rulers claim to be the government of the affected state. This shifts the dynamics of decision from a simple binary of recognize or not to a more complicated decision about who, if anyone, should be recognized.

Changes of government in accordance with a state's internal rules

Most changes of government occur according to the constitution or other domestic procedural rules of the state concerned. These changes are accepted without comment by the governments of other states, which deal with the new authorities as a government from the moment of their formal entry into office. This rule is so well established that international lawyers writing on the topic simply state the rule without giving examples before moving on to consider the situations in which questions about whether new rulers should be accepted as the government can arise.

Changes of government by coup d'état

Coups d'état – whether 'military coups' involving units of the armed forces or 'palace coups' involving a faction displacing another faction within a ruling group – typically fail or succeed within days if not hours. Failure means that the incumbent government remains in power and continues in its role as international agent of the state. Success means that the people accept and obey the newly installed rulers. The governments of other states often accept the new rulers as that state's government, but the 'extraconstitutional' or 'extralegal' means by which the new rules gained power creates a break in legal continuity between governments that allows raising questions about whether the new rulers should be accepted as the affected state's government.

The post-Napoleonic insistence on monarchical legitimacy – that European states should be headed by a monarch and that that monarch should be drawn from some branch of the current royal family did not last long because of disagreements among the Great Powers (Peterson 1997: 57–8). More enduring have been notions of democratic legitimacy – that governments must secure their title to rule, and hence their claim to be the state's external agent, from an expression of explicit popular consent. This insistence on making post-coup popular affirmation a precondition for recognition of the new government by other states was first adopted multilaterally after Carlos R. Tobar's (1907) formulation was adopted in the 1907 Treaty of Peace and Amity among Guatemala, Honduras, Nicaragua, Panama, and El Salvador (Additional Protocol, 1907 Article 1) and repeated in their 1923 Treaty of Peace and Amity (Article II) (see General Treaty of Peace and Amity 1923). An Organization of American States (OAS) resolution adopted in 1966 revived it in a modified form as post-coup consultations among governments in the region focused on whether the coup had foreign inspiration or help, whether the coup-installed leaders would hold new elections 'within a reasonable time,' and whether they would uphold the state's existing legal obligations before each government decided on its own about recognition (OAS 1966). Similar ideas were repeated in OAS General Assembly Resolution 1080 (OAS 1991) by including

withholding recognition as the government among the possible responses to a coup d'état in an OAS member state. The related idea that any ruler seeking to extend their term of office or legitimize a coup by winning an election that does not meet 'internationally recognized electoral norms' of fair campaigning and honest counting should not be recognized also has support among some international lawyers (e.g. Burger 2003: 109).

Notions of democratic legitimacy were also invoked occasionally in other parts of the world during the Cold War (Peterson 1997: 63–7), and more frequently in the late 1980s and early 1990s as dictators were replaced by elected governments in many parts of the world, the Soviet bloc dissolved, and the Soviet Union itself broke up into multiple states (see Marston 1991 on the post-Soviet situations). Member States included a guarantee of democratic governance in the 1992 Treaty on European Union (Article F.1), and made adopting democratic constitutions a precondition for EU membership (European Union 1993). In parallel, some academic international lawyers were arguing that peoples have a 'right to democratic governance' (most clearly in Franck 1990; Reisman 1990).

Yet state behavior ('state practice' in international lawyers' parlance) remained inconsistent. Even when seeking UN Security Council support for the regional effort to restore President Aristide in Haiti after the 1991 military coup, the OAS was careful to present Resolution 1080 as regional rather than general international law:

The community of American nations, organized in the O.A.S., has therefore characteristics that are peculiar to it, one of the main such characteristics being that relating to the promotion and consolidation of democracy. ... no claim is being made that these distinctive features are universally applicable.

(OAS 1992: 7–8)

Similar ideas were tried elsewhere. In 2000, the Organisation of African Unity adopted a scheme for group consultation after a coup or other violent overthrow of a democratically elected government or refusal of an incumbent government to yield power when it lost a fair, free, competitive election, but left open whether nonrecognition and/or sanctions would follow (OAU 2000). Later in the decade the UN General Assembly formally identified democracy as a preferable mode of governance and outlined a plan for promoting it, but stopped well short of asserting that peoples have a right to democratic rule (e.g. UN, 2007a, 2007b). The UN General Assembly or Security Council sometimes supported regionally organized efforts to persuade a government originating in a palace or military coup to step down or to hold new elections – regarding Cambodia in 1997, Sierra Leone in 1997, Honduras in 2009, and Ivory Coast in 2011 – by declining to seat the new rulers' delegation. Yet, as Murphy (1999: 572–4) and Downer (2013: 584) pointed out, these decisions were not sufficiently well explained or consistent to provide good support for claims that there is a legal rule against seating delegations sent by new rulers who had displaced democratically elected predecessors through a coup. States' individual behavior also remained inconsistent (Kufuor 2002; d'Aspremont 2011). In view of these inconsistencies, it is not surprising that the idea individual states or a regional group of states can commit themselves to maintaining democratic forms of rule (International Court of Justice 1986: 131; OAS 1991) were not regarded as affecting other states' decisions about recognition.

The main alternative to basing recognition on democratic legitimacy is the long-established view that 'effective control' – whether new rulers effectively administer all or most of the state's territory – should be the primary consideration. This was sometimes defined as a corollary of the principle of territorial integrity (Schuit 2012: 385) and sometimes as a binding legal rule (Lauterpacht 1947: 28). Effective control was asserted in direct criticism of

the Tobar Doctrine by Mexican foreign minister Genaro Estrada in 1931 (Estrada Doctrine 1931), the same year the five Central American States terminated their 1923 Treaty of Peace and Amity. Yet it has not become the sole criterion. As an eminent Southeast Asian diplomat put it, '[o]ne generally recognizes the Government which exercises effective control over a territory. But this is not an absolute rule without exceptions' (Koh 1979).

Rival claimants to government status

In contrast to the short periods of uncertainty created by immediately suppressed or successful coups, longer periods of uncertainty about who is ruling a state can occur for any of four reasons: continued conflict within a ruling group that turns into internal war; a rebellion originating outside the current ruling coalition spreading far enough to present a serious challenge to government authority; a foreign state gaining effective control by installing a 'puppet government'; or wartime military occupation. The first two involve rival local claimants for status as the conflict-torn state's government; the last two most often involve displacement of the incumbent government into exile, where it seeks to maintain its status as the recognized government of the affected state.

Internal wars for control of the state

Whether originating inside or outside a ruling coalition, armed conflict accompanied by rival claims to status as government of the conflict-torn state has long been a fact of international life. Though rules of international law disfavor 'premature recognition' – recognizing a ruling group as the government of a state before it effectively controls all or most of the territory – they permit a good deal of discretion in determining when such control exists and allow other considerations to come into play. Nor are governments of other states forced to choose. They can simultaneously accept one contending faction as the affected state's government while accepting another as a *de facto* government operating in some part of the state, or they can settle into a period of accepting multiple *de facto* governments, each ruling a different part of the affected state.

Recognizing a faction as the *de facto* government of some part of the state becomes plausible when a rebellion gets to a scale indicating what 19th-century international lawyers called 'belligerency' (e.g., Beale 1896; Rougier 1903: 372–447) – the rebel movement has sufficiently organized and disciplined armed forces to wage effective war against rival forces and sufficiently secure control over some portion of the state's territory to have a stable base of operations. At that point, a rebel group could be considered a 'local *de facto* government' capable of taking administrative action within the territory it controls and developing limited relations with the governments of other states. Though the 19th century rules specifying that other states should be neutral and discourage their own nationals from participating in the fighting have eroded, the basic notions of rights of belligerency remain relevant (see, e.g., Duculeso 1975; Neff 1997). Typically, though, rebel groups seek more – recognition as the government of the state if their goal is taking over the existing state, or recognition as the government of a new state if their goal is secession.

Rebellions motivated by desire to take over the entire state are simpler in that they inspire no questions about statehood. All the combatants (the incumbent government if it still exists; the rebel group or groups) agree that the state should continue to exist within its current boundaries. At the same time, the existence of internal conflict does pose the question who, if anyone, should be accepted as the affected state's government. For many

decades the general presumption has been that as long as it exists in some form, the government in power when the rebellion began should continue to be regarded as the affected state's international agent until a rebel-organized rival has gained effective control of all or most of the territory.

The strength of this presumption provided the grounding for a long discussion of dispensing with recognition of governments in the later decades of the 20th century. The French and Belgian governments were early adopters (France 1965; Belgium 1973); the US government made some reference to the idea (USA 1977), but did not establish a consistent policy. The British government began a more consistent practice in 1980 (UK 1980) and by the end of the decade it had spread sufficiently beyond the Commonwealth (see Ando 1985) that the Solomon Islands Foreign Ministry could say that 'the practice of most states (70) to-date is to recognize States and not Governments' (Solomon Islands 1988). The Dutch (Siekman 1991) and New Zealand (New Zealand 1992) governments and the European Union (EU 1999) followed.

As some commentators noted (e.g., Symmons 1981; Peterson 1983; also see British Foreign Office discussions recounted in Young 2014), this did not solve the problem of identifying who should be accepted as international agent of a state affected by a prolonged internal conflict because there were likely to be occasions when domestic political considerations, judicial requests for information in the course of litigation proceeding in domestic courts, or arguments about seating a delegation in an intergovernmental organization would require a government to express its preference as among competing claimants to status as the government of another state.

This reality had been clear during the lengthy UN General Assembly debate about seating delegations from Cambodia in 1978–79 and again in contentions over seating delegations from Cambodia in 1997, Sierra Leone in 1997, Honduras in 2008–9, and Côte d'Ivoire in 2010–11 (Downer 2013: 603–7). The problems that could arise became more widely appreciated in 2011 during the Libyan civil war. A British government announcement in February 2011 that it would no longer treat Gaddafi as Libya's head of state, while his forces still controlled most of the country, appears to have been motivated mainly by desire to prevent him from seeking refuge in the UK, where some family members were already resident rather than by intention to accord status to the rebels (Talmon 2011: 763). The opposition's National Transition Council was called Libya's 'legitimate representative' by the French, German, and Italian governments by the end of March (varied wordings noted in Schuit 2012: 395). The French and United Arab Emirates governments called the NTC 'the government of Libya' in June, well before rebel forces reached Tripoli, while others supporting the rebels, including the UK, waited until August (Matk 2011).

Internal wars of secession

Some internal wars involve local rebels seeking to form a separate state by detaching some of its territory. Wars of secession thus pose the question of whether an existing state should be split, and the secessionists acquire their state only if they are able to establish and hold a territory against the best efforts of the incumbent central government. Secessionists have usually needed some foreign assistance, but that assistance only weakens the secessionists' claims to be legitimate political actors when the outside supporters are doing most of the fighting.

Acceptance of the principle that peoples have a right of self-determination into international law significantly changed the politico-legal context within which wars of secession occur, aiding some and inhibiting others. Self-determination was invoked as the primary

legal justification for dissolving the European overseas empires assembled in the 16th through 19th centuries. This found clearest expression in UN General Assembly Resolution 1514 (XV) (UN 1960), which defined independent statehood as the only proper future for every colony. In practice, a number of exceptions were allowed: (i) the incorporation of small colonies into a larger state with a plausible historical claim to their territory (e.g., India regarding Goa; China regarding Macao and Hong Kong); (ii) the merger of two separate colonies into a single new state (e.g., British and French Togoland as Togo; British and Italian Somaliland as Somalia), (iii) the division of a large colony into two states (India and Pakistan); and (iv) voluntary continuation of a dependent relation with a larger state by the population of a small colony (e.g., Netherlands Antilles; American Samoa). However, these exceptions defined application of the rule without undermining the basic expectation, tirelessly advanced by the Third World majority in the UN General Assembly, that all colonies would become independent states.

The status of ‘national liberation movement’ developed by the OAU and the UN during the height of decolonization provided a way to accord status indicating political preferences while acknowledging that other authorities remained in control of the territory. It allowed a number of governments sympathetic to the Algerian independence movement to signal support for the *Gouvernement provisoire de la Republique Algerienne* (GPRA) without triggering a strong French reaction. However, 39 states, including the USSR, other Soviet bloc states, China, and African states, recognized the GPRA as a government before France agreed to Algerian independence (Talmon 1998: 300–1). India proceeded more cautiously in its relations with the self-proclaimed Bangladeshi government-in-exile that established itself on Indian territory in April 1971, giving it considerable aid but not recognizing it as the government until December when Bangladesh independence had been conceded and it had moved to Dhaka (Tripathi 1990: 104–5; 117–20).

Defining how self-determination should be understood in noncolonial situations – whether within a state never subjected to European colonialism or within a state independent after a period of colonial status – has been more difficult. One important influence has been use of colonial-era lines to define the boundaries of newly independent states even though they ignored ethnic divisions within or across colonial borders. Using the colonial lines (*‘uti posseditis’*) was adopted when multiple Latin American states gained independence from Spain in the 1820s, and specifically affirmed for decolonization in Africa (OAU 1963: Article II(1)(c)). The roots of disagreement about noncolonial situations can be traced to the territorial settlements devised for the Balkans and Central Europe after World War I. Though there was some rhetoric about giving each people its own state, different ethnic groups were sufficiently intermingled that territorially compact and ethnically homogeneous states could not be created. Instead, acceptance of several of the new states was made contingent on their undertaking obligations to respect and protect ethnic minorities within their borders (Stone 1932; Thornberry 1991). Together, the post-World War II strengthening of the principle of territorial integrity of states (UN Charter 1945: Article 2, para. 4) and elaboration of international human rights law have provided additional support for conclusions that there is no right to what some have called ‘remedial secession’ – a minority group forming a new state because of serious persecution and gross human rights violations against it in the existing state (e.g., Raič 2002: 323–8 advocating; Buchanan 2004: 357–400 opposing; Shaw 2017: 203–4 summarizing debate). Murphy (1999: 554) argued that UN General Assembly Resolution 2626 (XXV) (1970: 7th para., under Equal Rights and Self-Determination of Peoples) adopted this view in discouraging secession when a government is ‘representing the whole people belonging to the territory without distinction as to race,

creed, or colour.’ The UN Security Council’s call on states to avoid recognizing the Turkish Republic of Northern Cyprus as a separate state (UN 1983) used similar reasoning, intensified by the fact that it emerged after armed intervention by Turkey (Shaw 2014: 170–1). The Badinter Commission (1992) also adopted this approach in concluding that the internal boundaries of pre-1991 Yugoslavia should guide the territorial settlements and ethnic minorities within would be protected through international human rights law. Though self-determination was offered as a rationale for Kosovo independence in 2008, the ICJ’s Advisory Opinion (ICJ 2010: 438, paras. 82–4) avoided addressing whether Kosovo’s declaration of independence in 2008 can be justified as an exercise of the right of self-determination, leaving open the question of which wars of secession are permissible today.

‘Puppet’ governments and military occupation

There is ample support for refusing to recognize as a government any set of rulers whose accession to power results from intervention or belligerent occupation by the armed forces of another state. As indicated in concurrent French support for Emperor Maximilian in Mexico and US support for the Republican government led by Benito Juárez (1862–67), states engaged in an intervention elsewhere could recognize their protégés as the government while states opposing the intervention could continue to recognize a now-displaced rival having a reasonable claim to be the ‘real’ ruler (Miller 1965). Concern about the extent of dependence on foreign support was expressed in 1920 by an International Commission of Jurists established by the League of Nations, which stated that recognition of Finland’s independence was delayed ‘until a stable political organization had been created and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of foreign troops’ (League of Nations Commission 1920: 8–9). Venezuela and some other Latin American states opposed seating the Libyan National Transition Council’s delegation in the UN General Assembly on grounds it had been imposed from outside (UN 2011). However, a sufficiently long-lived government installed with significant foreign help is likely to secure recognition over time, as demonstrated in the most blatant examples: Soviet-installed governments in Hungary (1956) and Czechoslovakia (1968) or US-installed governments in the Dominican Republic (1965).

Wartime occupations of already-recognized states raise different questions, and there is greater tendency to continue recognizing the now-displaced government. With the exception of Soviet refusal in May through late summer 1941 to recognize the Belgian, Norwegian, Yugoslav, and Greek governments displaced by Nazi Germany (Talmon 1998: 291–5), governments of Allied states recognized the governments-in-exile of Axis-overrun states. The Vichy government of France was an exception because it negotiated a surrender with the Germans and continued to administer a large part of France rather than flee. Yet, Allied states recognizing the Vichy government simultaneously treated De Gaulle’s Comité français de libération nationale as a partner in the war effort (Talmon 1998: 24–5). A similarly complex path was followed with Ethiopia between Italian annexation in 1936 and British liberation in late 1941. The country was never formally removed from the roster of League of Nations members even though many other members recognized the Italian annexation. Emperor Haile Selassie, then in exile, maintained a delegation office in Geneva but did not accredit delegates to the League Assembly in 1937–39 to avoid a debate over their credentials (Talmon 1998: 178–9). In contrast, there was no confusion in 1990–91 when the UN Security Council instructed states (UN 1990) to regard the exiled emir as the legitimate ruler of Kuwait (Talmon 1998: 161–3). Whatever the interim arrangements, questions about

rulership created by foreign military occupation are resolved at the end of the war, when the winning side determines who will govern where.

The effects of having or lacking recognition as a government

A state's own existence and international legal personality is not affected by a change of government. Even a complete breakdown of order in a particular territory is not by itself reason to regard a state as nonexistent. This proposition is most vividly demonstrated by the continuing recognition of Somalia, defined by its borders on July 1, 1960, as a state despite the fact it has been divided into three distinct regions since 1991 – the independence-seeking 'Somaliland' in the northeast ruled by an effective locally based government, 'Puntland' in the northwest ruled by an effective locally based government that specifically eschews seeking independence, and the rest nominally governed by a succession of governments based in Mogadishu but generally unable to control interclan warfare or offshore piracy.

Recognition as a government carries all the privileges and duties held by a state's international agent. These include maintenance of full formal diplomatic and consular relations, conclusion of treaties, ability to sue and immunity from suit in the courts of recognizing states, full respect for its own acts of state, and full control over state property located at home and abroad. Lack of recognition has varying implications depending the choices of nonrecognizing states. The rules of international law are complex and leave considerable room for discretion since treatment can vary according to whether the unrecognized government is regarded as a '*de facto* government' effectively ruling the whole state, a '*local de facto* government' ruling only part of the territory, a 'national liberation movement,' or a 'legitimate representative of the people.'

De facto governments enjoy wide possibilities. The ability of 'authorities *in situ*' (Talmon 1998: 195) to administer territory, collect taxes, and regulate individuals' and families' daily affairs in general has created a split between recognition as the international representative of a state from acknowledgment as the actual ruler of all or some part of the state. The legal doctrine justifying the split has two branches: an explicit one addressing internal wars (e.g., Neff 1997; Frowein 2009) and an implicit one addressing politically motivated recognitions or nonrecognitions of particular rulers (e.g., Briggs 1952: 168–70; Lauterpacht 1947: Chapter 10). The largest set of 19th-century precedents supporting the explicit tradition of treating the political leaderships of rebel movements attaining belligerency status as '*local de facto* governments' came out of the US Civil War (1861–65), with even the US government, the target of the rebellion, accepting the legal validity of marriage certificates, tax collection, and trial verdicts reached in the Confederacy (most clearly in *Texas v. White*, 1868; also see Moore 1906: I: 184). Another set of defining cases arose out of the Spanish Civil War (1936–39) (Lauterpacht 1939–40). Lengthy delays in accepting the Soviet government, persisting well beyond the point when it controlled the entire country, encouraged borrowing of civil war-related precedents to construct an implicit form of acknowledging realities on the ground by separating acceptance of 'administrative acts' from international representation of the state, and various types of 'informal' dealings from formal interstate diplomatic relations (for interwar discussions see, e.g., Gemma 1924; Houghton 1929).

Exactly how far courts in another state go in giving legal credence to such administrative acts depends on their own national law. Judges have generally regarded themselves as more rule-bound than political leaders since their task is to determine who has the authority to take what administrative actions where. In some countries, including the UK and the USA, the courts closely follow executive branch guidance about who is the accepted government

of another state or a *de facto* government in at least some part of another state. In others, courts have more discretion to determine those questions based on an appreciation of facts on the ground derived from litigants' testimony. Yet despite these national differences certain judicial conclusions are fairly consistent: new rulers seeking to get hold of state property located abroad, to conclude new bilateral treaties, and to engage in formal diplomatic relations need recognition as a government. There remains considerable variation in the extent to which rulers not recognized as the government can initiate lawsuits or be granted immunity from being sued in foreign courts.

As Herbert Briggs (1952: 118) noted, "unofficial relations" are a convenient, though juridically ambiguous device for dealing with [entities] from which, because of their indeterminate status or for political reasons, it is desirable to withhold recognition.' Governments have long maintained considerable discretion in defining the relations short of formal diplomatic relations and signing of treaties that they will undertake with rulers they do not recognize as the government of another state. The variety of these 'unofficial relations' has expanded since the mid-19th century, partly because the interconnections between societies have expanded and partly because the ways of signaling political approval have increased. Favored factions acknowledged as a 'national liberation movement' or the 'legitimate representative of the people' will be able to maintain a 'representative office,' with personnel having frequent contacts with high-level government officials, while disfavored factions will be denied those advantages.

There is growing consensus among international lawyers that the laws of warfare, including the international humanitarian law rules protecting civilian populations, apply to rebel groups (Moir 2002; Bassiouni 2003; Sivakumaran 2012) and oblige them to conduct their wars within the bounds of the law of armed conflict. Willingness to provide arms to favored groups varies, with some governments arguing in 2011 that recognizing the National Transition Council as the government of Libya was necessary first (Schuit 2012: 401, note 106), while others are willing to supply rebel groups they regard as belligerents.

Nonrecognition, particularly of rulers imposed through foreign intervention or military occupation, is often accompanied by other measures, including the freezing of financial assets of the affected state located within the territory of the nonrecognizing state so that the foreign-imposed authorities cannot get hold of them (Talmon 1998: 195–6). However, these measures are not direct effects of nonrecognition; freezing state assets is a common UN sanction and frequently features in bilateral contentions as well.

The law and politics of recognizing new governments

The process of identifying which set of rulers is in charge of a particular state has always existed at the intersection of international law and world politics. Governments generally agree that some amount of predictability is desirable, but stop short of adopting fully standardized and consistent rules about when new rulers should or should not be recognized as the government of their state. They have also created more opportunities for playing politics and dealing simultaneously with multiple claimants to government status by treating challengers as local *de facto* governments, national liberation movements, or legitimate representatives of their country's people.

The international lawyers' long debate about whether recognition is constitutive or declaratory of being a state or a government remains unresolved in legal theory. Scholars avoiding the debate often say recognition has both declaratory elements, in being a reaction to facts, and constitutive elements, in enabling a new government to interact with governments of

other states as a peer. The impasse may stem from the different starting points of the two conceptions. The declaratory view has a ‘bottom-up’ look because it gives primary attention to the results of local contention between supporters and opponents of creating a new state or displacing an existing government, while the constitutive view has a ‘top-down’ look because it gives primacy to the attitudes of the governments of established states. Yet that contrast oversimplifies. Local contention is not insulated from other actors, who may pursue their own goals by helping one side enough to change the result. Similarly, if the supposedly ‘top-down’ constitutive conception of recognition is combined with belief that there is a duty to recognize once the requirements for recognition are met, the decision is ‘bottom-up’ in giving greatest weight to local results.

Analysts of international relations have become more interested in recognition in recent years. Both the constructivist reaction against structuralist and rational choice theory accounts of world politics (e.g. Onuf 2013) and the ‘practice turn’ (e.g. Adler and Pouliot 2011) encouraged paying more attention to actors’ conceptions of status and its implications. Scholars pursuing international political sociology go even further in emphasizing the relational aspects of acceptance or nonacceptance as a peer for both newcomers and long-established actors (e.g., Greenhill 2008; Fabry 2010). Yet transferring sociological concepts about status and the impact of others’ reactions to status claims developed to study human interactions within in a society to states and governments in the current international system (e.g., Lindemann 2010; Wolf 2011) can be misleading because the conception of recognition used in these studies is far broader than international lawyers’ understanding of the term (see caution in Agné 2014).

Increased concern about the ethical bases of international order (e.g., Buchanan 2004) gives new point to the long contention about whether recognition as a government should be conditional on accepting certain principles and norms. This gives new point to the long contention between advocates of democratic legitimacy and advocates of effective control. It also gives sharper point to the argument that a new government’s attitudes toward respecting human rights should figure in its acceptance (an early expression is in Fawcett 1965–66). The European Community included respect for human rights and rule of law in its guidelines on recognition of states in the wake of the Cold War (European Community 1991), and later backsliding by particular governments has inspired concern. Declared readiness to commit mass human rights violations – most notably in a lengthy speech broadcast nationwide on February 22, 2011 – was a more important element than the undemocratic character of Gaddafi’s rule in decisions by some other states to support Libyan rebels (Vidmar 2013: 156). Yet even governments emphasizing human rights in their foreign policy decisions have shied away from making respect for human rights a consistent precondition for recognition as the government of another state (e.g., Nesi 2011; UK 2011).

The continued lack of practical or ethical consensus among actors in the international system means that governments remain unready to adopt binding rules that would severely constrain their discretion in particular cases (e.g., Talmon 1998; Takashi 2010; Nesi 2011) or to agree that all recognition decisions will be made collectively at the regional or global level (Shaw 2017: 345). This refusal to develop generally applicable rules means, as international lawyers have long acknowledged, that decisions about recognizing or not recognizing some set of rulers as the government of their state will continue to be based on varying motives and respond to the particulars of each situation. International lawyers can illuminate some of the considerations involved, but the full range of considerations taken into account will depend on how governments of states perceive and act within the international system they inhabit.

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STATEHOOD AND COLLECTIVE RECOGNITION

Practice of states and UN organs

Jure Vidmar

Introduction

The law of statehood and recognition has been heavily influenced by the great theoretical debate on whether recognition is a declaratory or a constitutive legal act (Shaw 2017). The constitutive school, which is now of predominantly historic relevance, advocates the view that states become persons of international law on being recognized by other states (Oppenheim 1905). The obvious problem of this theory is that it remains unclear how many and whose recognitions are necessary for an entity to become a state. Is recognition of all states required, of most states, of more than a half, or of certain most powerful ones? The constitutive theory does not have an answer. Most contemporary theorists subscribe to the view that recognition is declaratory, meaning that recognition does not create a state, but merely acknowledges a pre-existing fact—that of an existence of a state (Shaw 2017). It is submitted in this contribution that the declaratory theory also has its conceptual shortcomings. If the constitutive theory cannot explain how states emerge in international law, this does not simply mean that recognition must be declaratory and that no other explanation is possible.

This contribution argues that certain concepts in international legal doctrine silently assume that under some circumstances recognition could be constitutive. This is particularly the case where recognition is granted collectively, i.e. by a large number of states over a relatively short period of time. Collective recognition then becomes a mode of collective state creation. It is still unclear how many states need to recognize for collective recognition to have such effects. This contribution argues that the legal effects of recognition should not be assessed in the absence of the concept of statehood. Indeed, if the debate is focused on the theoretical legal question of whether or not (collective) recognition can create a state, it is crucial to explain what the state is under international law. This question has been insufficiently explored in contemporary theoretical writings. It is submitted here that the state is a certain legal status under customary international law. Recognition is a mode of expressing state practice and *opinio juris* that a certain entity has the legal status of a state. Collective recognition that is widespread can end doubts with regard to the legal status of an entity.

The inadequacy of the constitutive vs. declaratory debate

Writers on recognition have traditionally distinguished between the constitutive and declaratory theories. In the constitutive view, recognition is 'a necessary act before the recognized entity can enjoy an international personality' (Dixon, McCorquodale and Williams 2016). Accordingly, it is claimed that statehood depends on recognition (Grant 1999). A state may be recognized by some states but not by others, and this is the main problem of the constitutive view (Brierly 1963). Since there is no central international authority for granting recognition, such an entity at the same time has and does not have an international personality (Brierly 1963). If we accept the constitutive view, it is then unclear how many and whose recognitions need to be granted to successfully create a state.

Most contemporary writers have thus adopted the view that recognition is declaratory, that is, 'merely a political act recognizing a pre-existing state of affairs' (Harris 2010). Recognition in this view only *acknowledges* that a certain state exists, but does not create it. Not even this theory is without difficulties. In a decentralized system of international law and in the absence of a public international authority for identifying states, this duty needs to be performed by the (existing) states. In this vein, Hersch Lauterpacht (2013) argued that, once the statehood criteria are met, foreign states have a *duty* to grant recognition. This position is generally rejected, as no such duty has never been established in state practice (Kelsen 1999). In the absence of a duty to recognize, Lauterpacht's constitutive approach does not work. This brings the recognition debate back to the original deficiency of the constitutive theory and it remains objectively unclear whether or not non-recognized or partly recognized entities can be states.

Non-recognized states

The practice of states and UN organs confirms that non-recognized states may exist. Such are the examples of the Federal Republic of Yugoslavia (FRY) and Macedonia. In the somewhat peculiar process of the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the international involvement channelled through the European Community (EC) led to the legally non-binding but politically highly persuasive opinion of the Badinter Commission that the SFRY no longer existed (Badinter Commission 1991: Opinion 1). This position was subsequently universalized and accepted in the practice of states and confirmed even by the UN Security Council, which gave it also a legal dimension (UN Security Council 1992a, 1992b). New states in the territory of the SFRY then emerged in the absence of a counterclaim for territorial integrity. The FRY and Macedonia for some period remained universally non-recognized, but, in the absence of any other state authority in these territories, there was no doubt that they were states. Indeed, the only other explanation could have been *terra nullius*, which is no longer tenable in contemporary international legal doctrine.

The FRY was an unusual example because it denied that it was a newly created state and instead claimed continuity with the legal personality of the SFRY. The controversy was thus actually about state succession rather than statehood. But, despite being non-recognized, the FRY appeared before the International Court of Justice (ICJ) in the *Bosnian Genocide* case, where the judicial proceedings are only available to states. The ICJ implicitly (ICJ 1996) and the Badinter Commission explicitly (Badinter Commission 1993: Opinion 11) pronounced that the FRY became a state on 27 April 1992, the day of the adoption of its new constitution, and was therefore a state before any other state extended its recognition.

Although the Badinter Commission recommended its recognition in 1992, Macedonia remained unrecognized by the EC member states until 16 December 1993, and even then it

was recognized under a compromise name: the Former Yugoslav Republic of Macedonia (FYR Macedonia) (Crawford 2006). The reason for non-recognition was Greece's objection to its constitutional name—Macedonia (Grant 1999). The EC did not extend recognition, owing to internal policy matters, but this policy was applied almost universally, given that only Bulgaria, Turkey and Lithuania granted recognition under the original name before admission of the FYR Macedonia to the UN (Rich 1993). The lack of universal recognition for Macedonia does not mean that it was not a state in that period. Even the Badinter Commission held in its Opinion 11 that Macedonia became a state on 17 November 1991, the day that it adopted a new constitution proclaiming independence.

These two examples show that in some circumstances declaratory theory indeed works. For the FRY and Macedonia, recognition indeed was not instrumental and it played no role in the process of state creation. What was crucial in these two situations is that it became accepted through the practice of states and UN organs that their predecessor state no longer existed. In the absence of another state authority in their territories, it was clear that the two entities could only be states. The FRY and Macedonia nevertheless emerged in an internationalized political process. This involvement was not formalized through collective recognition but rather led to legal authority that the predecessor state no longer existed.

State creation via recognition

Examples such as Kosovo, on the other hand, pose a challenge to the conventional declaratory approach. Where the parent state continues to exist, collective recognition could be instrumental and even have constitutive effects. When Kosovo declared independence on 17 February 2008, the act attracted significant international support. But ten years later recognition is still far from being universal. Has this attempt at state creation through recognition been successful? Before these recognitions had been granted, it was clear that Kosovo was not a state. This is now unclear and remains unclear even after the *Kosovo Advisory Opinion*, in which the ICJ avoided any reference to Kosovo's legal status (ICJ 2010). If Kosovo is a state, would it be a state also without the collective recognition which has been granted by a high number of states? If recognition is always declaratory, why should Kosovo be a state now when it was not after the declaration of independence in 1991? At the time only Albania granted recognition, while since the 2008 declaration of independence recognition has been granted by 117 states. It is difficult to ignore such a high number of recognitions but what implications does it have for Kosovo's legal status?

One could try to reformulate the deficiency of the constitutive theory and ask the well-known question from the other direction: whose and how many *withholdings* of recognition are necessary such that an entity is *not* considered a state? Is Kosovo a state because it has been recognized by 117 states, or is it not a state because it has been recognized *only* by 117 states? This is fewer than two-thirds of all states in the world and without recognitions of two out of five permanent members of the UN Security Council: China and Russia. This dilemma illustrates the problem of the constitutive approach, yet it also illustrates that it is precisely the high number of recognitions which has led to the situation in which Kosovo's legal status is objectively at least ambiguous. Kosovo is a state for, e.g., the United States, the United Kingdom, France and Germany but not a state for, e.g., China, Russia, Spain, Slovakia and South Africa. Is it possible to determine Kosovo's legal status objectively? Regardless, collective and widespread recognition has led to a situation where 117 states consider Kosovo to be a state. What does this tell us about the concept of (collective) recognition and the declaratory theory?

Is collective recognition constitutive?

Writing about Kosovo, Marc Weller (2009) suggests that recognition would need to be ‘widespread’ if it were to have state-creative effects. Similarly, James Crawford (2006: 501) argues that:

[I]n many cases, and this is true of the nineteenth century as of the twentieth, international action has been determinative [for new state creations]: international organizations or groups of states—especially the so-called ‘Great Powers’—have exercised a collective authority to supervise, regulate and condition ... new state creations. In some cases the action takes the form of the direct establishment of the new state: a constitution is provided, the state territory is delimited, a head of state is nominated. In others it is rather a form of collective recognition—although the distinction is not a rigid one. Alternatively, various international regimes have been established for particular territories or groups of territories, with eventual independence in view—in particular, the Mandate and Trusteeship systems, and the procedures established under Chapter XI of the [UN] Charter.

If recognition is universal or near universal, collective recognition and collective state creation virtually become synonyms. What if recognition is only ‘widespread’, yet not near universal, as is currently the case with Kosovo? In this case recognition creates ambiguity with regard to the legal status of a territory and this ambiguity is sometimes overcome over a longer period of time, in the same way the legal status of Bangladesh between 1971 and 1974 had yet to be clarified.

Although mainstream international legal theory insists that recognition of states is a declaratory act, when dealing with practical issues and case studies most writers at least implicitly acknowledge that collective recognition can have constitutive effects and is difficult to distinguish from collective state creation. But recognition in this case needs to be virtually universal, otherwise widespread collective recognition can lead to ambiguity with regard to the legal status of a territory. The possible constitutive effects of collective recognition are also implied by the duty to withhold recognition where a state would have emerged illegally. Why would a collective withholding of recognition even be necessary if recognition could never create a state?

The obligation of collective non-recognition and why is it necessary?

Any legal debate on statehood usually begins with the so-called Montevideo criteria. Article 1 of the 1933 Montevideo Convention on Rights and Duties of States, which reflects the commonly accepted definition of a state under customary international law, provides that ‘[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) [the] capacity to enter into relations with other states’ (Montevideo Convention 1933: Article 1). Is it possible to explain by these criteria alone whether Kosovo is a state or why Somaliland is not? The Montevideo criteria are descriptive in nature, but are at the same time too inclusive and too exclusive to be used as a legal definition of a state. While most states indeed have these characteristics, it is not only states and it is not all states that have them. Most writers nevertheless accept the view that states in principle emerge automatically and self-evidently by meeting the Montevideo criteria, although state practice clearly demonstrates that this is not the case (Vidmar 2013). The misconception of Montevideo is closely associated also with the misconception about the nature and purpose of collective non-recognition.

Discussing the legal status of Southern Rhodesia, where the so-called Montevideo criteria for statehood had been met, James Crawford argues that three interpretations are possible: (i) Southern Rhodesia was a state; (ii) Southern Rhodesia was not a state because recognition was collectively withheld; and (iii) Southern Rhodesia was not a state because 'the principle of self-determination in this situation prevented an otherwise effective entity from being regarded as a State' (Crawford 2006). Crawford then concludes that, in the light of international practice, the first possibility needs to be rejected. The second possibility is also rejected, with the explanation that recognition is declaratory, and Crawford thus accepts the third option: although the Montevideo criteria were met, Southern Rhodesia was not a state because it would have emerged in breach of the right of self-determination of the majority population of the territory. Crawford's explanation is that, in addition to Montevideo, an additional set of legality-based statehood criteria is also applicable, i.e. the so-called 'additional statehood' criteria.

This reasoning presupposes that Southern Rhodesia would have been a state had the Montevideo criteria been the only applicable statehood criteria. Since it was not generally considered to be a state, this means that a set of additional statehood criteria must exist beyond Montevideo. The logic of this argument works only if it is accepted that states emerge automatically upon meeting the statehood criteria, albeit the statehood criteria are here extended with a set of non-Montevideo ones. Crawford here tries to understand state creation purely as a matter of law and ignores the political dimensions of it. Statehood may well be a status under international law, but it is not created by legal rules alone. Statehood is politically created and the law merely registers it. As will be demonstrated below, many international legal theories misconceptualize and try to over-legalize the process of state creation, which also leads to several wrong conclusions on the nature and purpose of recognition. Recent practice shows that an entity can meet both the Montevideo statehood criteria and the so-called additional criteria, but nevertheless not be a state. The concept of the additional statehood criteria is influenced by the zeitgeist of Southern Rhodesia, the South African homelands, and Northern Cyprus, but it cannot explain why, for example, Somaliland is not a state. And neither can it clarify the legal status of Kosovo. Statehood is therefore not a simple question of meeting or not meeting the statehood criteria, be it Montevideo or also something in addition to it. What is statehood as a concept?

When clarifying the effects of an illegal state creation for the entity's legal status, it is of central importance to consider the purpose of the collective non-recognition on legal grounds. Namely, the advocates of the additional statehood criteria argue that an illegally created effective entity is not a state. At the same time, the illegality underlying the additional statehood criteria triggers an obligation to withhold recognition under general international law. If an illegally created effective entity is not a state and yet it is subject to collective withholding of recognition, the interpretation could follow that the purpose of collective non-recognition is preventing this entity from becoming a state. This interpretation is not easy to square with the prevailing view in contemporary international law of recognition being a declaratory, not a constitutive act (Harris 2010).

International law is, in principle, neutral on the question of unilateral secession and that declaring independence without consent of the parent state is not an internationally wrongful act (Crawford 2006). As was confirmed even in the otherwise very narrowly phrased *Kosovo Advisory Opinion* (ICJ 2010: 10):

[T]he illegality attached to [some other] declarations of independence ... stemmed not from the unilateral character of these declarations as such, but from the fact

that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).

This pronouncement of the ICJ is highly significant. The Court was otherwise criticized for establishing a formalistic distinction between issuing a declaration of independence and creating a state. At this point it nevertheless affirmed that under some circumstances even a declaration itself might be illegal where it tries to consolidate a situation created in violation of *jus cogens*. This doctrine is largely based on the practice developed with regard to Turkey's forceful creation of Northern Cyprus, the declarations of independence of Southern Rhodesia and four South African homelands, and South Africa's illegal presence in Namibia (Raič 2002). There are also some older potentially relevant examples, such as Japan's creation of Manchukuo (Raič 2002). The unilateral character of declarations of independence did not create the territorial illegality in these circumstances (for example, without approval of parent states); it was created by the fact that these entities intended to become states as a result of illegal use of force, i.e. in contravention of Article 2(4) UN Charter, or in pursuance of apartheid.

Where declaration of independence is issued in violation of *jus cogens*, it is illegal and other states have a duty to withhold recognition. Articles 40 and 41 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) have confirmed this doctrine. Article 41(2) provides that 'no State shall recognize as lawful a situation created by a serious breach [of *jus cogens*] ... nor render aid or assistance in maintaining that situation' (ARSIWA Article 41(2)). This is where the neutrality of international law on declarations of independence ends. In the sense of paragraph 81 of the *Kosovo Advisory Opinion*, we are no longer talking about a unilateral declaration of independence but an attempt at secession in violation of *jus cogens* (ICJ 2010). This circumstance triggers Article 41 of ARSIWA. All states—including the wrongdoer—are obliged to withhold recognition.

Concerning recognition, one might ask why the duty to withhold recognition, as reflected in Article 41 ARSIWA, is necessary if recognition could not create a state. Some writers see declaratory recognition as a dogma and then use evasive language when they need to deny any constitutive effects. One such position is advanced by David Raič (2002):

[T]he obligation of non-recognition has a declaratory character in the sense that States are considered to be under a legal obligation not to recognize a specific situation which is *already* legally non-existent. Thus, the obligation of withholding recognition is not the cause of the fact that an illegal act does not produce the intended results, that is, legal rights for the wrongdoer. Non-recognition merely declares or confirms that fact and the obligation not to grant recognition prevents the validation or 'curing' of the illegal act or the situation resulting from that act.

Such an argument presupposes that a breach of certain fundamental norms of international law *automatically* results in this entity not being a state. The argument is paradoxical as this school of thought denies the automatic effects (i.e. state-creative) of the Montevideo criteria, yet at the same time presupposes the automatic effects (statehood-denying) of the additional statehood criteria. In this view, an entity does not become a state automatically upon meeting the Montevideo criteria, but a violation of the additional statehood criteria automatically results in this entity not being a state. Stefan Talmon (2005) argues that the call for collective non-recognition of an illegally created effective entity implies only that such an entity

could become a state through recognition and proponents of the declaratory theory do not adequately prove that this is not so. Indeed, illegality being ‘cured’ through recognition is just a way of saying that recognition could create a state without saying this directly. It is simultaneously proposed that an illegal state creation triggers an obligation to withhold recognition, and that the underlying illegality *automatically* results in this entity not being a state. The territorial illegality ought to trigger an obligation to withhold recognition of an entity which is not a state in the first place. Why would that be necessary if recognition could not constitute a state? One then needs to accept either that recognition may constitute a state or that the illegally created effective entities are, in fact, states and non-recognition has no consequences for the legal status.

Non-recognized *illegal* states?

The view of treating illegally created effective entities as states and preserving the declaratory nature of recognition is very prominently advocated by Talmon, who argues that ‘[t]he collectively non-recognized States may be “illegal States” [but] they are nevertheless still “States”’ and that ‘the additional criteria of legality proposed are not criteria for statehood but merely conditions for recognition, *viz* reasons for not recognizing *existing* States’ (Talmon 2005). This position introduces the concept of ‘illegal states’, which uses the word ‘states’ and thus accepts that collectively non-recognized ‘illegal states’ are *prima facie* states. Since they already are states, no constitutive effects are ascribed to the act of recognition. In other words, non-recognition only interferes with the adjective ‘illegal’ and not with the noun ‘state’.

The concept of ‘illegal states’ presupposes that states are naturally born, but then their rights and duties need to be legally created. Hans Kelsen (1999), however, argues that ‘[t]he State is an international personality *because* it is a subject of international duties and rights’. Furthermore, ‘[t]he rights of states under general international law are always the reflection of the duties imposed by general international law upon other states’. The concept of statehood implies the existence of certain rights and duties inherent in statehood. We cannot have states without the rights and duties stemming from statehood.

Besides the problem of adopting the controversial view of a natural birth of states, the concept of ‘illegal states’ in the end does not even resolve the problem of ascribing constitutive effects to recognition via the obligation to withhold it. Indeed, unlike ‘states’, ‘illegal states’ in this perception do not have the full attributes of statehood. By holding that non-recognition *only* withholds ‘the rights inherent in statehood’, it is assumed that recognition could endow an ‘illegal state’ with the full attributes of statehood. Constitutive effects of recognition are then admitted through the back door and the conceptual problem merely pushed to another level: it is not a state itself which could be constituted by recognition; it is ‘only’ the rights and duties of statehood that could be constituted if recognition were not withheld. This is another way of admitting that recognition could be constitutive, but without actually saying this directly.

What is a state?

It has been demonstrated that the misconceptions on the effects of recognition and the purposes of the duty to withhold recognition stem from the attempt to over-legalize the process of state creation, treating it as an entirely legal occurrence and ignoring its political dimensions. This misunderstanding seems to be deeply engrained in international legal science, and the attempt to analogize states under international law with individuals in municipal legal systems. The above-discussed concept of ‘illegal states’ falls close to Oppenheim’s

understanding that a state emerges as a matter of fact, yet it does not acquire an international personality by its 'natural birth' but rather by recognition (Oppenheim 1905). As Lauterpacht (2013) noted, such an explanation adopts the 'confusing distinction between (natural) statehood, which is independent of recognition, and membership of the international community (or full international personality), which alone is a source of rights and which is dependent on recognition'. Lauterpacht (2013: 38–39) continues:

The distinction seems to be of little value. There is, in law, no substance in the assertion that a community is a State unless we attach to the fact of statehood rights and competencies within the internal or international sphere, which international law is ready to recognize. It seems irrelevant to predicate that a community exists as a State unless such existence is treated as implying legal consequences.

A much more realistic explanation of the purpose of the obligation to collectively withhold recognition is that universal recognition of an illegally created effective entity would have state-creative effects. It would provide for state practice and *opinio juris* that such an entity is a state. The obligation to withhold recognition thereby seeks to prevent that an illegally created entity would become a state. When adjectives are attached to the noun state, the rights and duties stemming from statehood cannot depend on this adjective. Statehood is a unitary legal concept and there cannot be varying degrees of it. The concept of 'illegal states' needs to be rejected, as it implies the existence of 'states' without the rights and duties stemming from statehood. It is precisely such rights and duties that make a state a state and thus different from other persons of and actors in international law.

Many legal theorists historically analogized states with objects and even people. It is still common for international lawyers to equate the attributes of states with those of humans (d'Aspremont 2015). It has been especially significant of German positivist writers to see states as natural persons of international law (Aust 2015). From this line of thought also comes the understanding that states are 'born' as natural persons (Talmon 2005). It is said that international law merely issues a birth certificate to 'naturally born states'—via recognition (Talmon 2005). In municipal law, the existence of a natural person indeed does not depend on whether or not a birth certificate was issued. The same ought to apply analogously to states under international law. But how exactly are states born the way children are born?

It may be more appropriate to compare states to corporations rather than individuals in municipal law, as they are legal persons rather than natural persons. Corporations also have visible physical components, such as buildings, employees, management, and the capacity to conduct business with other corporations. While there exists a physical aspect of corporations, they are legal entities, not natural creatures. In international law, states are similarly entities that exist in law. Owing to a decentralized nature of international law, their legal status may be unclear in some borderline situations.

As states are not naturally born creatures, it needs to be answered where states are grounded in international law. If one is not prepared to accept the theory of natural statehood, this status needs to be grounded in the sources of international law, as enumerated in Article 38(1) of the ICJ Statute. Sometimes, states are created by international treaties (e.g. the 1955 Austrian State Treaty). In other cases, the existence of a state is accepted by other states in a less explicit way, but in practice states clearly indicate that they are accepting a certain entity as a separate state. The approach is evidently the same as that on the formation of rules of customary international law, which requires a uniform (although not universal) state practice and *opinio juris*. The problem of e.g. Kosovo is also similar to that of identification of

international custom: how general and/or universal do state practice and *opinio juris* need to be in order to have a customary rule of international law? The standard answer is: it should be as universal as possible, the more the better; universality diminishes the degree of ambiguity. The resemblance between the concepts of statehood and customary international law is not accidental: statehood is quite simply customary status under international law. It is not the statehood criteria which are customary, but statehood itself.

Grounding statehood in customary international law also explains the concept and purpose of recognition. In contemporary scholarship, recognition is seen a declaratory legal act and is supposed to have no constitutive effects. This position is dogmatic and not entirely in line with state practice. It is true that the constitutive theory is inadequate, as it does not answer how many and whose recognitions are necessary for an entity to become a state. If recognition were constitutive, an entity could be a state for some states but not for others. However, just because the constitutive theory has its flaws, this does not mean that recognition must always be declaratory. Where independence is declared unilaterally, a state could be created through collective recognition. As Crawford acknowledges, collective recognition could have the effects of a creative state creation. In the Quebec case, the Supreme Court of Canada even more prominently acknowledged the constitutive effects of collective recognition:

The ultimate success of ... a [unilateral] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.

(*The Quebec Case 1998*: par. 155)

Taking the recent example of Kosovo as an example, one can question whether its recognition indeed was merely declaratory. Or is it rather that Kosovo falls within the meaning of the 'constitutive paragraph' of the Quebec case? Where an attempt at secession is unilateral, collective and widespread recognition can have constitutive effects. Notably, Kosovo is often described as a *sui generis* situation. Describing a situation with the *sui generis* label merely acknowledges the shortcomings of the existing theories. Yet, a valid theory needs to stand when scrutinized with difficult situations.

Certainly, when one admits certain constitutive effects of recognition, the old problem of the constitutive theory surfaces: whose and how many recognitions are necessary? Its collective nature becomes of crucial importance. The legal effects of collective recognition make the emergence of states theoretically similar to the emergence of customary international law. The making of international customary law requires state practice and *opinio juris* that are sufficiently uniform, but do not need to be entirely universal. Just as state practice and *opinio juris* coming from one, two or three states do not create international custom, recognition coming from one, two or three states certainly does not create a state. But collective recognition that is sufficiently universal can be taken as evidence of state practice and *opinio juris* and indicate that an entity's statehood is generally accepted under customary international law.

Conclusion

The predominant view in the law of statehood is that states emerge simply by meeting the statehood criteria and that recognition merely acknowledges this fact. Recognition thus ought to have a merely ceremonial declaratory role and no consequences for the legal status of a territory. When the theories of statehood and recognition are tested with some difficult

examples they prove to be deficient. Why is Somaliland not a state? What is the legal status of Kosovo and is recognition in this case really merely declaratory? Why are states under some circumstances under an international legal obligation to withhold recognition of an illegally created effective entity? Why would that be necessary if recognition were always declaratory? In response to these challenges, theorists have developed explanations, such as: Kosovo is a situation *sui generis*, the purpose of collective non-recognition is that the illegal territorial situation would not be cured, and Northern Cyprus is an illegal *state*. This contribution has argued that such explanations are based on a dogmatic premise that recognition must always be declaratory, no matter what. They further adopt the questionable theory that states emerge automatically and self-evidently on meeting the statehood criteria.

Despite the somewhat dogmatic attachment to declaratory recognition in international legal theory, certain authoritative positions exist which at least implicitly admit that recognition could have constitutive effects under some circumstances. In the 1998 *Quebec case*, the Supreme Court of Canada held that Quebec's possible unilateral secession could become effective via international recognition, whereas foreign states would be considering the legality and legitimacy of its claim for independence when deciding whether or not recognition should be granted. Even certain prominent writers who otherwise defend the declaratory theory have at least indirectly admitted that under some circumstances recognition could have constitutive effects. Crawford (2006) argues that collective recognition could be seen as a less formalized way of a collective state creation, while Weller (2011) implies that widespread recognition could be seen as a granting of legal authority for secession.

Theoretical views on recognition are often difficult to square with certain practical developments, and then theorists are trying to develop new theories to explain the process of state creation via recognition while seemingly preserving the declaratory nature of recognition. But these theories often fail to address the fundamental question of what a state is. This contribution has argued that recognition is a puzzle in a larger picture of the law of statehood. The latter is still influenced by nineteenth-century German positivism, which viewed states as natural persons of international law which ought to be born the way children are born. But states are legal persons, not natural ones. This contribution has sought to supplement the theories of Hans Kelsen (1999) and Hersch Lauterpacht (2013), who reject the state-as-a-natural-fact approach and define states as purely legal concepts. Lauterpacht, however, proceeded on the assumption that a duty exists to recognize a state once the Montevideo criteria have been met. International practice suggests otherwise—that no such duty exists. Instead, this contribution has asked where a state as a person of international law is founded. The answer can only be found in the formal sources of international law.

Some states have been created by treaties, but most states are founded by customary international law. It is therefore no coincidence that in some difficult examples, especially where states try to emerge unilaterally, the process of state creation echoes the emergence of international custom. State practice and *opinio juris* need to be as general as possible. Not necessarily followed by all states in the world, but the more that do so, the stronger the claim that a customary rule has emerged. Recognition of states is thus nothing other than evidence of state practice and expression of *opinio juris* that a new state has emerged under international law. It is not the only way of such impression and universally non-recognized states have existed before where other circumstances left no doubt they are states (e.g. FRY, Macedonia), but it is a persuasive indicator of statehood. Collective recognition can have the effects of a collective state creation. The term collective is not linked to any particular number, but, in order to end any doubt with regard to the legal status of a territory, as many states as possible should recognize and

the more powerful ones also carry more weight. Where collective recognition is widespread yet not universal, we may have ambiguity with regard to legal status. Such ambiguity is a consequence of the nature of the state under international law: states are not objective physical facts, statehood is legal status under customary international law and the formation of custom is prone to ambiguities that are sometimes ended only over a longer period of time.

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18

COLLECTIVE NON-RECOGNITION OF STATES

Nina Caspersen

Introduction

For many aspiring states, international recognition remains but a distant dream. This is even true for a number of entities that have maintained prolonged territorial control, have built state-like institutions and in some instances have introduced political reforms. As Samuel Huntington once commented, “the bias against political divorce, that is secession, is just about as strong as the nineteenth century bias against marital divorce” (Huntington 1972: vii). This international bias against secession manifests itself in forms of collective non-recognition: more or less complete refusals by the international system of sovereign states to formally recognise the state that has been proclaimed or to aid and assist its *de facto* independence.

Collective non-recognition can, as James Crawford (2006: 157) has argued, be based on either legal or political reasons. In the case of territorial disputes, the former implies a legal duty not to recognise the independence of a breakaway entity and a prohibition against assistance, while political non-recognition is discretionary (*Ibid.*). However, this chapter will argue that the practical effects of this distinction may be limited: the obligation that follows from non-recognition tends to be interpreted restrictively, even when the grounds are political, rather than legal. Most states will significantly limit their engagement with *de facto* or unrecognised entities, although the extent of international exchanges in specific cases depends on the territory’s strategic significance and the position of its the (*de jure*) parent state. This restrictive interpretation of collective non-recognition has a number of negative effects, including on the prospect for conflict resolution.

This chapter explores themes such as: collective non-recognition in the context of secessionist conflicts, the potential conflict between individual and collective state interests, and the human costs of non-recognition. The chapter first looks at the practice of collective non-recognition, examining the normative, legal and pragmatic reasoning behind it and its effects: what forms of interactions are prohibited in cases of collective non-recognition? It will then analyse the implications of the resulting isolation: how does it affect the dynamics of conflict, the significance of patron states and the domestic developments in the resulting unrecognised (or *de facto*) states.

Collective non-recognition of states

Crawford argues that a legal duty of non-recognition arises in two situations. First, “when the illegality involved is substantial, and in particular when it involves a peremptory norm of international law” (Crawford 2006: 160). A peremptory norm (*jus cogens*) is accepted and recognised by the international community as a whole as a norm from which no derogation is permitted (Talmon 2006). When it comes to the creation of new states, the most relevant peremptory norms are the prohibition of the use of force against the territorial integrity of any state and the prohibition against genocide, racial discrimination and apartheid. Second, a duty of non-recognition can follow an explicit process, usually a resolution by the UN Security Council (Crawford 2006: 160). An example of the latter was when the declaration of independence by the Turkish Republic of Northern Cyprus, on 15 November 1983, was declared “legally invalid” by the Security Council, which called on states “not to recognize any Cypriot State other than the Republic of Cyprus” (Crawford 2006: 161). Only Turkey failed to heed this call. There is some disagreement in the literature on the need for UN authorisation of collective non-recognition, but Talmon (2005: 112) argues that a UN decision is not a requirement: “the function of the political organs of the United Nations is one of coordination, rather than creation, of the obligation”. However, without a UN decision, collective non-recognition is unlikely to be viewed as a legal obligation, especially in cases where the norm violation is less than clear. This will be further discussed below.

Collective non-recognition entails an obligation not to recognise as lawful a situation created by a serious breach of international law. The reasoning behind this is twofold: to uphold foundational norms of the international system, such as the prohibition of territorial conquest, and therefore to prevent the attribution of legal status in a particular case of illegality, either through recognition or through other dealings that would consolidate the status quo (Crawford 2006: 159). However, there is a lack of clarity when it comes to the specific obligations that follow from collective non-recognition. Some authors argue that the obligation not to recognise a situation as lawful amounts to nothing more than a formal declaration of non-recognition. However, Talmon (2006: 112) asserts that non-recognition practice, in cases such as the South African presence in Namibia and the Turkish Republic of Northern Cyprus, shows that non-recognition requires states “to refrain from any action implying recognition of the legality of the situation in question”. It amounts to a “duty of active abstention” (Talmon 2006: 112). Bruno Coppieters (2018: 348) argues that collective non-recognition is “status-denying” and that it implies “legal constraints on all policies on state-building”. The International Law Commission’s (ILC) 2001 Articles on Responsibility of States for Internationally Wrongful Acts hold that non-recognition also obliges states not to “render aid or assistance in maintaining” the lawful situation (Art. 40(2)). In its *Namibia* opinion the International Court gave some advice as to activities and interactions that would be inconsistent with the declaration of illegality of the South African administration and which might imply recognition of its legality. This included an obligation to abstain from diplomatic and consular activities in Namibia, but also to refrain from “economic and other forms of relationships or dealing with South Africa on behalf of or concerning Namibia that may entrench its authority over the territory” (Crawford 2006: 164).

However, this still leaves some ambiguity and consequently room for manoeuvre. It is commonly accepted that a policy of non-recognition does not trump respect for human rights or humanitarian concerns (Coppieters 2018: 347). In its *Namibia* opinion, the court also held that non-recognition “should not result in depriving the people of Namibia of any advantages derived from international co-operation” (Crawford 2006: 164). While the

practice of non-recognition therefore suggests that the international obligation goes beyond abstaining from a formal recognition of an unlawful act, and also restricts other forms of relationships with the *de facto* authorities, it seems clear that complete isolation of the contested territory is not legally required. In particular, the rights and needs of the population residing in the contested territory should be protected. Other legal obligations can be interpreted more or less restrictively. It is for example not completely clear what would constitute “assistance” in “maintaining a lawful situation” or what type of international exchanges that qualify as statebuilding policies. For example, any kind of capacity-building could be viewed as statebuilding, even if it does not involve direct links with the *de facto* authorities, or the creation of core state institutions (see also Caspersen 2018). Despite the resulting ambiguity, restrictive interpretations of non-recognition tend to win out, as will be further explored below.

Collective non-recognition on legal grounds is relatively rare when it comes to the creation of new states. Out of the 18 or so *de facto* states currently in existence (Florea 2014), only the Turkish Republic of Northern Cyprus is the subject of a collective non-recognition decision by the UN Security Council. The legal duty to abstain from recognition (formal and implied) applies when the new state is the result of aggression by another states – or one of the other peremptory norms of international law have been violated – not when the declaration of independence follows an internal secessionist conflicts. The use of force by a non-state entity is, as Crawford (2006: 136) argues, “legally neutral, that is, not regulated by international law”. However, separatist conflicts often have an external dimension and the distinction between an intra-state conflict and an act of external aggression is not always clear. The separatist forces may for example have received diplomatic, financial and even military support from an external patron, and such support is likely to have been crucial for their ability to achieve *de facto* independence (Caspersen 2012). The *de jure* parent state will in such situations usually argue that the declaration of independence is indeed a result of the illegal use of force and therefore insist that there are legal grounds for collective non-recognition. For example, the Georgian government views the creation of *de facto* states in Abkhazia and South Ossetia a result of Russian aggression, while Azerbaijan similarly sees Nagorno-Karabakh as a case of Armenian occupation. However, the respective patron states deny such illegal use of force and a UN decision on collective non-recognition has not been passed, even though UN resolutions have called for the withdrawal of Armenian troops from Azerbaijani territory.¹ When states are proclaimed following a separatist conflict, even one involving extensive external support for the separatist forces, the legal grounds for non-recognition are less clear. Moreover, in some of these cases, the patron state that is accused of violating a peremptory norm is Russia. As a permanent member of the Security Council, Russia is able to veto any UN decisions on collective non-recognition.

Collective non-recognition on political grounds is much more common. In these cases, no international body makes a formal decision on collective non-recognition, yet most states choose against formally recognising the contested territory as an independent state and also restrict other forms of dealings and relationships with the entity. Rather than requiring a substantial violation of international law, this form of collective non-recognition generally only requires the parent state to reject secession. The norm that is being violated, and the norm that the collective non-recognition is trying to uphold, is the norm of territorial integrity. Without non-recognition in these instances, the fear is that a dangerous precedent will be created, that other would-be separatist movements will be encouraged and that greater international instability will therefore result. This political form of collective non-recognition is therefore fundamentally about stability, although it sometimes also refers to violations of international law, for example if territorial control was achieved on the basis of ethnic cleansing.

The obligations and restrictions that follow from this form of collective non-recognition are less than clear. When non-recognition is obligatory, the incidents of non-recognition are normally spelt out in the instruments (Crawford 2006: 162), even if this still leaves significant room for interpretation, as argued above. No such clarification is provided when the collective non-recognition is informal and has a political rather than legal basis. Crawford (2006: 158) argues that the effect of political non-recognition “may be purely nominal, since they are whatever the States concerned intend them to be”. Even acts that may be thought to imply recognition will not constitute recognition as long as the position of non-recognition is clearly stated (Ibid.). James Ker-Lindsay (2015: 284) similarly stresses that recognition cannot be accidental and that non-recognition does not therefore prevent even extensive links with the contested territory:

As long as a state insists that it does not recognize a territory as independent, and does not take steps that obviously amount to recognition – such as the establishment of formal diplomatic relations through the appointment of an ambassador or the establishment of an embassy – then it does not do so.

Yet, most states take a much more restrictive view of the obligations that follow from collective non-recognition, even if this non-recognition does not follow a formal UN decision. The perceived obligation certainly amounts to more than abstaining from formal recognition and implied recognition in the form of diplomatic and consular activities. There is a widespread reluctance to have dealings with the authorities of these entities, and also of any dealings that could be seen to aid, consolidate or legitimise the status quo. The typical position is therefore akin to international practice in the case of collective non-recognition on legal grounds. This perhaps reflects the lack of a clear dividing line between the two types of collective non-recognition. However, as noted above, this practice still leaves some room for manoeuvre, for example when the International Court in its *Namibia* opinion advised that non-recognition “should not deprive the population of the contested territory of any advantages derived from international co-operation” (Crawford 2006: 164). As a result of this lack of clarity, the willingness to establish links with contested territories, and the resulting degree of isolation of these entities, varies considerably from case to case.²

Effects of collective non-recognition: constrained and varying engagement with de facto states

Many unrecognised or de facto states do benefit from international links, in the form of humanitarian aid, travel, educational exchanges, trade and even some diplomatic relations (see also Caspersen 2018). But the extent of these links, and therefore the effect of non-recognition, shows significant variation. At one end of the spectrum, we find Somaliland, where the UN, the EU, the US and other recognised states have cooperated intensively with the local authorities, especially on issues related to security and counterterrorism (Pegg and Kolstø 2015: 199). At the other end of the spectrum, we find Nagorno-Karabakh, which has hardly any interactions with recognised states and international organisations. Nagorno-Karabakh is not completely isolated, but its international linkages consist mostly of financial support and investments by the Armenian diaspora (see e.g. Ó Beacháin et al. 2016).

What are the decisive factors behind this variation? Why does collective non-recognition, whether formal or informal, sometimes result in relative isolation, while at other times it is seen as compatible with extensive international links? First, scholars have pointed to the strategic

importance of the unrecognised entity. International engagement is more likely to be offered to *de facto* states that are seen as strategically important, which helps explain the significant international links found in the case of Somaliland (Berg and Pegg 2018). *De facto* states can play up their strategic position and their willingness to act as a reliable partner, such as when the Somaliland authorities argue that Somaliland “has shown itself to be a reliable and responsible regional partner in tackling issues as varied as terrorism, crime, piracy, extremism and trafficking” (Ministry of Foreign Affairs and International Cooperation of Somaliland 2017). However, *de facto* states are constrained by their geographic position, which therefore becomes an important factor accounting for the effects of collective non-recognition (Caspersen 2015).

Second, the *de jure* parent state will in many cases act as an effective gatekeeper and go out its way to oppose international engagement (Ker-Lindsay 2012; Caspersen 2015). Parent states are worried that engagement could lead to “creeping recognition”. Even if an intention of non-recognition is clearly stated, they worry about the cumulative effect of international links: that it could normalise and legitimise the status quo and eventually make recognition seem the obvious choice (see e.g. Caspersen 2018). Although international recognition, in a legal sense, does not creep (Ker-Lindsay 2015), this concern is widely shared by governments involved in separatist conflicts, including the governments of Georgia, Azerbaijan, Moldova and Cyprus (see e.g. De Waal 2017). If the parent state strongly resists international links with the contested territory, and argues that such links violate their territorial integrity, then other states tend to follow this position. However, some parent states are willing to accept certain forms of engagement with their breakaway territories, including international links, *if* this is seen to further attempts to reach a negotiated settlement and reinforce their claim to territorial integrity (Caspersen 2018). For example, in 2010 the Georgian government launched an engagement strategy with the explicit purpose of achieving “the full deoccupation of Abkhazia and the Tskhinvali region/South Ossetia” and enable the peaceful reintegration of “these territories and their populations into Georgia’s constitutional ambit” (Government of Georgia 2010: 1). The Public Defender of Georgia, Ucha Nanuashvili (2017), recently defended this policy, which remains controversial, by reminding people that the population of Abkhazia and South Ossetia “are citizens of Georgia” and “caring for the rights and needs of the people living in the occupied territories points directly to the legitimacy and fairness of Georgia’s claims to territorial integrity”.

The strategic position of the *de facto* state and the extent of parent state opposition to international links therefore appear to be the two main factors impacting on the effects of collective non-recognition. Whether the collective non-recognition has taken the form of a UN decision or if the collective non-recognition is based on political grounds does not, on the other hand, seem decisive. The Turkish Republic of Northern Cyprus is, as noted above, the only contemporary *de facto* state affected by a UN decision on collective non-recognition. However, we find a fairly high degree of international engagement in this case. After the Turkish Cypriots supported the Annan Peace Plan, which was rejected by the majority of the Greek Cypriot population, the EU promised – and to some extent implemented – increased engagement with the Turkish Cypriot community. Crucially this engagement has the support for the Cypriot government, which sees links with the North, including capacity-building on the other side of the Green Line, as a strategy for promoting reunification. As a result, there has been a considerable increase in contacts and trade across the Green Line. A significant number of Turkish Cypriots now work in the South and trade worth €57million has crossed from North to South.³

However, some shared effects of collective recognition can be found across the different *de facto* states; some constraints on international engagement are common. First, recognised states

and international organisations only appear to be willing to engage with unrecognised entities if at least one of the following two conditions is met: either they have strategic interests in the contested territory or the parent state accepts engagement as a conflict resolution measure. In the latter case, the engagement tends to come with significant constraints: international engagement has to go through the parent state, or be subject to its explicit approval, and interactions are often limited to individuals or community representatives and does not include what could be termed “hard” engagement, that is, engagement that leads to capacity-building in the contested territory and which therefore can be seen to consolidate the status quo. For example, in the case of the Turkish Republic of Northern Cyprus, the Cypriot government has been adamant that engagement must be explicitly linked to the settlement talks and also insists on quite significant limitations. These constraints have been respected by international actors, such as the EU, which has continued to require the consent of the Cypriot government for Green Line regulation and financial support in the North, and has not established the promised direct trade or direct flights.⁴ What are the implications of these forms of collective non-recognition? How does non-recognition impact on the territorial conflict and what are the external and domestic effects in the *de facto* states? This will be explored below.

Implications of collective non-recognition

Collective non-recognition in the case of parent state opposition to secession is a key cause of the existence of *de facto* states. International recognition is not forthcoming, no matter how long the *de facto* separation from the parent state has lasted or regardless of the extent of state-building that has taken part in the entity (Caspersen 2012). Outside the context of decolonisation, the international system of sovereign states is effectively closed to new entrants. If the leaders of the *de facto* states are set on independence and have the resources to resist attempts at forceful reintegration, and the central government is equally set on preserving its territorial integrity, but without the military capacity to force this, then the result is a highly protracted territorial conflict. Marc Weller (2008) has described this as the “self-determination trap”.

Following from a policy of non-recognition, mediators and other international actors involved in attempts to secure a negotiated settlement will typically insist that any solution must respect the parent state’s territorial integrity. The parent state has international support on its side when insisting on the continued existence of the state (Fabry 2010). In the case of Abkhazia, the Georgian government was for years adamant that any peace agreement had to resolve the issue of status, i.e. confirm Georgia’s territorial integrity, and this position was adhered to by the mediators.⁵ However, other solutions are sometimes put forward, such as a deferred independence referendum which has been proposed in the case of Nagorno-Karabakh.⁶ If the parent state agreed to such a settlement, it would amount to an agreed, and deferred, dissolution of the state. It would consequently not be covered by the default position of collective non-recognition in the case of unilateral secession. A deferred independence referendum was accepted by Papua New Guinea in the 2001 peace settlement for Bougainville and the referendum is due to be held in 2018. This popular consultation is however not legally binding and Bougainville’s independence is therefore not a foregone conclusion. Other parent states, including Azerbaijan, have strongly resisted settlement proposals that include even the possibility of independence for the contested territory (Caspersen 2017).

The recognition of Kosovo in 2008, and Russia’s subsequent recognition of Abkhazia and South Ossetia, led some analysts to argue that the balance between territorial integrity and self-determination had shifted in favour of the latter (see e.g. Fabry 2010: 179). However, any new precedent has yet to affect the solution to other conflicts involving *de facto* states. The

possible weakening of the norm of territorial integrity may, if anything, have made the parent states even more wary of engagement with their breakaway entities. It used to be assumed that de facto states had limited staying power; that they would eventually collapse under the weight of non-recognition. Cases of failed de facto states, such as Republika Srpska Krajina (Croatia) and Chechnya (Russia), seemed to confirm this assumption. Yet a number of de facto states, including Abkhazia, Nagorno-Karabakh, Somaliland, South Ossetia, Transnistria and the TRNC, have survived for decades and thereby demonstrated that they are not merely transitory phenomena (see e.g. Broers 2013). The conflicts that involve such entities can therefore be highly protracted indeed. This protractedness is reinforced by two other effects of collective non-recognition: one external and one internal.

Reliance on patron states

One effect of the relative international isolation caused by collective non-recognition is increased dependence on the patron states that most de facto states rely on for the supply of vital resources and access to the outside world. Maintaining de facto independence, rebuilding infrastructure, and building state institutions require significant resources. Without access to such resources, de facto states will be left unable to provide their populations with public goods. This will impact on their domestic legitimacy (Bakke et al. 2014) increase the risk of large-scale emigration, and it could even render the entity unable to defend itself (see e.g. Caspersen 2012; Kolstø and Paukovic 2014).

The more isolated the de facto state, the more reliant it tends to become on external patrons, and we have in a number of cases seen a growing dependence on patron states and increasing integration into its military, economic and sometimes political structures. For example, Nagorno-Karabakh derives 60% of its budget from its patron state, Armenia (Ó Beacháin et al. 2016: 443), and the two economies are increasingly integrated (Grono 2016). In the case of South Ossetia, many speak of a de facto annexation (see e.g. Gerrits and Bader 2016). De facto states typically describe such support as a pragmatic response to the need for external support and their lack of access to the international system (Bakke et al. 2017: 163). However, the patron state may also seek to deepen this isolation, thereby ensuring their continued control over the entity. For example, De Waal (2017) finds that growing Russian assertiveness has narrowed the space for EU engagement in Abkhazia, and there are signs that Russia is trying to prevent engagement with Georgia. For example, Russia and Abkhazia have signed an agreement which allows Abkhazians with Russian citizenship to use Russian medical services. This is seen as an attempt to ensure that Abkhazian patients are not tempted by the health services provided on the Georgian side of the de facto border.

Domestic effects: siege mentality and vulnerability

Collective non-recognition and the resulting constraints on international interactions with de facto states also impact on the internal dynamics of de facto states. Some de facto states are willing to downplay their claim to independence, in order to gain access to international links (see Caspersen 2018). For example, the Transnistrian authorities accept that Transnistrian companies trade with Moldovan customs stamps (Blakkisrud and Kolstø 2011: 190–1) and that their best football team, FC Sheriff, plays in the Moldovan League (Glennon 2016). Taiwan similarly accepted the designation “Chinese Taipei” when it got observer status in the World Health Assembly (Caspersen 2015). Rebecca Bryant also finds that Turkish Cypriots have had to symbolically disavow their state in order to benefit from “engagement and non-recognition”.

Engagement “is possible only through the inverted comma hand gesture that insists that we do not believe in the ‘state’s’ sovereignty” (Bryant, n.d.: 22). Such gestures, which signal that the entity may (sometimes) compromise on demand for full (de jure) independence, result in greater access to the international system, but access is still constrained: certain forms of interactions are, as outlined above, not seen as compatible with non-recognition.

The effects of this restricted access and relative international isolation depend on whether the resulting vacuum is filled by a patron state. Without patron state support, a significant resource gap can be expected. A patron state can help fill this gap, but the upshot is increased dependence on the patron and reduced autonomy. Moreover, the deteriorating effects of international isolation is felt even in cases with high levels of patron state support. Grono (2016) reports on the negative impact on public services in Abkhazia: “Most doctors do not learn about modern treatments. Most teachers have little access to new international best practices and methods. Police still work according to old manuals.” While collective non-recognition does not render state-building impossible, it does affect the capacity of de facto states.

The effects also go beyond institutional capacity. Non-recognition and the denial of access to the wider international community also have a psychological impact on the population. It is seen as humiliating and as a denial of legitimacy. The speaker of the TRNC parliament describes it as “an embargo on my voice”,⁷ and Grono (2016) similarly reports how Abkhazians “from all walks of life ... spoke of frustration at exclusion from the Europe they feel they belong to”. Such feelings could lead to increased emigration, which is a risk facing all de facto states, especially if they are also unable to provide effective public services (Caspersen 2012). A recent survey suggested that 70% of Nagorno-Karabakh’s population were ready to leave the entity (International Crisis Group 2017: 15). Another effect that several scholars have pointed to is a pronounced siege mentality. This is a consequence of feeling under threat, a feeling that the status quo is precarious. However, it also owes something to a sense of being ignored by the world, without any recourse to international laws and norms in case of a military offensive by the parent state (see e.g. Caspersen 2012).

Part of the rationale behind a policy of non-recognition – and a restrictive interpretation of the obligations that follow from this – is that it will make it easier to re-establish the parent state’s effective territorial integrity. That it will avoid the consolidation and legitimization of the status quo and therefore give the de facto authorities more reason to compromise and accept the reintegration of the contested territory. However, the two effects outlined above are likely to impact negatively on any prospect for a negotiated settlement. Abkhazia’s and South Ossetia’s increasing dependence on Russia, and the patron’s resulting control over the entities, is viewed as an almost insurmountable barrier to a negotiated settlement (see e.g. Gerrits and Bader 2016) and patron state involvement is generally viewed as a negative factor when it comes to conflict resolution. Similarly, a mistrustful population is unlikely to support the leap of faith associated with a negotiated settlement and more likely to support a continuation of the status quo.

Conclusion

Collective non-recognition can be based on either legal or political reasons. In the case of new states, the legal basis of non-recognition is usually the illegal use of force by an external party. However, this chapter has argued that in practice there is little difference between the two forms of non-recognition: the justifications and the implications are very similar. There is often not a clear dividing line between a separatist conflict with a strong external dimension and an act of foreign aggression. Non-recognition is, in any case, the default position if

the parent state objects to the creation of a new state, regardless of whether the separatist forces received external support. Moreover, the perception of the obligations and restrictions that follow from non-recognition does not seem to depend on whether a formal UN decision on collective non-recognition (on legal grounds) has been made.

The obligations that follow from collective non-recognition lack clarity, but tend to be interpreted restrictively, as an obligation to refrain from any actions that could be seen to aid or legitimise the de facto separation. The aim is to uphold the norm of territorial integrity and avoid the creation of a dangerous precedent. The position of the parent state is generally followed and not only is collective non-recognition therefore seen to require a formal position of non-recognition but it also severely constrains others forms of relationships and dealings with the contested territory. However, we do still find variation in the degree of international links available to de facto states: some benefit from a variety of international exchanges, in some cases even diplomatic links, while other face a high degree of isolation. Such variation depends on the strategic position of the de facto states and on whether the parent state accepts engagement as a conflict resolution strategy that will further their goal of reintegration.

The rationale behind collective non-recognition is that it will help preserve the stability of the international system. Moreover, it is also intended to uphold foundational international norms and ensure that the use of force and, in some cases, grave human rights violations are not rewarded. However, the default position of non-recognition in case of parent state objection also results in highly protracted conflicts and the restrictive interpretation of the obligations that follow from this position risks adding to this protractedness by increasing the influence of external patron states and by creating a strong sense of vulnerability and siege mentality within the de facto state.

Notes

- 1 E.g. UN Security Council Resolution 822, 30 April 1993.
- 2 For an analysis of the different degrees of integration of de facto states into the international system, see e.g. Berg and Kuusk, 2010.
- 3 Author's interview with Marios Tsiakkis, Secretary General of the Cyprus Chamber of Commerce and Industry, Nicosia, 12 June 2017.
- 4 Comments by Fikri Toros, president of the Turkish Cypriot Chamber of Commerce, at the seminar "Non-Recognition and Conflict Dynamics in the Cyprus and International Context", Nicosia, 13 June 2017.
- 5 Author's interview with Dieter Boden, former UN Special Representative, 16 December 2015.
- 6 For a summary of the Basic Principles, or Madrid Principles, which form the basis of the ongoing talks, see OSCE 2009, "Statement by the OSCE Minsk Group Co-Chair countries", 10 July, www.osce.org/mg/51152.
- 7 Author's interview with Sibel Siber, speaker of the TRNC parliament, 14 June 2017.

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19

ENGAGEMENT WITHOUT RECOGNITION

Bruno Coppieters

In December 2009, the Political and Security Committee of the Council of the European Union endorsed a policy of ‘non-recognition and engagement’ towards Abkhazia and South Ossetia (Fischer 2010). This policy reflected a clear stand on defending Georgia’s territorial integrity in these two secessionist conflicts, and at the same time a willingness to engage with the populations of these places through confidence-building projects. The combination of these positions was nothing new in the traditional practice either of states or of the EU when it came to breakaway territories: what attracted attention was the fact that it was turned into a policy formula, to be found in EU documents and bilateral agreements with Georgia (Partnership between the European Union and Georgia – The Cooperation Council 2013, 2016). The formula was soon rephrased, in policy recommendations and academic literature, as ‘engagement without recognition’, and was used there to describe EU policies towards unrecognized entities generally. The words rank differently in the two formulas, with the latter reflecting a different position from the earlier one. In contrast to the EU position on Georgia, it was the willingness to engage that now came now first. Some authors – such as Alexander Cooley and Lincoln A. Mitchell, in the first academic article using this second formula (2010) – still defended a position of non-recognition, but academic literature mostly turned the formula into merely an assertion that EU engagement was taking place in entities that the EU did not recognize as states. The second formula replaced the stress on an EU policy of non-recognition (in the first formula) with a factual acknowledgement of the political conditions under which EU engagement was taking place.

The wide acceptance of this formula (in both its original and revised forms) in the debates on the EU’s policies towards Abkhazia and South Ossetia calls for an explanation. The first part of the present chapter addresses the practical consequences of the plurivocal use of the formula for EU policies.¹ It demonstrates that this use had clear benefits for EU engagement in the conflicts in Georgia. This part also examines the reasons why academics and NGOs broadened the application of the second formula to other cases of secession, while the EU limited its use of the first formula to Georgia. The second part of the chapter shows that there are, by contrast, no benefits to be expected from its plurivocal use in terms of descriptive analysis. On the contrary, a precise distinction needs to be drawn between the formula of ‘non-recognition and engagement’ and that of ‘engagement without recognition’: the first is appropriate for describing the EU’s engagement policies where its member states

are united in defending a position of non-recognition as a primary objective; the second formula, on the other hand, is appropriate for analysing these policies where, in order to overcome divisions between member states on the question of recognition, the EU has to defend a status-neutral position. This distinction is necessary for analysing the practical forms and consequences of EU engagement.

A plurivocal formula useful for political purposes

It is striking that the EU's Political and Security Committee policy document explaining the scope and meaning of the formula of 'non-recognition and engagement' has never been made public – neither at the time of its endorsement, in 2009, nor any time later.² In principle, it is in the EU's interest to be transparent about its objectives and the instruments for attaining them. In this particular context, however, it was feared that disclosing such a document would lead to unnecessary polemics in Georgia, Abkhazia or South Ossetia, or even within the EU.³ Since then, in official documents regarding Georgia's conflicts, the EU has therefore referred to a 'policy of non-recognition and engagement' without elucidating its precise meaning and the means of its implementation.

From the very start, the EU formula was aimed at legitimizing a policy combining non-recognition with engagement in Georgia's conflict. The EU needed to be present on territories that were not under the control of Tbilisi, in order to be better informed about the local security situation and for the sake of conflict transformation. The projects implemented within the framework of the EU's engagement policy were aimed at bringing the positions of the conflicting parties closer together, in line with the EU's role as mediator in Georgia's conflicts after the 2008 war. The formula of 'non-recognition and engagement' reaffirmed the EU's stake in the preservation of Georgia's territorial integrity and its opposition to Russia's policies in the region – Moscow having recognized Abkhazia and South Ossetia as independent states in 2008.

The formula is not part of an overall EU strategy for enabling the Georgian government to recover the two territories, but it does more than expressing a simple practice. It is actually to be considered a policy, in the sense that any contradiction between the position of non-recognition and the practice of engagement has to be decided in favour of the position on non-recognition. The EU also describes the formula as a 'comprehensive approach' (Council of the European Union 2018), which means that, in implementing it, it takes a wide range of factors into consideration. Georgia has been receptive to this position. In 2008, it promulgated a law on occupied territories which included severe legal restrictions on any form of foreign presence on the territories of Abkhazia and South Ossetia, but it was not fundamentally opposed to a limited form of engagement with their populations – in fact, in July 2010 it promulgated its own 'Action Plan for Engagement' (Office of the State Ministry for Reintegration and Civic Equality 2010).

The formula allowed the EU and Georgia to express their joint opposition to the recognition of Abkhazia and South Ossetia and their shared willingness to engage with the populations of these territories. And it allowed the EU to define its own priorities for engagement, in line with its assessment of its potential and risks, but also with the policy instruments and financial means at its disposal. Peter Semneby (2010) – who, as the EU's special representative for the South Caucasus, was the main architect of this policy – explained in an interview in May 2010 that, for the EU,

both the non-recognition and engagement are indispensable parts of one policy, because non-recognition without engagement is counterproductive; it will only

lead to raising barriers between the Georgians and people in these regions. But engagement without the non-recognition part is a policy that would mean a risk that any step that we take could be instrumentalized in various ways and misused to stake claims in this dispute about status. Engagement is not about status, but in order to disassociate engagement from the status we have to be clear where we stand on the status issue.

Academics, think tanks and NGOs dealing with the Georgian–Abkhaz conflict were eager to use the ‘engagement without recognition’ formula for their own purposes. Researchers did not necessarily want to express any normative position regarding the status issue. Most of them were therefore keen to turn an EU position on non-recognition into a simple description of the state of affairs, even though some of the authors and organizations using this formula still defended a prescriptive position on non-recognition. NGOs focusing on conflict transformation and resolution do not have to choose sides, and are generally agnostic on the issue of recognition or non-recognition – defending either of these positions would unnecessarily make their activities in conflict areas more difficult. Furthermore, their financial dependence on EU funds, and the need to rely on authorization from local authorities in order to operate in the breakaway regions, would also make it difficult to engage in an open debate on recognition versus non-recognition. The revised version of the formula was helpful in allowing them to call for a strengthening of the EU’s engagement policies – involving additional support for their own activities – without having to refer to non-recognition as a normative principle. The London-based NGOs Conciliation Resources and Safer World called on the EU to favour an engagement policy with more immediate benefits for the populations of the disputed territories: ‘EU engagement needs to be more tangible to ordinary people and better understood in order to gain maximum benefit from the policy of engagement without recognition.’⁴

The Abkhazian criticism of the lack of EU engagement on their territory should also be mentioned in this context. Those Abkhazian political leaders and NGOs that were striving for closer links with the EU turned the original formula of ‘non-recognition and engagement’ into an additional variant of ‘non-recognition and non-engagement’.⁵ In their dialogue with the EU, this allowed them to be critical of the latter’s perceived lack of coherence: the EU’s position on non-recognition was seen as contrary to the objectives of confidence building and post-conflict reconstruction.

After reaching its primary objective – convincing the Georgian authorities that engagement policies did not constitute a threat to the EU’s policy on non-recognition – the formula in a revised form was thus open to interpretation by the various actors, thereby enabling the EU to hold an open dialogue with all the conflicting parties and other stakeholders. The expression was allowed to mean different things to different audiences: each individual actor was free to choose one of the formulas and invest it with their own preferred substance.

It may then be asked why, in documents and bilateral agreements, the EU has generally confined the official use of such a successful formula as ‘non-recognition and engagement’ to Georgia’s conflicts, even though it defends a policy of non-recognition and the need to engage in many other conflicts too. This is even more remarkable as it uses policy instruments similar to those it has adopted for Georgia in other conflicts in its Eastern Neighbourhood, for instance in the conflict in Moldova on Transnistria. The EU’s Eastern Partnership policy, launched in 2009, adds new opportunities for engagement to the existing instruments of the European Neighbourhood Policy. These new opportunities are open to both Georgia and Moldova. They include association agreements (AAs) and deep and

comprehensive free trade agreements (DCFTAs), each offering new policies on establishing links with the populations living in disputed territories, including on visa liberalization and new financial instruments designed to support conflict transformation (Fischer 2013). The use of the same policy instruments for engagement in both conflict settings did not, however, give the EU sufficient reason to extend its use of the formula of ‘non-recognition and engagement’ to Transnistria. Nor has it been used in other conflicts on the international status of territories where the EU is involved.

The formula was not extended to Transnistria or to other breakaway territories for several reasons. First, unlike in Georgia, there was no pressing need to convince the Moldovan or any other central government confronting secession that the EU’s policy of engagement with a breakaway territory was not leading to shift in its position on non-recognition. Second, neither the Council nor the Commission had an interest in encroaching on the reserved powers of the EU member states regarding the question of recognition and non-recognition. The introduction of such a general formula could raise complex political and legal issues, and the ensuing discussion would then be divisive. Third, any attempt to extend the validity of a policy formula to other forms of engagement that are constrained by a policy of non-recognition would – even in a highly abstract form – go against states’ existing practice of not making their preferences regarding such a policy explicit. The lack of a formalized, systematic set of precepts reflects the need for an ad hoc approach to these questions. The ‘non-recognition and engagement’ formula therefore remained limited as a formal description of the EU’s policy towards Georgia’s conflicts, even though EU officials were free to use it in a personal capacity in workshops and informal meetings when describing other policies and practices, relating for example to Transnistria.

A plurivocal formula in need of analytical precision

The academic literature on the EU’s policies of engagement has extended the geographical scope of the ‘engagement without recognition’ formula far beyond Abkhazia, South Ossetia and Transnistria. It has been used to study the EU’s policy in its Eastern Neighbourhood (Harzl 2018; Newman and Visoka 2018) and Cyprus (Kiris 2018), but has also been seen as applicable to all forms of interaction between the EU, or even the US, and non-recognized entities that are located in Europe, Africa or Asia (Ker-Lindsay 2015; Berg and Pegg 2016). It has been regarded as capable of creating a common systematic framework for comparing all such cases.

This choice is problematic. A comparative analysis that brings together all forms of EU engagement policies in non-recognized states under the single formula of ‘engagement without recognition’ overlooks the necessary distinction between two types of EU engagement policy. The fact is, a position of non-recognition means more than the absence of recognition, and more even than the statement that the unrecognized territories cannot count on future recognition by the EU. Regarding Northern Cyprus, Abkhazia, South Ossetia, Transnistria, Donetsk, Lugansk, Taiwan and Somaliland – entities which all EU members refuse to recognize as independent states – the EU plays a coordinating role by reinforcing a policy of non-recognition when its institutions and member states are engaging with the population of these territories. Here, the formula of ‘non-recognition and engagement’ is applicable. In Kosovo and Palestine, by contrast, where its member states are divided on the issue of recognition, the EU engages in line with a status-neutral position. And, here, its coordination policies can be described as ‘engagement without recognition’.⁶

Policies of non-recognition and policies of engagement have different objectives. Non-recognition is generally chosen out of a concern to support long-term objectives relating to

the stability of the international order, such as respect for existing borders. The objectives to be reached through engagement are generally more concrete, and often shorter-term. They include the implementation of humanitarian programmes, mediation and confidence building between conflicting parties, or the establishment of strong trade links between them or with the EU. It is assumed that attaining these short-term objectives will, step by step, allow for more trust between the parties, and that it might even be able gradually to transform the conflict setting in a positive way.

In a policy of non-recognition and engagement, the refusal to recognize an entity as an independent state comes first, and the pursuance of particular goals regarding this conflict, to be achieved through engagement, second. A policy of non-recognition delimits the acceptable forms of engagement in each of the conflicts under consideration. The main goal to be achieved with the help of engagement is the strengthening of the means to reach the objectives of a non-recognition policy. The highest preference goes to engagement programmes that directly reflect those objectives, such as the creation of common security mechanisms for the conflicting parties, or a trade regime that creates mutual trust and interdependence. Some initiatives even foreshadow reunification.

A policy of engagement without recognition, by contrast, is based on the necessity for the EU to remain status-neutral. Here, the EU member states are divided on the objectives to be reached and/or the means for achieving them through policies of recognition and non-recognition, in particular where conflict resolution and regional stability are concerned. A status-neutral policy involves different kinds of constraints on engagement from a policy of non-recognition (Berkes 2017). Engagement here entails an obligation to search for pragmatic solutions and agreements between the conflicting parties that do not strengthen or weaken any status claims.

The two formulas thus reflect different types of coordination of engagement policies through the EU, each of which entails particular problems to be addressed. In the first type of coordination, all member states refuse to recognize a particular entity as an independent state, and here the EU reflects a consensual position. But each member state also has the discretionary power to give a particular interpretation to its position on non-recognition, and to turn it into a particular policy of engagement. It will then defend its position within the EU. Moreover, each of the EU institutions, in its own sphere of competence, has specific functions to perform regarding non-recognition and engagement, and will link these to a particular interpretation of these policies. This means that, here, the EU – the EU institutions and the member states – not only have to reflect a consensual position on the question of recognition but, furthermore, must also define forms of engagement that are acceptable to all member states and that reflect a minimum of coherence among the institutions.

Coordinating a policy of non-recognition and engagement

A number of issues to do with engagement in the defence of a non-recognition policy are divisive for the EU's member states and institutions, such as the question of whether or not the territories concerned are occupied by a foreign power. This issue directly determines what is acceptable as engagement (Coppieters 2018). Under international law, occupation cannot lead to unilateral changes in the status of a territory. Annexation or an attempt to create a new state under such circumstances are to be considered breaches of law. The description of the territory of a self-proclaimed independent state as being occupied by an outside power thus turns a policy of non-recognition into a principle of non-recognition, and pragmatic considerations regarding the use of a policy of non-recognition to achieve

international stability then give way to the legal principle of non-recognition. Non-recognition then ceases to be a discretionary decision for the member states, and the EU itself is under an obligation to resist the redrawing of international borders.

The EU's member states and institutions are divided on whether or not territories such as Abkhazia and South Ossetia should be considered occupied. This means that their consensual affirmation of a position of non-recognition does not imply agreement on its precise meaning or on its significance for engagement. Here, the EU has to take on a coordinating role and defend a policy that all its member states find acceptable. Moreover, a consensus between EU member states regarding the condemnation of a breach of *jus cogens* norms – as in the case of the creation of a self-proclaimed independent Republic of Crimea and its subsequent annexation by Russia – may go hand in hand with differences of opinion as to how a defence of the principle of non-recognition should be turned into concrete policies. The EU has to take such disagreements into account when imposing sanctions on an occupying power or adopting policies of engagement with the populations of the disputed territories.

Each EU institution will have a different approach to bridging these differences. It is the European Council and the Council of the European Union that coordinate EU non-recognition and engagement policies. In some cases, this may require a consensual approach from the member states and in others a qualified majority – each requiring particular compromises between the member states. Moreover, the EU's mediation efforts in the conflict regions, made by the Council and the European External Action Service (EEAS), require a prudential attitude. Even where EU diplomats are defending a principled position on non-recognition, they would be well advised to avoid terminology that is unnecessarily offensive to one of the conflicting parties or external actors. They also need to avoid any position that would limit their flexibility in defending a policy (or the principle) of non-recognition in diplomatic negotiations, or that would place additional constraints on engagement. For instance, they will not avoid using the terms 'occupation' or 'annexation' in the context of Crimea, but they will in the context of Eastern Ukraine. In the international negotiations with Russia on Eastern Ukraine, the use of such a term by the EU would certainly jeopardize the chances of successful conflict management within the framework of the Minsk agreements – as these international agreements are not based on the assumption that the regions of Donetsk and Lugansk are militarily occupied by Russia. The Council and the EEAS also avoid defending such a position in the context of Abkhazia and South Ossetia, as that would likewise make both the dialogue with the '*de facto*' authorities and international negotiations with Russia on the future of these territories more difficult.

It is the European Commission (EC), meanwhile, that actually implements the engagement policies. The EC's activities are extremely wide-ranging in scope. It and Taiwan are involved in multilateral trade negotiations within the framework of the World Trade Organization, and they also have intensive bilateral trade relations – Taiwan being the EU's fourth-largest trading partner in Asia in 2016 (European Economic and Trade Office in Taiwan 2016). The EU's engagement with Transdniestria, through trade relations, is also well developed. Generally, in territories under the control of non-recognized authorities, the EU gives funding for programmes in the health sector, infrastructure, education and support for NGOs. The EC is, moreover, very active in delivering humanitarian help for the benefit of local populations, as in the South Caucasus, for instance. Each of these activities requires an acceptable balance between the defence of its position on non-recognition and the need for the EU to be present in these territories. The European Parliament (EP), by contrast, is not hampered by such diplomatic constraints. From its institutional perspective, it is far more important to formulate principled positions for

the general public than ones that allow for diplomatic flexibility, as is the case with the Council, the EEAS and the EC.

Other EU institutions – such as the European Court of Auditors (ECA) and the Court of Justice of the European Union (CJEU) – likewise have particular approaches to turning a position on non-recognition into a concrete policy. The ECA is only marginally involved in questions regarding non-recognition, but – when examining whether engagement projects are managed effectively and whether they have reached their objectives, for instance – it does defend criteria such as sustainability. These criteria are not easy to meet under conditions of non-recognition. In a 2012 report on EU engagement in Northern Cyprus, for instance, the ECA pointed to the lack of cooperation with the local authorities in Northern Cyprus as a major cause of the inefficiency of EU engagement projects (Coppieters 2018). The CJEU examines few cases relating to non-recognition and engagement. But when it does, as for instance in the case on external trade and property issues affecting Northern Cyprus (Talmon 2001), its role in creating a legal framework for EU engagement policies is considered crucial.

Coordinating a policy of engagement without recognition

When the EU implements ‘engagement without recognition’ policies, the coordination procedures are different from those in cases of non-recognition, and the Council and the Commission have to refrain from making any pronouncements regarding the status of a contested entity. In the case of Palestine, however, the division between EU member states concerns only its present status: there is a consensus among them in favour of a future two-state solution to the conflict. But when it comes to Kosovo, the EU can make no such distinction between time perspectives, which means that while it may very well make public pronouncements in favour of the future statehood of Palestine, it must remain neutral in its statements concerning the present and future status of Kosovo.

In such situations, the EP, by contrast, is not bound to a position of neutrality as regards status. In 2010 it adopted a resolution calling for all EU members to recognize Kosovo (Euractiv.Com 2010). It also managed, in 2014, to bridge the gap between a refusal to recognize the statehood of Palestine at present and the need to recognize it at some point in the future. By an overwhelming majority of 498 votes to 88, it voted in favour of a resolution stating the following: ‘the European parliament supports in principle recognition of Palestinian statehood and the two-state solution, and believes these should go hand in hand with the development of peace talks, which should be advanced’ (Beaumont 2014). The CJEU has a role in defining the legal limits of the EU’s engagement with Israel and with the Palestinian National Authority. It has, for instance, dealt with EU trade policy towards the territories occupied by Israel, and has also addressed the question of whether Hamas, which controls the Gaza Strip – a territory where the EU strives for active engagement – is to be considered a terrorist organization or not.

Comparing the two EU coordination policies

Governments confronting breakaway draw red lines for the EU’s presence in the break-away territories, its relations with the *de facto* authorities controlling breakaway territories, and its position on the presence of these *de facto* authorities in multilateral frameworks. The prohibitions vary considerably from one conflict to another. Azerbaijan does not allow any EU presence on the territory of Nagorno-Karabakh or of its surrounding

regions. Georgia watches very carefully to ensure that EU activities in its breakaway territories do not contradict its own policies. The People's Republic of China (PRC) puts no restrictions on EU economic and cultural activities in Taiwan – as long as they are considered 'non-political'.

The counter-secession policies of governments confronting secession have a strong impact on the EU's engagement policies when they share a position of non-recognition. The EU then perceives the drawing of such red lines by these states as legitimate in principle – and even more so when the EU defends the legal principle of non-recognition. Then it will generally restrict its engagement policies to what the central government considers compatible with its counter-secession policies. This does not rule out friction, however, or even serious disagreements between EU institutions, on how to draw particular red lines. In the case of Cyprus, for example, in 2010 the Commission attempted to develop direct EU trade with the North, an initiative that was opposed by Cyprus and was not taken up by the EP either. Regarding Georgia's conflicts, the EU Special Representative has criticized the restrictions contained in the 2008 Georgian law on occupation (Coppieters 2018).

By contrast, the EU is less dependent on the policies of a central government confronting breakaway when it follows a policy of engagement without recognition. EU status-neutral policies are defined on the basis not of the red lines set by counter-secession policies but of the need to avoid conflicts with member states on the subject of recognition and non-recognition. Neutrality on status does not permit the condemnation of unilateral moves by the unrecognized authorities to strengthen their claims to independence (Berkes 2017). But an EU policy of 'non-recognition and engagement' treats such forms of conflict escalation differently from an EU policy of 'engagement without recognition'. The EU has repeatedly expressed its concern that the policies of Taiwan's president Chen Shui-bian are 'not helpful to maintaining stability and peaceful development in the Taiwan Straits' (Lim and Winkler 2012: 184). This was particularly the case for his 2004 initiative to organize a referendum on UN accession under the name of Taiwan. The EU has also condemned the organization of referenda for independence in the breakaway territories of South Ossetia, Abkhazia and Transdniestria. It does not, on the other hand, formally condemn unilateral moves by Palestinian or Kosovar authorities to strengthen their claims to statehood and independence.

An EU policy of non-recognition does not necessarily support the status proposals of a government confronting breakaway, but it always presupposes that the final status of a disputed territory will be mutually agreed between the conflicting parties. The EU defends a policy of non-recognition regarding Taiwan, but this does not mean that it shares Beijing's interpretation of the One China principle and its application to Taiwan – rather, the EU refers explicitly to 'its own' One China policy. It takes an open-ended position on Taiwan's final status, including on such questions as sovereignty, international personality and citizenship, as long as this status is accepted by both Beijing and Taipei. The EU would also support an agreement between Azerbaijan and Armenia that would not provide for the reintegration of Nagorno-Karabakh into Azerbaijan. But in other cases, where it likewise defends a policy of non-recognition, the EU comes forward with a defence of single-state solutions, as for instance regarding Transdniestria, Abkhazia and South Ossetia. The OSCE's 57 participating states have endorsed a status settlement for Transdniestria that is based on Moldova's sovereignty and territorial integrity and allows for 'a special status' for Transdniestria within Moldova (Scanlan 2018). In the case of Cyprus, the EU's defence of a single-state solution is prescribed by UNSC resolutions. They stipulate that a settlement 'must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded' (United Nations Security Council 1992). All these examples of EU positions on

status, which are based on a policy of non-recognition and engagement, refer to solutions that will eventually have to be agreed by the conflicting parties. By contrast, an EU policy of engagement without recognition is, precisely, based on a divergence between member states on whether the statehood of a self-proclaimed independent entity should be recognized before or after the parties have reached an agreement on this issue.

The distinction between the two formulas relates, furthermore, to whether statebuilding efforts may be part of a policy of engagement or not. It is a general rule that a policy of engagement in line with a policy of non-recognition does not allow for such endeavours. Reinforcing the effectiveness of the political institutions of the non-recognized entities, and the legitimacy of the self-proclaimed independent authorities, would run counter to the declared objectives of the policy of non-recognition. Engagement programmes aimed at strengthening institutions that exercise the traditional functions of a state – in the fields of maintaining public order, defence, economic management and the exercise of legislative or executive power, for instance – are therefore excluded. For the same reason, the EU's policy of 'non-recognition and engagement' excludes support for democratic state reform, limiting its support to the democratization efforts of civil society institutions. Non-recognition rules out intergovernmental meetings and cooperation, and allows contact or cooperation between EU diplomats and members of non-recognized governments only on an administrative level.

In a situation where its policy is one of non-recognition, the EU will not use official titles such as 'president' or 'minister' to refer to self-proclaimed authorities. The addition of the term '*de facto*' before such titles is, however, not always a good option, as these authorities consider it offensive. A policy of non-recognition must, moreover, avoid any form of engagement that might strengthen the international legal personality of the non-recognized entity. This restriction may create tension between a policy of engagement and a policy of non-recognition. Consequently, it may also create tension within the EU: in 2010 the risk of strengthening the international legal personality of a non-recognized entity was key to the argumentation by the EP's legal department against endorsing an EC proposal to facilitate direct trade of goods between the European Union and Northern Cyprus. The EP's legal experts – unlike their colleagues in the EC – considered that applying the procedural rules that the Commission proposed to follow in establishing such trade links was tantamount to assuming that Northern Cyprus could be considered a 'third country' – an assumption that contradicted the principle of non-recognition (Karambelas 2010).

The EU supports a policy of 'meaningful participation' in international organizations by Taiwan – a formula it does not use in other conflicts on sovereignty where it likewise defends a policy of non-recognition. This is due precisely to its fear that the 'meaningful participation' formula could, in those other cases, be perceived as an attempt to strengthen the legitimacy and legal personality of a non-recognized entity. But the EU's policy on Taiwan's 'meaningful' participation in multilateral organizations reflects the particular attitude adopted by the PRC: Beijing accepts such participation provided statehood is not a condition for it, and provided Taiwan's belonging to China is expressed in one way or another – as it is in the World Trade Organization (WTO), to which it belongs as a customs territory, under the name 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)'. The EU's position on Taiwan's meaningful participation is based on the acceptance of these two conditions.

The non-recognition of statehood implies the non-recognition of the constitution of a self-proclaimed sovereign state. This then implies, in turn, the non-recognition of elections that are held according to constitutional rules. But the EU's position on non-recognition allows for different policies regarding the democratic character of elections, as can be illustrated by the cases of Taiwan and Abkhazia. For the Taiwanese presidential elections of 16 June 2016,

the EU supported the democratic process taking place on the island. This was in line with its position that it shares common values with Taiwan regarding democracy and the rule of law. It supported the elections without, however, mentioning the name of the candidate who won them, Tsai Ing-Wen: a clear reference to the name of the president-elect had to be avoided, as it could have been considered a form of recognition of a head of state. This means that the EU draws a distinction between the expressive character of elections – expressing democratic values shared with the EU – and their function of selecting representatives for state institutions. The first dimension can be recognized by the EU, but not the second. Federica Mogherini, the EU's High Representative for Foreign Affairs and Security Policy, made a statement on the evening of the 2016 elections that stressed the first dimension, and also mentioned the need for stability across the Taiwan Strait: 'today, the people of Taiwan have voted. Respect for democracy, the rule of law and human rights underpin the successful conduct of these elections. The EU reiterates its support for the continued peaceful development of cross-Strait relations' (European Union External Action Service 2016b).

By contrast, the EEAS condemned the holding of parliamentary elections in Abkhazia in 2017. It stated that the EU 'does not recognise the constitutional and legal framework within which these elections have taken place'. This position is also valid for the elections in Taiwan, as it is for all elections taking place in political entities that the EU does not recognize as states – but here it is made explicit regarding Abkhazia, whereas in the context of the elections in Taiwan the EEAS avoided referring formally to this rule. As with the Taiwan elections, the EEAS did not mention what kind of elections had taken place (referring merely to elections, in general), but – in contrast to its support for the democratic values reflected by the elections in Taiwan – it denigrated the Abkhazian claim that its elections could be considered an expression of democratic values, referring in its statement to 'so-called elections' (Delegation of the European Union to the International Organisations in Vienna 2017).

The EU's policy towards Somaliland contains three exceptions to the policy of non-recognition and engagement. First, it increases the country's domestic capacity in terms of public order and statebuilding efforts, for instance by giving military aid to Somaliland's coast guard (European Union External Action Service 2015). Second, it directly supports the democratization of state structures. Somaliland's 'international partners' (which include, apart from the EU itself, EU member states Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Sweden and the United Kingdom) actively supported the 2017 presidential elections. They noted, in a statement – which was also signed by the United States, Norway and Switzerland – that the observers 'praised the smooth and peaceful conduct of voting and, despite areas of concern, concluded that irregularities were not on a scale such that they would undermine the integrity of the electoral process' (European Union External Action Service 2017). Third, the EU does not avoid the use of official titles in referring to Somaliland's leaders. The EU was even officially represented at the inauguration ceremony of President Muse Bihi Abdi in 2017 (European Parliament 2018).

To justify making such exceptions to its policy of non-recognition, the EU could argue that a policy of engagement that was not active in the fields of maritime security or democracy building would overlook the difficult regional context in the Horn of Africa, which would contradict the non-recognition policy's long-term objectives of stability and respect for the international order. Moreover, the EU also has its own security interests to defend in supporting Somaliland's military – for example in the fight against piracy. It combines this statebuilding policy with active support for the negotiations between Somaliland and Somalia, in line with its non-recognition policy.

Statebuilding, on the other hand, is the general rule for status-neutral policies, even if such efforts are not necessarily made under this heading. The EU aims to reinforce the key functions of statehood of Kosovo and the Palestinian Authority. In neither case does it have any issue with recognizing the legitimacy of the electoral process (including its function within the state institution) or with calling Kosovar or Palestinian leaders or authorities by their official titles. Kosovar and Serbian representatives take part in EU-mediated negotiations on an equal footing, and the documents refer explicitly to 'Serbia' and 'Kosovo'. But at the same time the EU also refers, quite prudently, to the 'relations between Pristina and Belgrade' (European Union External Action Service 2016a).

The distinction between the two types of coordination is important for an assessment of the limits of EU engagement, but it does not give any indication of the intensity of the EU's relations with entities whose international status is contested. These relations are not necessarily less intense under a policy of non-recognition than under one of being status-neutral: it is entirely possible for the EU to engage profoundly with a non-recognized entity without contradicting its own non-recognition policy. Since 2011, for instance, it has a visa-free regime with Taiwan, which is not the case for Kosovo or for Palestine. It considers Taiwan a fully fledged democracy, which is not the case either for Kosovo or Palestine. Its trade relations with Taiwan are more important than those with the other two. But, unlike with Kosovo or the Palestinian Authority, these intense, positive relations do not allow for meetings between high-ranking EU officials and their Taiwanese peers, or allow the EU to refer to them by their official titles: that would run counter to the EU's policy of non-recognition in the context of cross-Strait relations.

The distinction between the two kinds of EU engagement is crucial for a better understanding of its capacity to strengthen the effectiveness of non-recognized entities. The extent to which these entities are made dependent on EU engagement, however, must also be taken into account. Kosovo's and Palestine's dependence on EU support is greater than that of Northern Cyprus (which depends mainly on support from Turkey), Nagorno-Karabakh (which depends solely on support from Armenia), Taiwan (which for its military security depends entirely on the United States), or South Ossetia, Abkhazia, Transdniestria, Lugansk, Donetsk or Crimea (which are all completely dependent on Russia). Up to now, Somaliland has survived without any patron state – which does not preclude increasing dependence on EU aid in the future.

The search for international and regional stability is an important factor in the EU's policies on non-recognition, in its defence of the legal principle of non-recognition, in its neutral position regarding the question of status and also in its recognition policies. On the one hand, it is one of the main considerations when choosing between these four different options. The strengthening of state resilience, the defence of territorial borders and the containment of state fragility, on the other hand, take on a different meaning within each of these four policy frameworks, but also in terms of the actual security environment. The EU can thus support state effectiveness for Kosovo, Palestine and Somaliland despite its status-neutral policy regarding Kosovo and Palestine or even its formal denial of the statehood of Somaliland. Such support does not necessarily increase these territories' chances of future recognition by all EU member states: state effectiveness is indeed one of the conditions of recognition, but the EU states may for instance consider that objectives such as international stability or respect for the international legal order are better served through a policy of non-recognition than through the establishment of full diplomatic relations.

Finally, the distinction between the two types of EU engagement policy coordination is important in order to analyse the kind of failure EU engagement may be confronted with.

In case of a policy of non-recognition and engagement, engagement programmes may fail to be implemented, to become sustainable, or to reach standard objectives such as conflict transformation. The overall policy of non-recognition and engagement will, however, never be considered a failure by the EU itself so long as the latter can demonstrate that it was able to remain unyielding in defending its position on non-recognition. The failure of an engagement policy based on a status-neutral position, by contrast, cannot be justified in this way. Here, the EU has to demonstrate that it is able to overcome the divergent positions of its members on the question of recognition and non-recognition and to develop engagement policies that are successful. In Kosovo and Palestine, non-recognition does not provide for a fallback position if the EU's engagement policies should fail.

Conclusions

The lack of clarification of the precise meaning of the EU's 'policy of non-recognition and engagement' towards Abkhazia and South Ossetia allowed the phrase to be transformed by other actors into a general 'policy of engagement without recognition', and is one of the key factors in the wide acceptance of both formulas. There is a need, however, for an analytical distinction between a 'policy of non-recognition and engagement' and a 'policy of engagement without recognition'. This distinction highlights the specific restrictive conditions for EU engagement. The first formula, in contrast to the second, refers to an EU engagement policy that excludes programmes aiming at statebuilding. This contrast is not without exceptions, however. In Somaliland, where stabilization corresponds to the long-term objectives of a policy of non-recognition, the EU is engaged in statebuilding. But, as in all cases of non-recognition, including Somaliland, its policy of engagement remains within the framework of a non-recognition policy and related objectives. It is hardly possible for the EU to support the participation of non-recognized entities in multilateral frameworks – its support for Taiwan's 'meaningful participation' being a significant exception in this regard – but it does so when engaging with Kosovo or Palestine on a status-neutral basis. But in this context, the exception is also fully in line with the EU's non-recognition policies: its support for Taiwan's international involvement does not transgress the red line set by the PRC, which allows for such participation as long as it does not challenge the One China principle.

The EU is far more sensitive to the red lines drawn by counter-secession policies under a policy of non-recognition than under status-neutral policies, but then too the EU's non-recognition policy is never identical to that of a central government confronting a breakaway – including the counter-secession policies of EU member state Cyprus. Relations with entities that the EU does not recognize on the basis of a common position of non-recognition among the EU member states are not necessarily less productive, or intense, than its relations with those that are not recognized on the basis of a status-neutral position. This is illustrated by EU–Taiwan trade relations and by the EU's visa-free regime for Taiwanese citizens. Because, as indicated in the first formula, it is more of a priority for the EU to achieve the objectives of a non-recognition policy than those of an engagement policy, a failure regarding the latter will not challenge the legitimacy of its policies overall – as long as the former objectives are not defeated. According to the second formula, status-neutral policies represent a bigger challenge to the EU. A failure regarding engagement here would directly challenge the EU's legitimacy, also taking into account the fact that its status-neutral policy is already the result of an internal division between its member states.

Notes

- 1 I am grateful to Thomas de Waal, Pasha L. Hsieh, Vjosa Musliu and the editors of this volume for their comments on this chapter, and to Veronica Kelly for her language corrections.
- 2 The following brief description is to be found: 'the EU's engagement with the breakaway regions is based on two pillars: non-recognition of these entities, but at the same time, a willingness to engage in a number of areas including confidence building along administrative border lines, people-to-people contacts and economic rehabilitation'. Council of the European Union (2010) *Council Document on the Main Aspects and Basic Choices of the Common Foreign and Security Policy (CFSP) Presented to the European Parliament in Application of Point G (Paragraph 43) of the Interinstitutional Agreement of 17 May 2006*, 8 June 2010, Brussels, 10659/10 JT/aa 1–2009: 29, Online. Available at: <http://data.consilium.europa.eu/doc/document/ST-10659-2010-INIT/en/pdf> (accessed 27 July 2018).
- 3 Conversation with a former EU official in Brussels, 1 December 2016.
- 4 Quoted in the findings and recommendations of a joint initiative of Conciliation Resources and Safer-world (2012) *The Georgian-Abkhaz Conflict*, The People's Peacemaking Perspectives, March: 2, Online. Available at: www.c-r.org/downloads/PPP%20Georgian-Abkhaz%20conflict.pdf (Accessed on 23 November 2018).
- 5 I coordinated an EU-financed teaching project for the Abkhaz State University in 2012–15. This critical formula was repeatedly referred to in talks I had with officials and NGO members in Abkhazia regarding this project. For the Abkhazian criticism of the EU strategy of non-recognition and engagement as a strategy of 'non-engagement', see Liana Kvarchelia (2012) *Perceptions of the EU in Abkhazia and Prospects for the EU-Abkhazia Engagement*, Analytical report, Online. Available at: www.c-r.org/sites/c-r.org/files/PPP_2012analysis1_EN.pdf (Accessed on 23 November 2018).
- 6 The distinction between the two formulas is designed to facilitate a better understanding of the EU's present engagement practices. It is not useful for analysing the non-recognition policies of individual states, including EU member states.

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PARLIAMENTARY RECOGNITION

Chiara Loda and John Doyle

Introduction

State recognition has been overwhelmingly discussed as a matter of executive authority, so much so that most debates on the issue do not deal with the role of parliaments at all. This is an extreme case of the widespread view in the academic literature that parliaments are weak actors on foreign policy in general. As recognition of other states is, in some respects, the most fundamental foreign policy decision a state can make in a state-centric world, it is hardly surprising that it is treated as a matter of exclusive executive competence. This chapter does not challenge the view that executives dominate the state recognition and non-recognition processes; however, ignoring the more limited role of parliaments, both national and supranational, misses an interesting element of the story around recognition. Parliamentary activism can occasionally be a challenge to executive authority; on other occasions parliaments can play the role of entrepreneur, opening a public debate or gently pushing an executive, but stopping short of a direct dispute with government; finally, parliaments can be used by executives as a first interim step, or as a means of testing international opinion, or as a way of responding to domestic pressure for full recognition, without the full consequences of such a move.

The literature on the role of parliaments is not well developed and mainly consists of individual case studies without wider analytical claims. For example, Stavridis, Gianniou and Cofelice (2016) look at the role of European national parliaments in the case of Palestine. Gianniou (2016) discusses the recognition of Palestine by the European Parliament, and Caplan (2005: 99) discusses the role of the European Parliament in the break-up of Yugoslavia. However, notwithstanding the important contribution of these individual case studies, there is no established body of scholarship which deals more comprehensively with the role of parliaments (both national and supranational) in regard to recognition and non-recognition matters.

Within a framework of recognition as a process, it is possible to look at a range of activities which confers some ‘recognition’ on an unrecognised state, such as public diplomacy, sporting connections, trade and functional interactions. For example, the success of Kosovo in sporting diplomacy has been seen as a form of symbolic pressure on those countries that have not yet recognised Kosovo (Brentin and Tregoures 2016). The decision to admit Kosovo into the International Olympic Committee (IOC) was vocally opposed by Serbia, whose sports minister, Vanja Udovičić, said this ‘precedent’ had the dangerous potential to

cause ‘serious consequences for the global system of sports’ (Brentin and Tregoures 2016: 369). While falling short of explicitly saying that the IOC granted ‘recognition’, this was the clear basis for Serbia’s objections. Even more limited forms of engagement can be challenged by parent states of breakaway entities. In 2007, the Cypriot government strongly condemned the meeting between the British foreign secretary, Jack Straw, and the Turkish Cypriot leader Mehmet Ali Talat, which took place at the presidential palace in Nicosia (Ker-Lindsay 2015: 277). In the view of the Republic of Cyprus, any engagement with the *de facto* government in the Turkish Cypriot-controlled zone could imply an implicit form of recognition. On the other hand, there are also long-running examples of pragmatic responses. The People’s Republic of China (PRC) adopts an absolutist position against any state which officially recognises Taiwan as a sovereign state – with immediate action against those who do, including the cutting off of aid and trade and, in the case of Macedonia, using their United Nations Security Council (UNSC) veto against any support for an otherwise uncontentious peace support mission. However, the PRC is totally pragmatic when it comes to trade and cultural relations with Taiwan as long as the niceties of its position are recognised in the language used to describe such activity.

This chapter does not deal with these other elements of informal recognition in sports, culture and trade and focuses exclusively on the explicit role of parliaments in the recognition process. However, recognition is seen as a process or perhaps a spectrum (given the frozen nature of some entities’ status), where formal recognition of a government is the strongest form and cultural contacts are somewhere at the other end, this chapter argues that parliamentary recognition, should be considered as an interesting and under-studied aspect of how states and the international system respond to statehood claims. This chapter is organised as follows. First, parliamentary recognition activities are placed within the broader debate on the role of parliaments in foreign policy, with particular reference to the legislative–executive relationship and parliamentary diplomacy. Secondly, the chapter explores the role of national parliaments’ recognition activities, and finally the role of supranational parliaments and assemblies are analysed.

Parliaments, foreign policy and state recognition

The academic literature reflects a broadly consensual view that, while parliaments play some role in some countries, foreign policy remains very largely a prerogative of the executive compared to domestic policy and that this weakness on foreign policy remains true even in national parliaments that have a relatively active role in domestic legislation (Raunio and Wagner 2017). The United States Congress has to some degree been treated over many years as an exception, given the weak party discipline and the requirement for Senate approval of international treaties (e.g. Angevine 2017; Mello and Peters 2018; Olson 1976). Notwithstanding this starting point, there are many cases where US presidents have managed to make significant international decisions without formal Congressional approval, including deploying troops abroad, signing treaties they could never formally ratify and using executive orders to act as if a treaty had been ratified. While the US Congress could, for example, withdraw funding for troops deployed overseas, many presidents have judged that Congress would not in practice take such drastic action. Likewise, on issues such as climate change, while President Obama could never hope to get the necessary two-thirds majority to gain Senate approval for treaty ratification, it was also difficult for the Congress itself to agree legislation to block presidential initiatives. Therefore, even in the US case, the role of the US Congress does not overturn the consensus that executives lead on foreign policy.

Although parliamentary involvement in US foreign policy has been appropriately researched, the literature on other countries, and significant international comparison, is less developed. Nonetheless, the literature, as it exists, tends to confirm the widespread view that executives dominate foreign policy decision-making, even where it is drawing attention to some interesting changes. In 2013, the British government proposed a motion to allow for British intervention in Syria, successively defeated by the Parliament. This would traditionally have been seen as a matter of almost exclusive executive competence – military action being at the end of the spectrum where Parliament's intervention was least likely. Kaarbo and Kenealy (2017) relate the government defeat directly to the 2003 parliamentary vote in favour of the Iraq war despite widespread public opposition, and the emerging consensus over the following years that the invasion was a diplomatic and humanitarian disaster. This, Kaarbo and Kenealy (2017) argue, discouraged parliament from approving military adventurism in the successive years. Strong (2015) argues that by asking for a parliamentary vote before the Iraq war in 2003, in order to silence opposition within his own party, Prime Minister Tony Blair set up a precedent that reinforced parliamentary input into this dimension of foreign policy. In the case of France, Ostermann (2017) argues that the constitutional reforms of 2008 reinforced parliamentary oversight in that country, where presidential authority of foreign policy had been assumed to be a cornerstone of the Fifth Republic. Kesgin and Kaarbo (2010) discuss the case of Turkey, where in 2003 parliament did not ratify the cabinet's decision to allow the US to use Turkish bases for logistical support in the military intervention against Iraq. This outcome was all the more astonishing because of the undisputed primacy of the executive branch, especially in security and external matters, in the modern Turkish Republic – not to mention the remaining significant influence of the military itself on security policy at that time. Taking the debate as a whole, notwithstanding the mixed US experience and the growing assertiveness of some parliaments on military intervention, parliaments are still relatively weak actors on foreign policy in general, compared to executives, and therefore their influence on state recognition would be expected to be limited.

Beyond formal oversight of foreign policy, the wider literature also explores the role of parliamentary diplomacy. Stavridis, Gianniou, and Cofelice (2016: 48) conclude that the great majority of the academic literature dealing with parliamentary diplomacy focuses on its 'moral aspect', such as the nature of elections and oversight institutions, and there is a much more limited activist agenda. Cutler (2006), reflecting on the activity of the OSCE Parliamentary Assembly regarding Central Asia and the South Caucasus, describes parliamentary diplomacy as an 'important middle ground' between traditional diplomacy and grass-roots approaches to transnational cooperation. Polese, Ó Beacháin, and Horák (2017) explore how recognised (authoritarian) states use parliamentary engagement to seek to boost legitimacy and it is likely that unrecognised states would follow a similar pattern. Weisglas and De Boer (2007: 93) argue that parliamentary diplomacy concerns that 'wide range of international activities undertaken by members of parliament in order to increase mutual understanding between countries, to improve scrutiny of government, to represent their people better, and to increase the democratic legitimacy of inter-governmental institutions'. Inter-parliament cooperation has been extended in recent years to include programmes of capacity-building and lesson learning, in particular for newly emerging democracies. Nitoiu and Sus (2017), for example, analyse the impact of the Cox-Kwasniewski Mission, sent to Ukraine in 2012–2013, ultimately concluding that, rather than challenging government or inter-governmental powers, such missions effectively complement those strategies implemented by the European External Action Service (EEAS) and the member states (European Parliament 2013).

Parliamentary recognition positions itself between these two literatures. On the one hand, it is an empirical expression, albeit unexplored, of parliamentary activism in a realm where the

executive branch predominates. In particular, as illustrated in the following section, acts of parliamentary recognition bring considerable legitimacy to the quests of unrecognised states. On the other hand, parliamentary recognition can be seen simply as an extension of parliamentary diplomacy as it does not confer any legal recognition. It may either be a strong form of informal legitimisation or a lower-level action supported by – or even encouraged by – the executive branch rather than a challenge to executive authority, thus allowing the executive to take some action without the diplomatic costs of full recognition.

National parliaments and state recognition

Most scholarly analysis on parliamentary engagement with state recognition has been devoted to the role of parliaments in cases of secession, rather than recognition. Kissane (2003) discusses the case of the 1919 Declaration of Independence in Ireland by the Sinn Féin deputies, who though elected to the British Parliament, met instead in Dublin, constituting themselves as the first Dáil Éireann (Irish Parliament) and passed a resolution declaring independence from Britain (Declaration of Independence 1919). Pavkovic and Radan (2007: 136) explore the 1990 resolution by the Latvian and the Estonian parliaments, proclaiming that their annexation by the USSR in 1941 had been illegal and, therefore, they had the legitimate authority to restore their independence. Caplan (2005: 98) looks at the more informal role of inter-parliamentary engagement in the dissolution of Yugoslavia, quoting France Bucăr, the speaker of the Slovene Assembly, as saying that the visit of a Slovenian parliamentary delegation to Vienna was ‘very important for Slovenia’s statehood and sovereignty’.

Nevertheless, national parliaments have played clear roles on state recognition-related issues. Between the end of 2014 and the beginning of 2015, the national parliaments of the United Kingdom, Ireland, Sweden, Spain, Portugal, Luxembourg and France all passed resolutions in support of Palestinian statehood, urging their respective governments to recognise an independent Palestinian state – typically specifying within the pre-1967 borders. While this was an important cluster of activity, the idea of such resolutions is not exceptional in itself. Processes of state recognition have previously involved national parliaments and supranational parliamentary assemblies. For instance, in August 2008, the Russian recognition of Abkhazia and South Ossetia was preceded by a parliamentary vote. In July 2010, the European Parliament passed a resolution urging all member states to recognise Kosovo (European Parliament 2010). In 2012, the Swedish Parliament passed a resolution urging the Swedish government to recognise the Sahrawi Arab Democratic Republic (BBC Monitoring Middle East 2012) and in May 2016, after a four-day conflict with Azerbaijan, the Armenian National Assembly discussed a bill on the formal recognition of Nagorno-Karabakh (Loda 2016).

Parliamentary recognition of Palestine

Palestine is the most developed case of parliamentary recognitions. While Palestine is recognised as an independent state by 137 of the 193 members of the United Nations member states, these are overwhelmingly in the Global South, the Middle East and the post-Soviet region.¹ Nonetheless in recent years European national parliaments have been quite active in passing non-binding resolutions, urging their respective governments to recognise Palestine as a state: Belgium (2015), France (2014), Greece (2015), Ireland (2014), Portugal (2014), Spain (2014) and Italy (2018). In some cases, that was not the only form of parliamentary activism. For instance, in 2016, some Greek parliamentarians from the ruling party, Syriza, travelled to Ramallah to meet the political parties represented in the Palestinian Legislative Council

(PLC). On that occasion, it was the Greek parliamentarians while in Palestine, rather than the government, which declared that the executive in Athens planned to recognise Palestine as a state (Thai News Service 2016). However, despite the procedural novelty, there was no tension between parliament and government on this issue, nor was there a sense that parliament was the initiator of a process the government would rather not have undertaken. The ruling Syriza Party was supportive of Palestinian statehood and backed the move. This allowed the government to take a step towards full governmental recognition, without risking a negative reaction at a time when they were dependent on external financial support. Such widespread support was present in many of the other cases. In Spain the resolution on Palestine was unanimous. In Britain, while the Labour Party imposed a parliamentary whip to require all of their MPs to support the motion, there was no active opposition by government and there were only 12 votes against the resolution (Wright 2014). Even in France, where there was more opposition, the resolution passed 339 to 151.

In other cases, the resolutions were obviously sponsored by opposition parties and it was clear the government did not welcome the parliamentary initiative, even if politically ministers found it hard to publicly oppose the resolutions. This was certainly the case in Ireland. While the resolutions were passed without opposition, the initiative came from the opposition Fianna Fáil and Sinn Féin parties and without their activism the government certainly would not have proposed the motion. However, the governing Fine Gael party did not command a parliamentary majority. Later calls to follow the Swedish government and formally recognise Palestine or to impose sanctions after the Gaza killings in May 2018 were opposed by members of the governing party, Fine Gael, on the grounds it would lead to a total breach of relations with Israel (Dáil Éireann 2018; Seanad Éireann 2018a). This did not stop the activism, however, and legislation to introduce sanctions against goods produced by Israeli settlers inside the Occupied Territories was proposed by the same coalition of opposition parties in 2018 and at the time of writing had been passed in the weaker upper house of parliament, Seanad Éireann (Seanad Éireann 2018b). In the case of Slovenia in 2018, a motion on recognition was introduced by the left-wing opposition and was deferred to an unspecified future date when it became clear the government would oppose it. In Spain, the return of the left to power in 2018, in the aftermath of a corruption scandal and a ‘no-confidence’ vote against the previous conservative government, has led to renewed activism on Palestine. The parties to the left of the social democratic PSOE, whose votes are essential to maintaining a parliamentary majority, are seeking full governmental recognition – following up the parliamentary resolution of 2014. The centre-left foreign minister has delayed a decision, by committing Spain to seeking a unified EU recognition of Palestinian statehood and saying they will consider unilateral Spanish action if an EU consensus is not possible (Middle East Monitor 2018). Given it is almost inconceivable that the EU could adopt such a position by consensus, this buys some time for a government that may not survive until the next planned election in 2020. However, if the centre left need to offer something to their more left-wing parliamentary supporters, then recognising Palestine, which would also be popular with their own support base, would be an easier political option than meeting the left’s demands for greater public spending. The European resolutions on Palestine show the variety of routes by which parliaments have adopted them. In some cases, the government supported them, in *de facto* terms, as a less controversial step than full and formal recognition. In other cases, they were the result of opposition activism, and do show that parliament can play a role in limiting the options of government and forcing them to take steps in response to popular opinion as expressed through parliament.

The impact of these resolutions is also a matter of debate. They do not have binding value but can be seen as a symbolic boost for the Palestinian cause. Expert commentaries interpreted these parliamentary recognitions as an important sign of growing international support for Palestine and as a means of expressing criticism of the ever-hardening Israeli position (Bilefsky and de la Baume 2014). Their significance can also be seen in the responses of the Palestinian and Israeli governments (Middle East and North Africa Financial Network 2014). In a speech given in the aftermath of these resolutions, the Palestinian president declared: ‘We take this opportunity to extend thanks to all the countries that have recognised the state of Palestine and all the parliaments that recommended this recognition to their governments.’ (BBC Monitoring Middle East 2016). In November 2014, the Palestinian minister of foreign affairs praised the resolution passed by the Spanish Parliament and urged the Spanish government to recognise Palestine (BBC Monitoring Middle East 2014a). On the other hand, Israeli authorities did not refrain from voicing their disappointment. Emmanuel Nahshon, an Israeli Foreign Ministry spokesman, said, for example, ‘We believe that such a decision will only radicalise the positions of the Palestinians and will send the wrong message to the leaders and people in this region’ (*The Daily Star Lebanon* 2014). In his address to the UN General assembly, the Israeli UN representative said, ‘Every European parliament that voted to prematurely and unilaterally recognise a Palestinian state is ... taking away any incentive for the Palestinians to negotiate or compromise or renounce violence’ (BBC Monitoring Middle East 2014b). Certainly, in the Palestinian case, the response of the respective governments was not one of minimising its significance. On the Israeli side, they were treated as a serious threat to their diplomatic position.

While Palestine is the most famous case of parliamentary recognition involving EU countries, it is not the only one. In December 2012, the Swedish Parliament adopted a resolution urging its government to recognise the Saharawi Arab Democratic Republic. This choice was praised by the Sahrawi government, which, in an MFA statement, ‘expresse[d] its gratitude and thanks to the Swedish parliament’ (BBC Monitoring Middle East 2012). On the other hand, the Swedish parliamentary recognition of Sahrawi triggered tensions with Morocco and in October 2015, when Morocco feared that Sweden might recognise Sahrawi as a country, it threatened a boycott of Swedish products.² Only a few days before, Moroccan authorities blocked the inauguration of the first IKEA store in the country, officially because of a missing ‘conformity permit’ (BBC Monitoring Europe 2015).

Parliamentary recognition of South Ossetia and Abkhazia

The activism of national parliaments has also been observed outside the Western context. For example, in May 2016, roughly one month after the four-day war between Armenia and Azerbaijan, opposition MPs proposed a resolution on the recognition of the Republic of Artsakh.³ While the bill ultimately did not pass, and was strongly opposed by prominent ministers (allegedly prompted by Russian pressure) (Loda 2016), it did reflect a serious debate. Other than Palestine, another recent high case is the role of the Russian Federation’s Duma in regard to Abkhazia and South Ossetia in August 2008. The then president of the Russian Federation, Dmitry Medvedev, announced his decision to recognise the independence of Abkhazia and South Ossetia by referencing the fact that the Duma had called on him to act.

The Presidents of South Ossetia and Abkhazia ... appealed to Russia to recognise the state sovereignty of South Ossetia and Abkhazia. The Federation Council and the State Duma voted in support of those appeals. ... I [President Dmitry Medvedev] signed

Decrees on the recognition by the Russian Federation of South Ossetia's and Abkhazia's independence.

(The New York Times 2008)

The resolutions adopted by both houses of the Federal Assembly of Russia, the Federation Council (the upper house) and Duma (the lower house), therefore preceded the formal recognition granted by the executive. This did not represent a standard procedure in the Russian Federation. For example, in 2006, the recognition of Montenegro by President Putin was not preceded by any legislative activity (Kostenko, Latukhina and Kornya 2008). Obviously in the contemporary Russian political system the predominance of the executive is not a matter of dispute (March 2011; Sadri and Burns 2010) and the opposition tends not to dissent from the Kremlin's direction,⁴ especially in times of crisis, when 'they effectively act as cheerleaders for the regime' (March 2011: 192). For instance, in 2014, the Russian Parliament immediately ratified the treaty that proclaimed Crimea to be part of the Russian Federation, despite its controversy and its non-recognition by most other states (Radio Free Europe 2014).

Throughout 2008, the Russian Parliament expressed explicit support for the recognition of Abkhazia and South Ossetia. In February 2008, the (then) president of the Russian Federation, Vladimir Putin,⁵ condemned the widespread recognition by most Western countries of Kosovo's declaration of independence while outlining Russia's restraint in not responding by the recognition of Abkhazia and South Ossetia.⁶ In the following weeks, the State Duma produced a draft resolution, which urged the president and the government to recognise these territorial entities as states (Allison 2009). Considering the predominance of the executive branch in Russian foreign policymaking, even Georgian observers deemed such parliamentary adventurism as unthreatening, assuming it was simply the regime's way of allowing some support for this position to be articulated without any serious diplomatic consequences. For instance, Georgian expert Mamuka Areshidze dismissed that parliamentary discussion as a show, clearly orchestrated from the centre, to intimidate the West (BBC Monitoring Trans Caucasus Unit 2008). While no recognition was granted to the two breakaway regions, the Kremlin formally lifted the sanctions in place against Abkhazia⁷ (Ó Tuathail 2008: 683).

At the beginning of August 2008, the situation fully escalated as Georgia and Russia confronted each other militarily, first in South Ossetia and then in Georgia proper. The brief war sparked a 'battle of narratives' between Russia and Georgia, aimed at winning over the favourable opinion of the international community. The Georgian position was that Russia premeditated the military action, threatening ethnic Georgians in South Ossetia. Russia argued that Georgian troops entered South Ossetia first, and Russia simply protected its own citizens who lived there, saving them from a calculated attempt of genocide (Loda 2017). Against this background, the involvement of the Russian Parliament needs to be analysed within this 'quest for external legitimacy'. While the first plenary of the parliament was originally scheduled for the beginning of September, deputies were recalled from their holidays to discuss developments in the Caucasus. At this point, a parliamentary resolution in favour of independence was widely expected (Kostenko, Latukhina, and Kornya 2008). On 25 August, the presidents of the *de facto* states, the South Ossetian Eduard Kokoity and the Abkhazian Sergei Bagapsh, attended the parliamentary debate and addressed the deputies. As anticipated, at the end of the session, both houses voted in favour of recognition, officially granted by President Medvedev the following day.

This was not the only case of the Russian Federation seeking to use Western rhetoric to present its actions to an international audience. Russia was one of a small number of states to condemn the NATO bombing of Serbia during the Kosovo crisis, bringing a failed

resolution to the UN Security Council (United Nations 1999). Nonetheless immediately after the NATO operation, the Russian Federation used it as a precedent to justify its operations in the second Chechen war. The use of a similar public rhetoric and line of reasoning to that used by NATO made it more difficult for Western states to loudly condemn Russia's actions in Chechnya (Wagnsson 2001). Highlighting the appeals by the two breakaway regions and then the resolutions of the Russian Parliament, Putin could present his geopolitical move as equivalent to the West's own practices of recognition.

National parliamentary activism and recognition resolutions therefore cannot be analysed exclusively as an attempt by parliaments to assert some authority in the realm of foreign affairs, where traditionally they were relatively powerless. Certainly, the resolutions in Russia on Abkhazia and South Ossetia, or in Greece and Spain on Palestine, are not evidence that parliaments have challenged the primacy of the executive. In these cases, the parliamentary activity is best analysed as part of a process led by government. In Russia's case this was to try to build legitimacy for a controversial action, in the cases of Greece and Spain it was clearly a step by the political party or parties in government, which allowed them respond to public opinion and pressure from their own political support bases without necessarily committing to formal recognition of Palestine as a state by the executive. In some of the other cases, the evidence for parliamentary activism is a little stronger. In the cases of Ireland and the UK the executive did not welcome the initiatives on Palestine, but, owing to the limitations of their power – either in their parliamentary majority or due to strength of public opinion, the executive decided not to actively oppose the motions. The fact that the executive did not respond with formal recognition (other than in Sweden) is evidence of reluctance on their part to go further, avoiding any potential consequences from formal recognition of Palestinian statehood within the pre-1967 borders.

Supranational parliaments and state recognition

Being granted UN membership constitutes the most widely accepted form of international recognition. Attaining UN membership requires the positive recommendation of the UNSC, followed by a resolution of the UN General Assembly (UNGA), passed by a two-thirds majority of the members present and voting (UN General Assembly Rules of Procedure: no 134–138). In practice, the largest barrier to states with widespread support attaining membership has been the opposition of a permanent member of the UNSC. This was seen in the late 1940s and early 1950s, when the USSR opposed applications from states that were perceived as pro-Western, and this bar was only resolved with a balanced extension of UN membership in 1955. In more recent years, the PRC has been opposing any attempt by Taiwan to seek UN membership while the Russian Federation opposes Kosovo's application and the United States opposes Palestine's. Apart from its role in granting UN membership and full recognition of statehood, the UNGA has shown a remarkable degree of engagement with some unrecognised states, first and foremost Palestine. Other supranational parliaments/assemblies, most notably the European Parliament and the OSCE Parliamentary Assembly, have also played important roles which are worth analysing.

The UNGA played an active role in setting the conditions for the emergence of states during the period of mass decolonisation in the 1960s. UNGA Resolution 1514, passed on 14 December 1960, declares that 'all peoples have the right to self-determination' (UN General Assembly 1960: para. 2). Although the resolution does declare that any 'attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of The United Nations', it offers no process for determining who are a people and what is a country, beyond the UNGA

determining this itself on a case-by-case basis. In practice, this has generally been interpreted as a rule requiring decolonisation to follow the colonial territory's boundaries, and this was the basis for UN action to prevent the breakaway region of Katanga, when with Belgian support they sought to secede from the Congo (UN Security Council 1960).

There was some softening of this position, with the recognition of Bangladesh with full UN membership in 1974, as a *fait accompli*, following the defeat of Pakistan in the 1971 war of independence, but working within previous boundaries remained a strong feature of the international system. Even with the collapse of the Soviet Union and Yugoslavia in the 1990s, the only territories to succeed in becoming UN members did so following the boundaries of previous union republics/republics, even if they did not reflect ethno-national majorities – almost treating them as equivalent to colonial boundaries of previous UN decisions.

While the active engagement of the UNGA, short of UN membership, does not offer any shortcut to UN membership, it nevertheless adds some element of legitimacy. This can be seen in the very active attempts by Palestine in recent years to expand their recognition by the UN system and in the efforts of Israel and the USA to slow or prevent such recognition. In 1974, UNGA Resolution 3210 acknowledged the Palestinian Liberation Organisation (PLO) as the legitimate representatives of the Palestinian people and invited its leadership to the UNGA plenary meetings dealing with Palestine. In November 1974, Yasser Arafat was the first leader of an unrecognised state to be invited to address the UNGA (Geldenhuis 2009: 78). Over the following years, the UNGA passed other resolutions in favour of Palestine's national independence and extended the presence of the PLO, and later the Palestinian Authority to numerous UN organs (Tschirgi 2004). In 2012, notwithstanding an impasse in the UN Security Council, an overwhelming majority in the UNGA passed Resolution 11317, which granted to Palestine the role of 'non-member observer state' status in the United Nations (United Nations 2012). The symbolism of the overwhelming majority of the international system voting 138 to 9, with 41 abstentions, accords Palestinian statehood very significant recognition. When Palestinian president Abbas addressed the UNGA on 27 September 2018, he was described on the official UN website as 'President of the State of Palestine' (UN General Assembly 2018). The importance of UNGA recognition is also seen in the reaction of Israel. The visibly dissatisfied Israeli prime minister, Netanyahu, not only spoke against the resolution but also thanked those (few) states that opposed it and repeated the public gratitude during a visit to Prague in the immediate aftermath of the resolution (CTK National News Wire 2012).

The UNGA has also been active in collective non-recognition instances. For instance, on 27 March 2014, after the Russian annexation of Crimea, the UNGA passed Resolution 68/262 in favour of the territorial integrity of Ukraine. The resolution, voted by an overwhelming majority, concluded calling the international community not to: '[r]ecognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol [and to] refrain from any action or dealing that might be interpreted as recognizing any such altered status' (United Nations 2014). While the resolution does not come with any enforcement mechanism, and UN Security Council members have often disregarded resolutions of the General Assembly, this resolution has nevertheless been interpreted as a significant degree of diplomatic pressure on the Russian Federation (Sengupta 2014). Ukraine has frequently referred to the resolution in order to assert the legitimacy of its territorial integrity claims, for example in opposing the organisation of the elections to the Duma of the Russian Federation within Crimea (BBC Monitoring Kiev Unit 2016). The UNGA has also occasionally represented a forum where members could promote the interests of unrecognised states, for example in favour of Kosovo (Newman and Visoka 2018a; Visoka 2018).

The European Parliament has shown some tendency towards activism in recognition matters (Gehring, Urbanski, and Oberthür 2017). In December 2014, the European Parliament passed a resolution in favour of Palestinian statehood, as part of expressed support for a two-state solution based on the 1967 borders (European Parliament 2014). In June 2016, Mahmoud Abbas, described in his capacity as president of the Palestinian National Authority, was granted the opportunity to address members of the European Parliament and expressed his gratitude to the European Parliament for recognising the state of Palestine (European Parliament 2016). According to Gianniou (2016), such resolutions represented a strong statement from the European Parliament, in particular to the High Representative of the European Union for Foreign Affairs and Security Policy, Federica Mogherini. Kosovo represents another interesting case, as it is recognised by 23 of the 28 EU member states, but is not recognised by five. In July 2010, the European Parliament adopted a resolution remarking that it ‘would welcome the recognition by all Member States of the independence of Kosovo’ (Tzifakis 2013: 45). Over the following years, EU parliamentarians kept the debate alive, making statements and asking questions about Kosovo’s statehood (Newman and Visoka 2018b). Alongside resolutions and parliamentary statements, immediately after Kosovo’s declaration of independence in 2008 European Parliament delegations started to meet with their Kosovar counterparts and European Parliament electoral observations missions were sent to Kosovo in 2007 and 2009 (Redei 2015).

On Crimea, the European Parliament has passed a number of resolutions stating that ‘the annexation of Crimea by the Russian Federation is illegal and in violation of international law’ (European Parliament 2015, 2017). The OSCE Parliamentary Assembly, which includes the Russian Federation among its members, passed a resolution in July 2015 which urged ‘[p]articipating States to refrain from any action or dealing that might be interpreted as recognizing the unlawful annexation of the Autonomous Republic of Crimea and the city of Sevastopol’ (OSCE Parliamentary Assembly 2015). This followed on from a similar resolution in 2012 in favour of the territorial integrity of Georgia and, therefore, implicitly against the recognition of Abkhazia and South Ossetia as countries (OSCE Parliamentary Assembly 2012).

Supranational parliamentary activism on recognition and non-recognition unsurprisingly follows a similar pattern in terms of cases as national parliaments, with Palestine being the highest-profile case over many years and periodic activity on Kosovo, Crimea and others. The symbolic stakes are higher and UNGA recognition, first of all of the PLO and then of Palestine statehood, has a level of international impact which is far greater than a set of individual national decisions.

Conclusion

This chapter does not challenge the dominant view in academic analysis that executives dominate the state recognition and non-recognition processes as part of their wider dominant role in foreign affairs and diplomacy more generally. The more limited role of parliaments, both national and supranational, is, however, an important and under-explored aspect of international campaigning on state recognition and non-recognition. Yet, it is not accurately discussed as a challenge by activist parliaments seeking to exert authority over, or influence on, their governments. Parliamentary activism can occasionally be a challenge to executive authority. This can be seen on the issue of Palestine in particular, where parliaments have acted as a conduit for public opinion and sometimes the grass roots of political parties to pressure a government towards action, or to take a formal legal decision short of executive recognition. They have been able to do this because the demand for Palestinian statehood has been popular with the general public and executive reluctance to act had to be balanced against the perceived political cost of opposition.

Parliamentary recognition in these cases was either a compromise or a step that a reluctant executive felt compelled to take, as the alternative of public opposition would be unpopular. However, on other occasions parliaments have played the role of opening debate and have been used by executives as a first interim step, as a means of testing international opinion, or as a way of responding to domestic pressure for full recognition without the full consequences of such a move. In other cases, such as in Greece on the Palestinian question and in the Russia Federation on Abkhazia and South Ossetia, the parliamentary activism was clearly prompted by the government itself as an interim step or as a prelude to an executive decision – in Russia's case – to try to build legitimacy for a controversial action. Supranational assemblies and parliaments are part of this legitimacy story – building ever-broader recognition in cases where the formal rules of the UNSC prevent UN membership being used to consolidate recognition, or asserting a majority if not consensual view that recognition should be denied.

Notes

- 1 Sweden is the only EU member to have recognised Palestine at the time of its EU membership. However, other countries did it before joining the EU: Czech Republic, Cyprus, Slovakia, Malta, Hungary, Romania, Bulgaria and Poland.
- 2 However, months before both, Prime Minister Stefan Lofven made clear that supporting a formal process of recognition was not currently on the table. Such position was restated by Foreign Minister Margot Wallstrom.
- 3 Artsakh is the Armenian name of the unrecognised republic of Nagorno-Karabakh.
- 4 With the exceptions of some nationalist factions that tend to advocate for more hardline solutions. For instance, in April 2008, Ivan Melnikov, from the Communist Party, expressed his disappointment with the Russian government's prudent attitude in regard of the recognition of Abkhazia and South Ossetia. See BBC Monitoring Former Soviet Union (2008). For a detailed account of the nationalist parliamentary opposition at the time, refer to Shlapentokh (2007).
- 5 While he was president of the Russian Federation at the time, he held the office of prime minister during the Russo-Georgian war (August 2008).
- 6 Nevertheless, in March 2008, the Russian government removed the pre-existing sanctions against Abkhazia and South Ossetia (see Ó Tuathail 2008: 683).
- 7 Sanctions against Abkhazia were imposed by the CIS in 1996. However, Russia suspended them in 1999.

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RECOGNITION OF STATES BY REGIONAL ORGANISATIONS

The European Union's contested experience

Gëzim Visoka and Edward Newman

Introduction

The international recognition of new states is loaded with political and legal controversies, and it lacks a consistent or rigorous normative framework to guide practice. Although the physical requirements of sovereign statehood have, in principle, reflected general agreement since the first half of the 20th century, the practice of international recognition has often been ad hoc, *sui generis* and highly political (Bartelson 2016). In particular, where legal sovereignty is contested, the politics of international recognition are controversial and can have far-reaching implications for peace and security. The international system is generally reluctant to grant statehood, especially in contested cases. However, there has arguably been a shift in international norms from the limited 1933 Montevideo Convention criteria for statehood towards a greater emphasis upon human rights, democracy and minority rights, and thus a shift towards recognising remedial secession. At the forefront of promoting this normative agenda are international and regional organisations. An underexplored question is whether and how membership of states in regional and international organisations shapes foreign policies and practices of state recognition. While international recognition is an exclusive prerogative of sovereign states, we argue that international and regional organisations play a significant role in this process, which is a reflection of their evolving capacity as well as an evolution in the political dynamics of international recognition.

This chapter explores the European Union's role in shaping the politics of international recognition, as a key example of the impact of regional organisations in this area.¹ It argues that the EU's practice of state recognition is based on a complex balance between internal and external considerations which expose tensions between the EU's liberal constitutive principles and the geopolitical realities it faces (Newman and Visoka 2018). Depending on the case, the EU has responded to aspiring states by generating a collective position on recognition or non-recognition, or a decision to allow individual EU members to adopt independent national positions. A number of challenges have emerged from these practices.

The EU's approach to recognition has often exposed a tension between its commitment to promote human rights and engage with communities (especially in its neighbourhood and near abroad), and its commitment to international order based upon territorial integrity. Thus, it has found itself engaging with societies which it does not formally recognise. A pragmatic policy of "engagement without recognition" has provided a way to avoid some of the sensitivities, but this has not addressed the tensions which exist. In addition, being active in relation to sensitive cases has put the EU in political conflict with powerful states – such as Russia – which has threatened important European interests. Thus, while the EU's pragmatic, case-by-case approach is driven by political expediency, it has not enabled it to avoid a number of controversies and inconsistencies which potentially undermine its normative credibility and problematise its relationship with powerful international stakeholders. At a time when cases of international recognition are increasingly partisan in the context of global geopolitical rivalries, the EU's approach may become increasingly sensitive.

This chapter provides both a conceptual and empirical discussion of the role of regional organisations in shaping international recognition politics, a neglected but important topic. It gives particular attention to the challenges encountered by the EU as it engages with international recognition, focusing on specific practices. The next two sections explore the role of the EU in the evolving dynamics of international recognition, providing a framework for understanding how the EU forms its recognition policies. The following section analyses the different patterns of EU practice since the early 1990s, which are collective recognition, collective non-recognition, and the practice of allowing EU members to form their own positions. In so doing, the discussion demonstrates how these practices generate the controversies introduced above, providing a substantive illustration of the tension between normative principles and geopolitical realities, made more acute in a transitional order. Finally, the conclusion provides an analysis of the broader implications of the EU's practices in this area. The research for this paper draws upon interview data gathered in Brussels, in addition to official EU sources.

Regional organisations and international recognition

The international system is generally reluctant to grant statehood, especially in contested cases. Decades of epistemic debates have not resolved disagreements among scholars, practitioners and lawyers on who has the right to recognise newcomers to international society and under what circumstances new states gain diplomatic recognition. Kolodziej (2005: 128) argues that

States, as actors, typically recognize each other as legal and moral equals, notwithstanding their vastly different material power, communal composition, or regime type. Their mutual recognition of their possession of sovereign or final authority over the territory and populations they control establishes these actors as the central actors in international relations.

In the absence of an international regulatory mechanism which grants, withholds, or rescinds the recognition of aspiring states, these acts remain at the discretion of existing states (Chen 1951; Crawford 2007). The recognition of states thus remains one of the most unregulated and decentralised aspects of the international community. Grant (2015: 204) maintains that "international law does not specify a particular procedure or apparatus that a State must use to confer recognition". Zyberi (2009: 448) argues that "[i]f there is anything that all states

would agree upon is that secession from an existing state should be a narrowly and carefully construed exception". Czapliński (2014: 78) points out that "[t]here is no supranational agency deciding in a binding way whether the criteria of statehood are met (although in exceptional cases such a binding decision can be passed, eg, by an international organization)". For Grant (2015: 37–48), recognition is "the mechanism by which international law, in the absence of a centralized institution of certification, responds to claims of the emergence of new States". Crawford (2013: 381) argues that "recognition involves the acknowledgement by one state or government that another state or government is legitimate: among other things, such recognition is seen to be declarative (although not constitutive) of statehood".

There were early attempts by several UN member states to delegate their right of recognition to UN bodies, in order to regulate and centralise the process. Lauterpacht (1947) argued that the collective coordination of state recognition would avoid controversial and unilateral interpretations of the principles and rules dictating the recognition of states and strengthen the global legal order. For Lauterpacht (1947: 168), "the idea of membership of a comprehensive international organization presupposes and calls for some collective machinery of recognition of governments". Collectivisation of recognition would resolve the issue of partial recognition and thus avoid state contestation; it would remove dilemmas among states on which rival side to support, and overcome the difficulty of forming a judgement on the availability of facts. However, a centralised, regulated regime for deciding on recognition decisions has never found much support among states, and it is generally agreed that "it is the national practice which will be of primary importance when it comes to the mechanisms and procedures of recognition" (Grant 2015: 194). While diplomatic recognition of new states is granted by existing sovereign states, the rise of regional organisations and supranational bodies is heralding new practices of state recognition which provide new grounds for understanding the international politics of state recognition (Raić 2002).

One of the major tasks of international and regional organisations as multilateral bodies is the development of common positions on a wide range of international issues, including self-determination and secession disputes. Although state recognition is not a common function of regional bodies, there are growing instances when they grant or withhold collective recognition of claimant states. Collective recognition is considered to be the most effective method for entering international society as it reduces the burden of bilateral recognition as well as enhancing the international legitimacy of new states (Ker-Lindsay 2015: 273). Admission to international organisations, for example, represents one form of collective recognition (Hillgruber 1998). It is widely accepted that "admission to full UN membership is tantamount to collective de jure recognition", which is "likely to facilitate the entry of the new state into other multilateral Organizations" (Geldenhuis 2009: 22). Collective non-recognition, on the other hand, is considered a necessary reaction to the situation when the claimant state emerges in violation of the fundamental norms of international law, including aggression and the use of force (Raić 2002: 442). For example, the deliberate exclusion of a state from UN membership amounts to collective non-recognition. Yet, there is still a desire among some scholars and practitioners to dissociate membership of international organisations from de jure and de facto recognition of states (see Dugard 1987).

While a great deal is known about the rules, roles and practices of the UN in the recognition of states, less is known about the practice of state recognition by regional organisations, such as the EU as an emerging global power (Caplan 2005; Dugard 1987). Can

regional organisations recognise states, and would this change the manner in which new states are admitted to international society? Regional organisations have the capacity to form collective intentions, and thus act as legal subjects in international relations (Erskine 2003). Increasingly, regional organisations, as distinct entities in world politics, demonstrate not only the capacity to coordinate the actions of member states, including when and how to recognise states, but also make decisions which have legal and political consequences. This capacity helps to explain the constraining and enabling role of regional organisations in relation to their members' foreign policy conduct. A regional perspective provides a differentiated understanding of state recognition by capturing region-specific dynamics, and it demonstrates the co-existence of geopolitical and normative agendas, and divergent foreign policy interests. The EU is a key test of this, since it has in the past two decades sought to consolidate a common position on external and security matters.

Other regional organisations, such as the Organization of American States (OAS) and the African Union (AU), have also engaged on a case-by-case basis with the question of state recognition largely by clarifying the discretionary character of recognition and shaping the decisions of their members on when to grant or withhold recognition (see Grant 1999: 24). The OAS considers recognition to be a declaratory aspect of statehood rather than solely a constitutive matter. However, on several occasions – such as when the government of Haiti was ousted in 1991 – this organisation has played an important role in coordinating collective non-recognition of the illegitimate regime (Talmon 1998: 10). The AU has also dealt with the question of state recognition. For instance, the AU has officially recognised the Saharawi Arab Democratic Republic (SADR) since 1982 as the sovereign government of Western Sahara. Despite the policy of individual member states, the AU as a whole has never recognised the sovereignty claims of Morocco over Western Sahara or approved Morocco's occupation of Western Sahara. The AU's policy of state recognition is directly related to a desire to end colonialism and promote independent statehood of all African nations (African Union 2015). However, beyond this, the AU's role in upholding the status of SADR as a sovereign state has been limited, mainly putting diplomatic pressure on the UN to resolve this self-determination dispute based on the UN Charter and international legality (African Union 2015). The AU has taken a rather different approach in the case of Somaliland, refusing to grant recognition or accept their bid for membership, fearing that such a move would unsettle other similar secessionist regions and movements across Africa (see Crisis Group 2006).

The European Union and state recognition

Understanding the EU's role in state recognition requires the integration of legal, normative and political perspectives, as well as an exploration of the internal and external considerations shaping recognition practices. Although the EU has made progress in consolidating common foreign, security and defence policies, the organisation does not have legal competency to recognise states as this remains a prerogative of its members.² The EU's ability to form a collective stance on state recognition rests upon the extent to which its institutions and member states have managed to generate consensus on when to grant or withhold collective recognition of states, a process which is conditioned by national self-interests and trade-offs. The EU's practice of state recognition is also shaped by external considerations. Whether a new state comes into existence through the consent of the "parent" state and a legitimate referendum or through unilateral action, contrary to international law, plays an important role in the EU's collective stance on state recognition. The EU's decision to coordinate the recognition of new states thus depends on how much the pathway to

independence enjoys international legitimacy and legality. The satisfaction of practical and normative criteria of statehood on the part of aspiring new states is also important. In addition to these traditional standards of statehood, respect for international law, non-interference in other states' internal affairs, and a commitment to democracy, human rights and the protection of minorities have also become increasingly but unevenly relevant (Buyse and Lawson 2007: 786). The EU and its members also have geopolitical interests which play an important role in the conduct of foreign policy, which often weigh against and sometimes side-line normative considerations – a tendency which is amply demonstrated in the analysis below (see Coggins 2014).

Since the consolidation of the EU in the early 1990s, this regional organisation has taken a stance on over 30 cases of state creation, where it has played an important role in establishing collective recognition or non-recognition to newly (re-)established and contested states, and when it has left its members to undertake individual decisions. One of the early major tests of European unity was the question of the recognition of new states emerging from the violent dissolution of Yugoslavia and the formation of new independent states in the former Soviet space in the early 1990s.³ In an unprecedented move, the European Community (or the EU) developed explicit guidelines on the recognition of new states in Eastern Europe and in the Soviet Union (Caplan 2005). In the recognition of new successor states, there was full consensus among member states to grant recognition to the entities which were republics within the USSR and former Yugoslavia, since these were more likely to fulfil the functional criteria of statehood (Rich 1993). This legal and constitutional threshold had serious ramification for Kosovo as an autonomous province within the former Yugoslavia, but also far-reaching consequences for entities in the former Soviet Union, namely Chechnya, Abkhazia and South Ossetia. There was an overriding concern, reflected in the guidelines for recognition, that the new states must respect the territorial integrity and sovereignty of other states and resolve their disputes peacefully as well as undertake legal commitment to protect minority rights. The EC's decision in favour of collective recognition of former Yugoslav and Soviet republics was aimed at limiting unilateralism within member states and demonstrating unity as an aspirational global power. The policy of collective recognition with regard to the former Yugoslav republics also intended to de-escalate conflict and shape the domestic and regional circumstances for resolving emerging conflicts by imposing conditional terms for recognition. However, the EU's collective decision to recognise the former Yugoslav republics had an unintended effect: rather than serving as an instrument of conflict management it arguably intensified violent conflicts in the region in the short term.

Beyond the Yugoslav and USSR cases, the EU was able to develop an implicit and derivative common recognition policy, mainly in relation to those countries which obtained independence via an UN-mediated or consensual process, which thus demonstrated an acceptable and uncontested pathway to independence. This is particularly evident with the cases of Eritrea, East Timor, Montenegro and South Sudan. In these uncontroversial cases, the EU issued joint statements on behalf of all member states, which opened the path for individual recognition by its members. In 2001, following independence, the EU issued a statement expressing the EU's commitment "to the success of the East Timorese transition to independence".⁴ Soon after, East Timor was admitted to the UN and did not require further bilateral recognitions. In the case of Montenegro's 2006 independence via a democratic referendum, the EU immediately issued a joint statement recording "that it will fully respect the decision of the people of Montenegro".⁵ As Montenegro's pathway to independence was compatible with national and international law and did not threaten the

EU's regional interests, granting collective recognition by the EU was a straightforward decision. Similarly, the EU granted collective recognition to South Sudan following the internationally mediated referendum for independence. A declaration issued on 9 July 2011 stated that "[o]n this historic day, the EU and its Member States welcome the Republic of South Sudan as a new independent state".⁶ Although there were no normative conditions attached to collective recognition, the EU's High Representative encouraged the new government in Juba "to demonstrate its commitment to national reconciliation, democratic and transparent governance and respect for human rights as the core of its vision for the future".⁷ Following the EU's statement, individual EU members of the EU granted recognition to South Sudan in accordance with their own domestic procedures.⁸

Over the years, the EU has also been challenged by other situations, such as when aspiring states have proclaimed independence without the consent of the host state; when secession and independence have taken place through aggressive and coercive methods; and when the EU's and its members' geopolitical interests would be threatened by the recognition of a new state. In all these situations, the EU has coordinated its members in collectively withholding recognition from some territories. For example, the EU has adopted a policy of collective non-recognition of the Turkish Republic of Northern Cyprus (TRNC), since the entity declared independence in 1983. However, despite not recognising the TRNC, the EU continues to provide aid to and engage with the Turkish Cypriot community to foster inter-communal reconciliation, help prepare for reunification, and bring the region closer to the EU.

The EU has also adopted a policy of collective non-recognition of Nagorno-Karabakh and Transnistria, two breakaway regions and "frozen conflicts" in the Caucasus region. The EU reiterates "its support for the territorial integrity of Azerbaijan, and recalls that it does not recognise the independence of Nagorno Karabakh".⁹ Similarly, the EU favours "a comprehensive, peaceful settlement of the Transnistrian conflict based on the sovereignty and territorial integrity of the Republic of Moldova with a special status for Transnistria".¹⁰ Somaliland is another self-proclaimed state which has not been recognised by the EU. In 2012, the EU high representative declared that "[t]he EU, like the UN, considers Somaliland part of Somalia, in respect of the country's territorial integrity".¹¹ Although Somaliland has a strong case for recognition – based upon its economic development, relatively effective governance and stability, and attempts to establish democratic practices – the EU's policy of collective non-recognition is largely motivated by geopolitical considerations, fearing that the alteration of borders could destabilise the entire Horn of Africa, a strategic route for European trade. The EU is also engaged in the case of Western Sahara, which has been occupied by the Kingdom of Morocco since 1975. EU member states are divided on the recognition of Western Sahara. While Spain, a former colonial power over Western Sahara, appears to support the right of the Sahrawi people for self-determination, France tends to side more with Morocco for geopolitical and cultural reasons (Benabdullah 2009). Unable to generate a common affirmative position, the EU's position so far has been that it "supports the UN Secretary-General's efforts to achieve a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara".¹²

While in the previous cases the EU's recognition policy was implicit in its own practices, the first time the EU pursued an explicit position of collective non-recognition was in the cases of Abkhazia and South Ossetia, two breakaway regions of Georgia. This policy was a threefold position, involving: explicitly and unanimously stating that no EU member would recognise the breakaway territories; calling on other states not to recognise the independence proclamations; and condemning "Russia's unilateral decision to recognise the independence of Abkhazia and South Ossetia".¹³ The extraordinary European Council meeting of 1 September 2008 outlined EU's common position:

The European Council strongly condemns Russia's unilateral decision to recognise the independence of Abkhazia and South Ossetia. That decision is unacceptable and the European Council calls on other States not to recognise this proclaimed independence and asks the Commission to examine the practical consequences to be drawn.¹⁴

The collective EU policy of non-recognition of Abkhazia and South Ossetia went a step further, instructing the EU's delegations and the diplomatic networks of members to send a demarche to countries across the world in support of Georgia's independence, sovereignty, and territorial integrity. While the EU has not recognised Abkhazia and South Ossetia, it has provided financial support for economic development and civil society. The aim of this policy is primarily geostrategic: to reduce Russia's strategic leverage over these regions and have a stake in the de-escalation of tensions springing from international isolation.¹⁵ The most recent example of the EU's explicit and robust collective position of non-recognition is Crimea. The EU issued a joint statement on 18 March 2014 stating that "[t]he sovereignty, territorial integrity and independence of Ukraine must be respected. The European Union does neither recognise the illegal and illegitimate referendum in Crimea nor its outcome." The EU's strong response came after Russia's incursion into Crimea, which occurred after Ukraine expressed its intention to sign an association agreement with the EU. This made the EU directly implicated in the crisis, for which it needed to take a strong political stand. The goal of the EU's common position on non-recognition was "to demonstrate that the EU does not accept the illegal annexation, using tangible measures in addition to regular political and diplomatic action".¹⁶ The aggression against Ukraine represented a serious threat to the Euro-Atlantic community, which partly accounts for such a robust response from the EU.

As the EU's policy of state recognition is determined on a case-by-case basis and depends upon the extent of internal consensus, in two significant cases – Kosovo and Palestine – EU members have pursued individual decisions and policies on recognition. In the absence of internal consensus, the European Council noted that "Member States will decide, in accordance with national practice and international law, on their relations with Kosovo".¹⁷ This was the cornerstone statement of the EU's policy of bilateral recognition of Kosovo's independence. The European Council clearly did not contest the declaration of independence, or consider it in breach of international law. While the EU reaffirmed its adherence to the principles of sovereignty and territorial integrity, it clearly stated that circumstances make Kosovo "a sui generis case which does not call into question these principles",¹⁸ highlighting two important factors which had facilitated Kosovo's independence: humanitarian intervention and the UN interim administration of Kosovo. Grant (2015: 91) argues that "EU institutions do not withhold recognition from Kosovo as a matter of general legal obligation; they do so because the EU as a whole reserves its position", asserting that "non-recognition as legal obligation and the withholding of recognition as a political reservation are very different acts". So far, 23 out of 28 EU members have recognised the independence of Kosovo and have established full diplomatic relations. Although most influential EU members – Germany, France and the UK – seem to have pushed for a common position on Kosovo's future status, the EU ultimately failed to offer Kosovo collective recognition due to internal resistance from five members (Cyprus, Greece, Slovakia, Spain and Romania). These five countries are sensitive about the establishment of any precedent or encouragement that may exacerbate separatist pressures or demands for further autonomy in their own territories (see Visoka 2018). Even in the absence of collective recognition, the EU signed the Stabilisation and Association Agreement (SAA) with Kosovo in 2015, signalling implied

recognition and opening the path for future membership. Moreover, the European Parliament, through numerous non-binding resolutions, has encouraged “those EU Member States which have not already done so to recognise the independence of Kosovo”.¹⁹

Another significant case of bilateral recognition by EU member states is Palestine, which has received different forms and degrees of political contact within the EU (Martins 2015). The EU as a collective entity has withheld collective recognition of Palestine in the hope that a mutually acceptable peace settlement would be reached between the Israeli government and the Palestinian authorities. In 2012 the EU Council expressed “its readiness to recognize a Palestinian State when appropriate” and “its support and wish for Palestine to become a full member of the United Nations as part of a solution to the conflict”, which for the EU is “a two-state solution with the State of Israel and a sovereign, democratic, contiguous and viable State of Palestine, both living in agreed borders and enjoying peace and security”.²⁰ Yet, the EU has reiterated that “recognition of a state is not within the competences of the European Union. It is a competence, technically and politically a responsibility of member states.”²¹ In line with this, Sweden was the first country to unilaterally extend diplomatic recognition to Palestine in 2014. Despite Palestine’s strong case for statehood, geopolitical interests intermeshed with a special relationship between EU member states and the United States and Israel seemingly prevents the formation of consensus on collective recognition of Palestine (see Bouris 2014). With parallels to the case of Kosovo, the European Parliament passed a resolution in 2014 reiterating:

its strong support for the two-state solution on the basis of the 1967 borders, with Jerusalem as the capital of both states, with the secure State of Israel and an independent, democratic, contiguous and viable Palestinian State living side by side in peace and security on the basis of the right of self-determination and full respect of international law.²²

Conclusion

This chapter has examined the role of regional organisations on state recognition with specific reference to the EU. The EU, as a regional organisation, does not recognise states in the traditional sense, but it can generate common positions among its members which have a significant effect upon the foreign policy actions of these states and also steer global opinion – and sometimes practice – on particular cases. The EU’s capacity to formulate a position on state recognition is a product of agreement among members to decide when to grant the EU permission to speak on behalf of all members and when to retain that right individually to themselves. The EU’s ability to produce common positions has reduced the diplomatic costs of individual states to deal with disputed cases, and provided an opportunity for certain states to promote their national interests within a more legitimate common position. The performative function of EU common positions on state recognition not only disciplines the conduct of its members but also influences the position of other states which are indirectly associated with the EU.

As demonstrated in this chapter, the EU’s practice of state recognition is driven by internal and external normative and geopolitical considerations, applied inconsistently in light of the circumstances of each case. Cases which have received collective recognition by the EU have satisfied most, if not all, of the following conditions: full consensus among EU members on whether to recognise the entity in question; close involvement of all EU institutions; the presence of strong advocate states within the EU; a declaration of independence

following an internationally supervised referendum; fulfilment of core statehood criteria; and a strong fit with the geopolitical interests of the EU and its members. The EU has predominantly justified state recognition on legal and normative grounds. Yet, geopolitical interests, especially concerns for regional stability, have been present across all cases in favour and against collective recognition. The EU is, in principle, committed to self-determination, democracy and human rights. However, in some cases it has denied recognition to viable entities which have a strong remedial case for recognition in the interests of stability or other strategic calculations. It has pursued a policy of engagement without recognition and formed humanitarian and technical links with separatist regions which it does not recognise, with questionable results. Moreover, as the EU has encountered state formation rooted in aggression, civil war and foreign invasion, it has adopted a collective non-recognition policy. Geopolitical and security sensitivities have pushed the EU to develop a more assertive stance towards geographically proximate contested and unrecognised states, compared to those cases which are considered to be more distant.

The EU demonstrates that regional organisations can play an important role in shaping the norms of recognition, especially in defining the character of recognition, in clarifying the discretionary and political character of recognition, and in setting conditions on a case-by-case basis to shape the decisions of its members. The EU is thus a norm-maker in the context of state recognition. The ambition to consolidate the EU's identity as a global actor for conflict resolution has shaped the EU's self-perception and encouraged it to take a stance on sensitive international matters. Speaking with a single voice – as a demonstration of internal unity and institutional consensus – reinforces the EU's credibility as a global actor. The EU's recognition practice is deeply intermingled with its diplomacy of conflict resolution. While in the case of Kosovo and Abkhazia/South Ossetia, the EU has formulated its recognition policy in the aftermath of the conflict, in the case of the collective recognition of the Yugoslav republics it has taken place during the conflict. The policy of collective recognition of the Yugoslav republics intended “to mitigate the conflict and to prevent its further expansion” (Caplan 2005: 16). The policy of individual recognition of Kosovo was designed to implement the UN's comprehensive status settlement and mitigate the effects of international failure to resolve Kosovo's status through supervising its independent statehood. The policy of collective non-recognition of Abkhazia and South Ossetia and later of Crimea and Sevastopol intended, among other reasons, to support conflict resolution efforts. Yet, the EU's differentiated approach to state recognition, determined on a case-by-case basis and by consensus, reveals weaknesses and inconsistencies, and also exposes internal tensions and limitations as an aspiring global actor. Through its case-by-case approach to recognition, the EU and its members have simultaneously reproduced the existing conservative order concerning state recognition in international politics, while also promoting a normative agenda and foreign policy interests related to EU enlargement, peacebuilding, security, trade, aid and development.

The EU practices have made an important contribution to the evolving politics of international recognition, especially in dealing with the existence of states in the grey area between recognition and non-recognition, and the challenges of engagement without recognition. Mainstream perspectives assume that recognition takes place in an anarchic international environment, highlighting the primacy of dominant powers in securing universal recognition. Yet, in the case of the EU, where decisions must be taken unanimously, even one small state can block the formation of a common position on recognition. In such circumstances, opportunities arise for some states to push forward a national agenda and camouflage it as the EU common position. However, the geopolitical interests of certain EU member states have prevented the EU from following a more consistent, rule-based policy. A more coherent

recognition policy would provide clarity and credibility to the EU and expand its external influence, but it is highly questionable, based upon the experience of the last two decades, whether the geopolitical and normative tensions can be adequately reconciled. EU practice is therefore likely to continue to represent an imperfect case-by-case approach, guided both by principles and interests.

Notes

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THE INTERNATIONAL COURT OF JUSTICE AND THE RECOGNITION OF STATES

Gentian Zyberi

Introduction

As Lauterpacht has noted (1947: v),

there are only very few branches of international law which are of greater, or more persistent, interest and significance for the law of nations than the question of Recognition of States, of Governments and of Belligerency. Yet there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven.

Understandably, answers to these questions are of heightened importance and urgency especially during turning historical moments as the aftermath of World War II, or the early 1990s with the dissolution and violent breakup respectively of the Soviet Union and Yugoslavia. While international law addresses different aspects of recognition (Talmon 2000), this chapter focuses on the contribution of the International Court of Justice (ICJ or the Court) to clarifying different legal aspects of the inter-related processes of state creation and recognition. The ICJ is an important international adjudication mechanism, entrusted with settling inter-state disputes and providing legal advice to the United Nations (UN) main organs and other duly authorised organs and special agencies (Zyberi 2008; Zimmermann, Tomuschat, Oellers-Frahm, and Tams 2012 (ICJ Statute Commentary); Kolb 2013; Hernández 2014; ICJ 204b; Shaw 2016; Thirlway 2016). The decisions of the Court have contributed to the development of different areas of international law (Tams and Sloan 2013). The general authority of the ICJ's decisions, and the fact noted by Dugard (1987: 126) that the UN has become 'the collective arbiter of statehood through the process of admission and non-recognition', demonstrate the potentially important institutional role that the ICJ can play within the UN context.

The main contributions of the Court to the issue of creation and recognition of states consist of legal findings clarifying the criteria for admission to UN membership and the role of the General Assembly and the Security Council therein, the emergence of new states through the process of decolonisation, declarations of independence, and conditions for

states' access to ICJ's contentious and advisory proceedings. The issue of access to the Court's jurisdiction could arise in the case of *withdrawal*, *suspension* (as in the case of the former Yugoslavia (Rosenne 2010)) or *expulsion* of a state from the UN, as well as from the *termination* of the existence of a state as in the *Gabčíkovo-Nagymaros Project* case between Hungary and Slovakia (*Gabčíkovo-Nagymaros Project*, ICJ Reports 1997: 7). While this latter case was about differences that had existed between Hungary and Czechoslovakia concerning the building of a system of dams in the Danube River, the 1993 Special Agreement about bringing the dispute before the Court reached between Hungary and Slovakia recorded that the latter was in this respect the sole successor state of Czechoslovakia. The Court has also settled disputes concerning land and maritime border delimitations related to the emergence of new states in Africa and elsewhere (Riziki Majinge 2012).

First, this chapter places in context the role of an important international adjudication mechanism as the Court in interpreting different legal aspects concerning the process of state recognition. Then, it proceeds to analysing the following issues, namely access to the Court for UN non-member states and differences between contentious cases and advisory proceedings; conditions for admission and membership of states in the UN; state recognition and self-determination in the context of decolonisation, including collective non-recognition of internationally wrongful acts; and declarations of independence under international law.

The Court and the process of state recognition

Article 7 of the UN Charter lists the ICJ as one of the six main organs of the UN, alongside the General Assembly and the Security Council. Articles 92–96 contained in Chapter XIV of the UN Charter regulate broadly access to and the place of the ICJ within the UN institutional framework. Article 92 recognises the Court as the UN's principal judicial organ. Article 35(1) of the ICJ Statute provides that the Court shall be open to the states party to the Statute, and Article 93(1) of the UN Charter provides that all UN member states are *ipso facto* parties to the Statute. Article 93(2) regulates access to the Court for non-UN members. Article 94 establishes the obligations of parties to a dispute to comply with the decisions of the Court (Schulte 2004). Article 95 ensures the states' freedom of choice when it comes to making use of dispute settlement mechanisms. Finally, Article 96 enables the General Assembly and the Security Council to ask the Court for legal advice on any legal matter and other UN organs and specialised agencies to ask for legal advice on matters related to their activities. This provision concerning the ICJ's advisory jurisdiction is further supplemented by Article 65 of the ICJ Statute (Chapter IV on Advisory Opinions). Under Articles 59 and 60 of the ICJ Statute, the Court's judgments are final, without appeal, and binding for the parties to a dispute, whereas its advisory opinions are generally considered as authoritative interpretations of international law (Aljaghoub 2006).

The basic criteria for statehood are codified in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States and include (i) a permanent population; (ii) a defined territory; (iii) a government; and (iv) the capacity to enter into relations with other states (Montevideo Convention 1933). These statehood criteria are closely related to the right of peoples to self-determination (Cassese 1995; Zyberi 2009; Summers 2013). The Court has helped clarify certain aspects of achieving statehood and the related interaction among states at the international level (Orakhelashvili 2015). State recognition is primarily a political act that entails legal consequences. Essentially, the act of recognition mainly involves the individual states concerned. As Dugard has noted (1987: 166), a state enjoys considerable discretion in deciding whether to recognise another state, except where the

Security Council has directed states not to recognise an entity as a state. More generally, the UN plays an important role in the recognition of states by certifying the existence of some states through its admission procedure and by denying the existence of others by means of non-recognition (Lauterpacht 1947; Dugard 1987: 164; Crawford 2006: 131–4, 157–73; Fabry 2010). However, different interests might be at stake in such cases. Thus, a problem presented itself in the *South West Africa* case, where South Africa exercised authority over South West Africa and its inhabitants contrary to the decisions of the UN Security Council and the General Assembly. As Orakhelashvili has noted (2015: 177), in this case the Court effectively proposed a two-pronged guideline for assessing state conduct: whether the recognition of the relevant act serves the interests of the inhabitants; and whether such recognition permits the illegal occupier to assert such public authority as the occupation purports to generate (*Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Reports 1971: 55–6, paras 121–127, especially par. 125). The advisory opinions in *South West Africa* and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* clarify state obligations with regard to exercise of public authority from an occupation power.

Besides acts of individual recognition between states and collective recognition through a state's admission into the UN, there are several other indicators of the level of recognition of a state at the international level. First, membership in the UN is commonly seen as a marker of universal and full recognition of statehood (Rosenne 1949; Dugard 1987). Yet, as Crawford has generally noted (2006: 193) with regard to UN membership, a member state could withdraw or be expelled, and a new state might not seek admission. Another important marker of international recognition, especially for a contested state, is to join different regional and international organisations, or the treaty establishing an international court, such as the International Criminal Court. Palestine joined the International Criminal Court and the Permanent Court of Arbitration in 2015. Kosovo joined the Permanent Court of Arbitration in 2016. Yet another could be joining or starting legal proceedings before an international court, like the ICJ. Palestine participated in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion)* and in September 2018 started a case against the US (*Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*). Kosovo participated in the advisory proceedings in the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Kosovo Independence Declaration case)*. Overall, and especially for contested states, membership in international and regional organisations is relevant for getting access to peaceful dispute settlement mechanisms and to global public goods and services. Such participation strengthens their claim to statehood and formalises their engagement with other states in the international arena.

The principle of peaceful settlement of disputes does not require or depend on the mutual recognition of the parties concerned. Moreover, making the settlement of disputes subject to mutual recognition could potentially undermine this general principle of international law, codified in Article 33 of the UN Charter. The ICJ seems to favour the view that statehood and related rights do not depend on mutual recognition by the parties to a dispute (*Application of the Genocide Convention*, ICJ Reports 1996: 595). In this case, the Court found that even if for purposes of establishing jurisdiction there was no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty, and even if it were to be assumed that the Genocide Convention did not enter into force between the parties until the signature of the Dayton-Paris Agreement, all the conditions were fulfilled to found the jurisdiction of the

Court *ratione personae* (*Application of the Genocide Convention*, ICJ Reports 1996: 613: 26). The condition under Article 34(1) of the ICJ Statute is that only states may be parties in cases before the Court. This is satisfied for all UN member states, but can be subject to controversy in the case of non-member states to the UN, or in case of state succession or other changes while the case is pending. In such situations, it is for the ICJ to decide whether the conditions for access to its jurisdiction have been satisfied.

Access to the Court for UN non-member states

Under Article 93(2) of the UN Charter, even states non-member to the UN may become a party to the ICJ Statute, on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council (Oellers-Frahm, ICJ Statute Commentary 2012: 179–85). States that became parties to the Statute of the ICJ before being admitted to the UN include Japan, Liechtenstein, San Marino, Nauru and Switzerland (Oellers-Frahm, ICJ Statute Commentary, 2012: 183). As Rosenne has noted (2006: 599), perusal of the debates in the Security Council and the General Assembly discloses that, except in the case of Switzerland, the object of repeated discussion was not the conditions but whether the applicant was a state which should or could become a party to the Statute.

Another potential venue for joining the ICJ Statute is Resolution 9(1946) of the Security Council, whereby a state can become a part of the ICJ Statute by accepting the jurisdiction of the Court, in accordance with the UN Charter and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertaking to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a member of the UN under Article 94 of the Charter. This Resolution relates directly to Article 35(2) of the ICJ Statute, but, in contrast to Article 93(2) of the UN Charter, the statehood of an entity coming before the Court is not subject to a preliminary political and binding determination by the General Assembly, upon a recommendation by the Security Council. The ICJ would be able to decide in this case and it remains debatable whether the Court in exercising its depositary functions could or should decide on the statehood issue, or just accept it at face value. Palestine has used this option to join the ICJ, through a declaration sent to the Court in July 2018.

The two possibilities of getting access to the Court for non-UN member states, respectively under Article 93(2) of the UN Charter and under Security Council Resolution 9(1946) and Article 35(2) of the ICJ Statute, are relevant especially when new states come into existence but do not or cannot join the UN. As Rosenne has noted (2006: 600), three cases have concerned state parties to the ICJ Statute under Article 93(2), namely *Nottebohm* (Liechtenstein), *Interhandel* (Switzerland) and *Phosphate Lands in Nauru* (Nauru). Overall, under the UN Charter articles and subsequent practice, access to the ICJ appears to be open to territorial entities that have at least some degree of international status.

Access to the Court in contentious cases versus advisory proceedings

While under Articles 34 and 35 of the ICJ Statute access to the Court in contentious cases is limited to states, whether members of the UN or not, a more lenient approach is taken by the Court with regard to advisory proceedings (Hernández 2011: 150–1). Under Article 66(2) of the ICJ Statute, the registrar of the Court shall inform states or international organisations that can provide the Court with relevant information of the possibility to participate in its advisory proceedings. As Zimmermann has noted (ICJ Statute Commentary 2012:

617), whenever the General Assembly and the Security Council, exercising their powers under Article 93(2) of the UN Charter, accept that an entity, which is not a member of the UN, becomes a party to the ICJ Statute, they implicitly determine that said entity is to be considered a state for the purposes of Article 35, any such determination by the competent organs of the UN then being binding upon the Court. Here below the situation concerning access to the Court for advisory proceedings will be addressed in some more detail.

Entities that can provide the Court with relevant information

The Court has allowed access to the Court to entities that are state-like and accepted as such by the majority of the UN member states. Thus, the Court has allowed access to Palestine and to Kosovo in advisory legal proceedings concerning matters of relevance to both states. While it is debatable whether this can be seen as an implicit recognition of statehood, such participation certainly furthers considerations of fairness in the legal proceedings. The acceptance of the Court's advisory opinion and necessary follow-up by the directly concerned parties has been problematic.

In terms of participation in the proceedings, in the *Wall* case the Court decided that all states entitled to appear before it, as well as Palestine, the UN and, subsequently, at their request, the League of Arab States and the Organization of the Islamic Conference, were likely to be able to furnish information on the question in accordance with Article 66(2) and (3) of the Statute. Palestine was allowed to participate in the written and oral submissions to the Court because the General Assembly had granted Palestine a special status of observer and Palestine was co-sponsor of the draft resolution requesting the advisory opinion (*Wall*, ICJ Reports 2003: 429, paras 2, 4). Israel objected to Palestine's participation in the proceedings.

In the *Kosovo's Independence Declaration* case, given that the authors of the independence declaration were considered likely to be able to furnish information on the question before it, the Court decided to invite them to make written contributions to the Court (*Kosovo's Independence Declaration*, ICJ Reports 2008: 410, para. 4). As a procedural matter and to avoid any perception of impropriety regarding Kosovo's statehood, the Court distinguished between 'written statements' by UN member states and the 'written contribution' from Kosovo.

The Court's findings concerning admission and membership in the United Nations

The issue of membership to the UN is both a political and a legal matter, as the process of acquiring membership into the UN has demonstrated. Given that both the Security Council and the General Assembly need to be agreed, membership of the UN depends largely on acceptance by the permanent members of the Security Council, who can veto a positive recommendation and general support by the General Assembly. The ICJ has had to deal with this issue in its first and third advisory proceedings, respectively *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* and *Competence of the General Assembly for the Admission of a State to the United Nations*. The relevant Charter articles were subject to differing interpretations on the part of states.

From the establishment of UN in 1945, some 12 states had unsuccessfully applied for admission. Their applications were rejected by the Security Council in consequence of a veto imposed by one of the permanent members of the Security Council, due to the

East–West blocs’ political divide. The Court interpreted the question posed by the General Assembly as requiring it to advise on:

are the conditions stated in paragraph 1 of Article 4 exhaustive in character in the sense that an affirmative reply would lead to the conclusion that a Member is not legally entitled to make admission dependent on conditions not expressly provided for in that Article, while a negative reply would, on the contrary, authorize a Member to make admission dependent also on other conditions.

(Conditions of Admission, *ICJ Reports 1948: 61*)

The Court found that there were five requisite conditions for an applicant legal entity to be admitted to membership in the UN, namely:

- (1) be a State;
- (2) be peace-loving;
- (3) accept the obligations of the Charter;
- (4) be able to carry out these obligations; and
- (5) be willing to do so.

(Conditions of Admission, *ICJ Reports 1948: 62*)

In interpreting Article 4 of the UN Charter, the Court found that the conditions stated in Article 4(1) must be regarded not merely as the necessary conditions but also as the conditions which suffice (*Conditions of Admission*, *ICJ Reports 1948: 62*). The Court clarified that a UN member state called upon to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a state to UN membership is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by Article 4(1) (*Conditions of Admission*, *ICJ Reports 1948: 65*). At the same time, the Court explained that this did not entail *en bloc* admissions, but that every application for admission should be examined and voted on separately and on its own merits (*Conditions of Admission*, *ICJ Reports 1948: 65*). A UN member did not have to subject its affirmative vote to the additional condition that other states be admitted to membership in the UN together with that state (*Conditions of Admission*, *ICJ Reports 1948: 65*). The principled legal position of the Court does not fit well with the political considerations motivating the permanent member states of the UN Security Council, which can eventually veto such admission requests.

This first advisory opinion of the ICJ did not suffice, as controversies also arose with regard to the interpretation of Article 4(2) of the UN Charter. In a related advisory opinion, the ICJ decided that it needed to determine *solely* whether the General Assembly could make a decision to admit a state when the Security Council had transmitted no recommendation to it (*Competence of Assembly Regarding Admission to the United Nations*, Advisory Opinion, *ICJ Reports 1950: 7* (General Assembly Competence)). First, the Court clarified that under Articles 4, 5 and 6 the Security Council cooperates with the General Assembly in matters of admission to membership, of suspension from the exercise of the rights and privileges of membership, and of expulsion from the Organisation (*General Assembly Competence*, *ICJ Reports 1950: 9*). The ICJ held that admission of a state to UN membership, pursuant to Article 4(2) of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the

candidate failing to obtain the requisite majority or of the negative vote of a permanent member upon a resolution so to recommend (*General Assembly Competence*, ICJ Reports 1950: 10). Jointly, these two advisory opinions have clarified the mechanism of admission of states into the UN.

State recognition and self-determination in the context of decolonisation

The process of achieving statehood follows the exercise of the peoples' right to self-determination. While the right to self-determination in the context of decolonisation has become widely accepted, secessionist movements face an uphill struggle vis-à-vis their parent state and an international community of states which is generally wary of such efforts. While it has been the Security Council, as one of the main organs of the UN vested with primary responsibility in the maintenance of international peace and security, that has dealt with issues concerning collective non-recognition (Gowlland-Debbas 1990), the ICJ has rendered some support to its work by addressing a number of related legal issues which impose a duty on the state concerned, as well as on third states not to recognise any illegal acts. Directly concerned states and third states have an obligation to act within the framework of international law and to refrain from internationally wrongful acts.

Collective non-recognition of internationally wrongful acts: the advisory opinions on Namibia and Palestine

This was a case where the Court's findings supported the Security Council's decision regarding the illegal administration by South Africa of Namibia. In its 1971 Advisory Opinion, the Court found that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately (*Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Reports 1971: 58, para. 133(1)). Moreover, the ICJ emphasised that all UN member states were under an obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts implying recognition of the legality of, or lending support or assistance to, such presence and administration (*Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Reports 1971: 58, para. 133(2)). Finally, the Court even added that it was incumbent upon states which were not UN members to give assistance in the action which had been taken by the UN with regard to Namibia (*Continued Presence of South Africa in Namibia*, ICJ Reports 1971: 58, para. 133(3)). Namibia finally gained its independence in March 1990.

The case concerning Palestine was about the wall and fences built by Israeli authorities in the Occupied Palestinian Territory. After considering certain fears expressed to it that the route of the wall would prejudice the future frontier between Israel and Palestine, the Court observed that the construction of the wall and its associated regime created a '*fait accompli*' on the ground that could well become permanent, and hence tantamount to a *de facto* annexation (*Wall*, ICJ Reports 2004a: 184, para. 121). Noting further that the route chosen for the wall gave expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements and entailed further alterations to the demographic composition of the Occupied Palestinian Territory, the Court concluded that the construction of the wall, along with measures taken previously, severely impeded the exercise by the

Palestinian people of its right to self-determination and was thus a breach of Israel's obligation to respect that right (*Wall*, ICJ Reports 2004: 184, para. 122).

With regard to legal consequences for Israel, the Court held that Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law (*Wall*, ICJ Reports 2004a: 197, para. 149). As regards the legal consequences for other states, the Court held that all states were under an obligation not to recognise the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction (*Wall*, ICJ Reports 2004: 200, para. 159). The Court further stated that it was for all states, while respecting the UN Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination be brought to an end (*Wall*, ICJ Reports 2004a: 200, para. 159). Additionally, the Court has drawn the attention of the General Assembly, to:

the need for the peace efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian state, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

(Wall Advisory Opinion, *ICJ Reports 2004a: 201, para. 162*)

These findings can be seen as part of the efforts of the Court to play a constructive role within the UN peacebuilding framework and an implicit recognition of Palestine's statehood. Despite the clear language of the Court, the situation on the ground has actually deteriorated with Israeli efforts and determination to legalise the annexation of East Jerusalem, which Palestine claims as its capital, and the peace process has been practically defunct for many years, despite significant efforts by the US and France to revive it in 2016–2017.

Decolonisation process interrupted: Western Sahara

A case where the process of decolonisation was interrupted and is still pending is that of Western Sahara. On 13 December 1974, the General Assembly requested an advisory opinion on the following two questions:

I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

In its 1975 Advisory Opinion, the Court found that Western Sahara at the time of colonisation by Spain was not a territory belonging to no one (*terra nullius*) (*Western Sahara*, ICJ Reports 1975: 69, para. 163). With regard to Question II, the Court found that the materials and information presented to it showed the existence, at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara (*Western Sahara*, ICJ Reports 1975: 68, para. 162). They equally showed the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara (*Western Sahara*, ICJ Reports

1975: 68, para. 162). On the other hand, the Court's conclusion was that the materials and information presented to it did not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus, the Court did not find

legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

(Western Sahara, *ICJ Reports 1975: 68, para. 162*)

Western Sahara remains occupied by Morocco and a long-awaited referendum on independence has still to take place. The issue remains in the agendas of both the General Assembly (UNGA Resolution, UN Doc. A/RES/72/95 (2017)) and the Security Council (UN Security Council 2018). A mutually acceptable political solution between Morocco and the Sahrawi people represented by POLISARIO remains elusive and the UN peacekeeping mission (MINURSO) remains deployed there.

Declarations of independence and international law

On the basis of a resolution initiated and drafted by Serbia, on 8 October 2008 the General Assembly asked the Court to render an advisory opinion on the following question: 'is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?' (UNGA Resolution 63/3 (2008)). The question asked to the Court by the General Assembly was quite sensitive for Kosovo, seen from a state creation perspective. A finding that the basic document of the emergence of a state is in violation of international law can trigger serious legal and political consequences. What Serbia expected from the Court was a clear condemnation of Kosovo's secession. However, because the question was so narrowly framed, the Court did not consider it 'necessary to address such issues as whether or not the declaration has led to the creation of a state or the status of the acts of recognition' (*Kosovo's Declaration of Independence*, ICJ Reports 2010: 424, para. 51). Ultimately, the Court concluded that 'the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244(1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law' (ICJ Reports 2010: 452, para. 122).

A declaration of independence is practically the birth certificate of a state. The ICJ noted that state practice during the eighteenth, nineteenth and early twentieth centuries 'points clearly to the conclusion that international law contained no prohibition of declarations of independence' (*Kosovo's Independence Declaration*, ICJ Reports 2010: 436, para. 79). In discussing the relevance of the principle of territorial integrity, the Court concluded that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States' (*Kosovo's Independence Declaration*, ICJ Reports 2010: 437, para. 80). Importantly, the ICJ also determined that no general prohibition of declarations of independence could be deduced from Security Council resolutions condemning other declarations of independence, because those declarations of independence had been made in the context of an unlawful use of force or a violation of a *jus cogens* norm (*Kosovo's Independence Declaration*, ICJ Reports 2010: 437–8, para. 81). The Court thus concluded that the declaration of independence in

respect of Kosovo had not violated general international law (*Kosovo's Independence Declaration*, ICJ Reports 2010: 438–9, para. 84).

The Court then turned to considering whether the declaration of independence was in accordance with Security Council Resolution 1244(1999), noting that the object and purpose of that resolution was to establish ‘a temporary, exceptional legal régime which ... superseded the Serbian legal order and which aimed at the stabilization of Kosovo ... on an interim basis’ (*Kosovo's Independence Declaration*, ICJ Reports 2010: 444, para. 100). The ICJ then examined the identity of the authors of the declaration of independence. An analysis of the content and form of the declaration, and of the context in which it was made, led the Court to conclude that its authors were not the Provisional Institutions of Self-Government but rather ‘persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration’ (*Kosovo's Independence Declaration*, ICJ Reports 2010: 447–8, para. 109). The Court concluded that the declaration of independence did not violate Resolution 1244 for two reasons. First, it emphasised the fact that the two instruments ‘operate on a different level’: Resolution 1244 was silent on the final status of Kosovo, whereas the declaration of independence was an attempt to finally determine that status (*Kosovo's Independence Declaration*, ICJ Reports 2010: 449, para. 114). Second, it noted that Resolution 1244 imposed only very limited obligations on non-state actors, none of which entailed any prohibition of a declaration of independence (*Kosovo's Independence Declaration*, ICJ Reports 2010: 451–2, paras 118–119). Finally, in view of its conclusion that the declaration of independence did not emanate from the Provisional Institutions of Self-Government of Kosovo, the Court held that its authors were not bound by the Constitutional Framework established under Resolution 1244, and thus that the declaration of independence did not violate that framework (*Kosovo's Independence Declaration*, ICJ Reports 2010: 452, para. 121). These findings of the Court have provided some context to the interaction between domestic law and international law, the relationship between the General Assembly and the Security Council concerning international administration of territory and maintenance of peace, and potential legal consequences for declarations of independence of new states.

In September 2010, a few months after the rendering of the advisory opinion, the General Assembly adopted a very brief resolution, essentially taking note of the ICJ decision and welcoming the readiness of the European Union to facilitate a process of dialogue between the parties (UNGA Resolution 64/298 (2010)). Considering that by then about 70 UN member states had already recognised Kosovo, this was a missed opportunity for Kosovo and countries that had recognised its independence to use the favourable advisory opinion in pushing for increased international recognition. As it is often the case, the balanced decision of the Court allowed both sides to claim victory. Kosovo, pointing to the *dispositif* of the advisory opinion, claimed that its declaration of independence was valid under international law. Serbia, ironically pointing to the question not asked in the advisory opinion, claimed that the Court had not recognised Kosovo's statehood.

More generally, as Marc Weller has noted (2015: 215), the Kosovo advisory opinion has not led to an avalanche of unilateral declarations of independence the world over. Anne Peters has pointed out (2015: 312) that the political intention of the states highlighting the uniqueness of Kosovo was to send a message to Catalans, Scots, Basques, Corsicans and Quebecois that they would not be allowed to rely on the Kosovo case to justify their secession. Though closely related, international law and politics live separate lives. Thus, while legally opposed to Kosovo's independence, Russia has not hesitated to use the Kosovo ‘precedent’ to justify its aggression against Georgia in August 2008 and subsequent recognition of South Ossetia and Abkhazia, and its intervention in Ukraine in 2014 and the unlawful

annexation of Crimea. An EU facilitated dialogue between Serbia and Kosovo continues and several bilateral agreements have been reached, although their implementation has lagged behind and some of them have attracted considerable domestic controversies.

Concluding remarks

The UN Charter and the ICJ Statute try to ensure the broadest possible access to the jurisdiction of the Court for both member and non-member states to the UN. A resolution of the Security Council has established an opt-in possibility for UN non-member states. Understandably, the process of state creation and state recognition, including the exercise of state attributes through membership into international and regional organisations and access to international legal proceedings, is bound to be controversial, as demonstrated by the case law of the ICJ. The contribution of the ICJ to the process of state creation and recognition has been important in several respects. First, the ICJ has helped in clarifying the criteria for admission to UN membership and the role of the General Assembly and the Security Council therein. Second, the Court has advised the General Assembly and the Security Council with regard to the emergence of new states through the process of decolonisation. Third, and more recently, the Court has clarified legal aspects of declarations of independence under international law. Other relevant cases which relate to the creation of states and related issues are those of *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion) and the *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*.

Perhaps the main direct contribution of the Court to the issue of recognition of states is its two advisory opinions on the criteria for admission to the UN and General Assembly competences. The Court has interpreted Article 4 of the UN Charter as including all necessary criteria for assessment of a state for membership in the UN, rejecting in this manner any claims for absolute or arbitrary discretion. With regard to General Assembly competences, the Court has found that the General Assembly cannot proceed in the absence of a favourable recommendation by the Security Council. Conditions for access to states in contentious cases and advisory proceedings before the Court are based on the general principles of fairness and equality of parties to legal proceedings. The ICJ seems to have broadened the possibility of participation in legal proceedings of state-like entities, among others by having accepted two legal entities to join the advisory proceedings concerning them, namely Palestine and Kosovo.

From the perspective of the law of international responsibility, the main gist of the ICJ's contribution refers to threefold obligations on the part of concerned states, third states and the main UN organs not to recognise illegal acts which hinder a peoples' right to self-determination, not to render support to the maintenance of an illegal situation, and to ensure as a residual duty that a just and durable solution is found for long-standing conflicts, including those concerning the Occupied Palestinian Territory and Western Sahara. If the ICJ were to assume a regular fact-finding function concerning the process of state creation, cases of premature or tardy recognition could be reduced to a minimum and recognition as a political act could be made more or less independent of the game of power politics, a step essential for the consolidation of the international society (Alexandrowicz 1952: 383). States are content with the discretionary power concerning state recognition, however, and there does not seem to be enough political will to make the Court a central actor for this purpose. Nevertheless, the ICJ can still contribute to such important processes as state creation and recognition in a piecemeal fashion.

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THE COUNTER-DIPLOMACY OF STATE RECOGNITION

James Ker-Lindsay

Introduction

While the subject of state recognition has gained greater prominence in the academic literature in the past decade, the way in which parent states try to prevent secessionist territories from being accepted on the international stage has been subject to rather less systematic attention (Ker-Lindsay 2012). However, the growth in the number of secessionist entities vying for statehood means that there is a growing academic and policy focus on the subject of how states respond to acts of separatism and how they formulate their diplomatic strategies to counter efforts by the seceding territory to gain recognition. This new area has been subject to very little theorising or formal conceptualisation, either in academic terms or by policymakers. The model outlined here is based on observations of a number of cases, including Cyprus, Serbia and Kosovo, and Georgia's response to the secession of Abkhazia and South Ossetia.

As will be shown, any counter-recognition strategy is centred on four main elements. In the first instance, the state must continue to claim sovereignty over the seceding territory. This can be done by making clear that the declaration of independence is opposed and by maintaining, even nominal, state institutions that claim responsibility over the breakaway entity. This is vital in terms of ensuring that the wider international community understands that the claim to independence is disputed. Second, there are the formal diplomatic efforts to prevent the territory from being recognised bilaterally by other states and preventing the territory from joining various regional and international organisations. While the parent state is usually in a strong position, this nevertheless requires cooperation with key partners. Third, even if the seceding territory does not receive widespread recognition, or join various international organisations, there are various ways in which it can gain 'creeping' legitimisation on the international stage. The parent state therefore needs to ensure that the territory does not gradually gain acceptance. Finally, there is a range of legal steps that can be taken to shore up a claim to a sovereignty over a breakaway territory. These can include challenges to the claim to independence of the territory, as well as efforts to show that the claim to statehood is in fact a sham and that the territory in question is in fact under occupation by an external party. Importantly, the context and circumstances of any given secession will have a significant effect on the way in which states engage in counter-recognition activities.

In cases where the act of secession is widely condemned, then the parent state will have an easier task. In other cases, where there is a widespread support, then the battle will inevitably be tougher.

Formulating a counter-recognition strategy

Before analysing the way in which states pursue a counter-recognition strategy, it is worth considering how such strategies are formulated. An act of secession is almost always viewed as a fundamental threat to the interests, if not the very existence, of the state. It will therefore often elicit a strong reaction. Indeed, it may become the overarching national issue. This strong reaction may be driven by a variety of reasons (Ker-Lindsay 2013). It may be because the territory in question has an important economic value to the state. For example, it may be a hub of industrial activity or a region rich in natural resources, such as oil or minerals. Alternatively, it may have some sort of cultural or historical significance to the nation. In some cases, there may be a fear of contagion. If the territory in question is allowed to secede, then other parts of the state will follow. This is often stated as a reason for Spain's strong opposition to Catalan independence. If it becomes a state, then calls for Basque independence would inevitably grow. Alternatively, it may be the case that the state is simply unable to reconcile itself to the loss of a part of its territory. Countries have a certain image of themselves and its citizens understand the state in a particular geographic way.

In most cases of contested secession, efforts to prevent the recognition of the territory will become the single most important foreign policy objective of the state. To this end, it will therefore often involve much of the state's domestic and foreign administrative apparatus. In some cases, a formal body may be established to coordinate the state's responses, such as a ministry. In other instances, it may be a looser arrangement, but nevertheless overseen by the political leadership. However, while all parts of the government may have a role to play in the process, as one would expect, the main actor in any counter-recognition process is the foreign ministry (Ker-Lindsay 2012). As well as the direct diplomacy of the foreign minister and other senior officials, the state may also establish an international network of embassies to press its case. These embassies engage not only with government officials but also with important parliamentarians and others involved in the policymaking process. The problem is that operating an extensive diplomatic operation and associated public diplomacy campaign is very expensive. Indeed, it is beyond the means of many states. A more focused effort is therefore used in many cases. In particular, the permanent mission to the United Nations in New York may become the hub for diplomatic activity as it provides a way to engage with the senior representatives of almost every other state relatively easily and effectively (Grant 2009). In this context, the annual General Assembly is an especially important focus of activity as it provides a chance for direct bilateral meetings with other heads of governments. As well as the traditional methods of diplomatic activity, states may also employ other partners to help them make their case. For instance, many countries engaged in counter-recognition efforts employ the services of major lobbying firms to act on their behalf. Well-organised and highly motivated diaspora communities in the right countries, armed with the right information and messages, can also play an important part in counter-recognition activities.

As for the developing the strategy itself, there is a lot of variation between states. Some countries take an uncompromising approach towards secession and have an extremely well designed strategy in place. For instance, Cyprus is often held up as the exemplar in this regard. It resists any and every attempt to recognise or even tacitly accept the existence of

the ‘Turkish Republic of Northern Cyprus’. In contrast, Serbia has tended to fluctuate in its reactions towards Kosovo. Following the declaration of independence, in February 2008, Belgrade developed a very active campaign to prevent recognition. However, five years later, it appeared as if it had all but given up on trying to stop states from recognising Kosovo. However, in the past few years, the Serbian government has resurrected its efforts. Following a successful initiative to prevent Kosovo from joining the UN Educational, Scientific and Cultural Organisation (UNESCO), in 2015, it has been actively trying to prevent Kosovo from being recognised by states and from joining other international organisations. More recently, it has even turned its attention towards persuading countries to withdraw their recognition. As of early 2019, the Serbian Foreign Ministry has claimed that 12 countries have done so. Interestingly, one element of the counter-recognition process that has hitherto been relatively unexplored is the relationship between the parent state’s efforts and those of the secessionist territory. However, the emergence of new work in the field of the recognition strategy of secessionist states may change this (Newman and Visoka 2018).

Maintaining a claim to the territory

The first step in any serious counter-recognition strategy is to maintain a claim to the territory in question. This element of the counter-recognition strategy is in fact absolutely vital to any wider strategy of counter-recognition. While it may seem a rather futile gesture in the face of an act of unilateral secession, especially when there is no realistic prospect of reasserting sovereignty in the short or medium term, it sends a crucial signal to the wider international community that the act of secession has not been accepted, even tacitly, by the parent state. This is important as it has long been accepted that a state facing an act of secession will often take many years, if not decades, before it formally recognises that a part of its territory is irretrievably lost. However, long before it openly and formally accepts that the territory is lost, the parent state will start to signal that it has effectively accepted the secession of the territory. In the intervening period between secession and formal acceptance, many third parties will closely watch the behaviour of the parent state before deciding how to respond to a secessionist entity (Lauterpacht 1947). If it looks as if the loss of the territory has been accepted in all but name, then it is likely that external parties will start to interact with the territory. This in turn will thereby erode the parent state’s claim to the territory. In other words, if a parent state appears not to contest the act of secession then others will inevitably start to accept it. For this reason, any state that wishes to fight an act of secession must ensure that outside actors are left with absolutely no doubt about its ongoing claim to sovereignty over the territory in question.

The assertion of sovereignty can be done in a variety of different ways. One of the first steps, and perhaps the most important, is to challenge the purported secession. Any unilateral declaration of independence (UDI), and any acts deriving from it, must be declared to be null and void. Sometimes, this can be done through a simple statement issued by the parent state. At other times, it may be a more formal procedure, such as a resolution by the national parliament. If necessary, this condemnation can be restated on a regular basis. At the same time, and to reinforce the point, states will sometimes bring criminal charges against key officials considered to be responsible for the act of secession. For example, three officials held responsible for Kosovo’s declaration of independence – the president, the prime minister and the speaker of the Assembly – were all charged with treason by the Serbian government. More recently, following Catalonia’s declaration of independence, in October 2017, the Spanish government charged Carlos Puigdemont, the president of

Catalonia, with rebellion. As well as these direct efforts to challenge an act of secession, steps may also be taken to undermine the legitimacy of such officials in other ways, such as by issuing warrants for their arrests on other charges, such as allegations of having committed war crimes. Such actions can be useful in terms of the wider counter-recognition strategy as they can then be used as further evidence by the parent state that the secessionist territory is either morally illegitimate or built on illegal foundations. Again, Serbia has been very active in this regard. A number of senior Kosovan officials have been detained by other countries on warrants issued by Serbia through Interpol.

As well as the immediate response to a declaration of independence, states will often maintain an ongoing claim to the territory in a variety of other ways. In some instances, the state will maintain the formal representation of the territory in state institutions and retain nominal structures of governance over the breakaway area. For example, it may continue to recognise the existence of municipal and regional councils, even though these have no direct authority over the territory in question. Likewise, they may continue to recognise the existence of elected officials for the region in question. This could include continuing to hold elections for mayors, councillors and even members of the national parliament. This approach is very prevalent in Cyprus, where exiled voters from towns and districts not under the effective control of the state continue to elect officials and send representatives to the national parliament to represent those areas. Tied to this, the government may also try to maintain a sense of community among the erstwhile inhabitants of the territories. For instance, as internally displaced persons, they may be given special privileges and tax breaks. In some cases, this status is even hereditary. This can mean that after a generation or two there are more people who hail from the region than were originally displaced. Allied to this, the ongoing claim to ownership of property in the breakaway territory will be recognised and may even be accepted as collateral for bank loans, albeit underwritten by the government. On top of this, there are a multitude of other ways that states can reinforce the claim to territory, both domestically and internationally. Even ensuring that the territory is included on television weather broadcasts sends the message that the territory is still regarded as an integral part of the state. All this in turn reinforces the message that the territory is still claimed and that the act of secession is still opposed.

Preventing bilateral recognition and membership of international organisations

The second element of any counter-recognition strategy is preventing the breakaway territory from gaining formal international acceptance, either by preventing bilateral recognition or by stopping the territory in question from joining international organisations. While maintaining a claim to the territory represents the foundation of any counter-recognition strategy, this element is the cornerstone of actual counter-recognition practice. Needless to say, states facing acts of secession will usually channel considerable resources into fighting their cause on the international stage. Indeed, as already noted, preventing the recognition of the breakaway territory will often be the single overriding objective of the state's entire foreign policy.

In terms of the actual objectives of a counter-recognition strategy, as one would expect, the prevention of bilateral recognition by other states is usually seen as the single most important activity for a state engaged in a counter-recognition effort. In this regard, it is widely understood that parent states start with an overwhelming advantage in the modern international system. Whereas, in the nineteenth century, territories that had broken away

and had managed to assert effective independence were usually recognised as states, since the end of World War II this mode of thinking has changed dramatically (Fabry 2010). The emphasis on the territorial integrity of states has taken on a greater emphasis in international affairs. And while many will also point to the emergence of self-determination as a norm of international politics, in reality the application of this concept in a manner that leads to the creation of new sovereign states has been applied in a very narrow set of circumstances, most usually relating to the independence of overseas colonial territories. This all means that in the modern era there has been a very strong aversion to recognising unilateral acts of independence. Given that most states are ethnically or religiously heterogeneous, few countries want to be seen to be endorsing separatism by minority communities. This gives the parent state a powerful platform on which to begin their efforts.

While the parent state has a strong advantage in secessionist disputes, in many cases it will in fact try to downplay the act of secession. Rather than present the situation as a domestic act of rebellion by the inhabitants of the secessionist territory, a parent state will instead emphasise that the breakaway entity is the product of an illegal act of aggression by an external state. This is very prevalent in the cases of Cyprus and Georgia. Both usually seek to present the situation as one of invasion and occupation, rather than secession. This approach offers two important benefits. In the first instance, it is used to emphasise that there is no intrinsic reason why the internal parties of the conflict cannot resolve their differences and live together. It is the outside actor that is ultimately responsible for the situation. Second, as it is generally recognised that statehood requires that the state be truly independent of outside control (Crawford 2006), rather than a puppet entity, this approach is explicitly designed to fundamentally undermine the claim to statehood by the breakaway territory.

Given these factors, in most cases of secession the chances of widespread bilateral recognition are relatively low. Nevertheless, states cannot afford to neglect a counter-recognition campaign. As noted, to do so may suggest that they had relinquished their claim to the territory. However, given the expense of doing so, it becomes readily apparent that any such efforts need to be focused. It is simply not possible to lobby every country on a permanent, or even on a regular, basis. To this end, there is a clear hierarchy of states that need to be engaged. As one may expect, the prime targets in any strategy are the five permanent members of the UN Security Council – China, France, Russia, the UK and the US. By virtue of their position to shape the Security Council, discussed below, as well as their wider standing in international affairs, these great powers invariably play an overarching role in preventing the wider acceptance of an act of secession (Sterio 2013; Coggins 2014). Beyond these five states, counter-recognition efforts will then be focused on other key actors, such as regional powers or states that have a degree of influence over other countries. For example, in the European Union context, Germany is an important actor. In the Islamic world, Saudi Arabia is often seen as a vital player. The UK still has a network of contacts with the countries that are members of the Commonwealth, just as Spain and France are seen to have a degree of influence over Latin America and the Francophone countries, respectively. Beyond that, states will also try to solicit support from other countries that are also facing a separatist threat. Of course, in such circumstances, it is not just about lobbying these states not to recognise the territory in question. A major part of any counter-recognition strategy will also focus on co-opting them as active campaigners to persuade others not to recognise the breakaway state.

The second strand of the formal counter-recognition strategy means preventing the secession territory from joining international and regional organisations, or from becoming

increasingly engaged with such bodies. Obviously, the most significant of these bodies is the United Nations. Indeed, the UN has now become crucial to any recognition battle. For the seceding territory, membership offers a way to full international acceptance. Although it must be underlined that the United Nations cannot recognise states, membership of the UN is often understood to amount to ‘universal recognition’ – even though not all members of the UN are recognised by every other member. In the case of the UN, membership is extremely hard to secure if the circumstances of membership are in any way contentious (see Grant 2009). The requirement that any application for membership must be endorsed by the Security Council means that the five permanent members hold a veto over the process. Thereafter, admittance is contingent on a majority vote from the General Assembly. Here it is a numbers game. A territory needs 97 votes of the current 193 members of the UN. This is where bilateral recognitions really matter. All this effectively means that the chances of a territory joining the UN without the express permission of the parent state are negligible. Indeed, to date, only Bangladesh has unilaterally seceded and managed to join the UN – and, even then, only with the acceptance of its former parent state, Pakistan (Musson 2008).

In reality, in cases of contested secession, preventing UN membership is fairly easy to achieve. To this extent, a far more important goal is to secure a UN Security Council resolution calling on states not to recognise the territory as an independent state. Perhaps more than any other step that can be taken, a resolution endorsing collective non-recognition can shape the overall international response to a secessionist territory. However, owing to the major veto wielding powers, this is not always possible. For example, in the case of South Ossetia and Abkhazia, which had seceded from Georgia and were recognised by Russia in 2008, Moscow was in a position to block any resolutions condemning either the purported act of secession by the territories or its own decision to recognise their independence. But, even if a formal act of condemnation is blocked in the Security Council, the UN can still play an important role in counter-recognition efforts by through the General Assembly. For example, while Moscow was able to block a draft Security Council resolution condemning a referendum on the status of Crimea, which was designed to pave the way for the territory’s secession and subsequent annexation by the Russian Federation, the General Assembly was able to pass Resolution 68/262 on the ‘Territorial Integrity of Ukraine’.

While formal membership of the United Nations may not be possible, there are in fact various other ways in which *de facto* states can engage with the UN. One possibility is to apply to become a non-member observer state. Unlike full membership, this does not require support from the Security Council. Instead, it can be granted by the General Assembly. Such a status can be incredibly powerful in terms of reinforcing the perception that the territory in question is a state. Moreover, history has shown that almost every state that has achieved this status has eventually gone on to achieve full membership. Once again, given that this requires a simple majority of the UN members, bilateral recognitions are vital. In addition, the UN also consists of a multitude of other bodies. Here the potential opportunities for membership are much greater. For example, the voting method used for membership of the World Bank and the International Monetary Fund are weighted towards the world’s wealthiest countries. This meant that Kosovo – which was supported by many of the world’s leading economies, such as the US, Germany, France, the UK and Japan, among others – was able to join both bodies a year after declaring independence. In other cases, there is no right of veto. In these cases, the sheer weight of numbers is sufficient. As membership of these other bodies can be important in terms of adding legitimacy to a territory, the campaign for membership can become very hard fought. This was seen

Kosovo's unsuccessful bid to join UNESCO, in 2015. Serbia engaged in a sustained diplomatic effort to prevent its membership. As a result, several countries that had already recognised Kosovo – such as Egypt, Japan and South Korea – abstained in the vote, thereby ensuring the bid failed. More recently, in 2018, Kosovo's bid to join Interpol, the international police body, was also thwarted following a concerted Serbian campaign to prevent membership.

As well as the UN bodies and organisations, there is a whole host of other international and regional organisations that states can potentially join. These too become key battlegrounds. Senior officials from parent states will therefore often try to attend major meetings on international bodies, precisely to engage in lobbying activities. However, there is a vast disparity in terms of the formal requirements for membership. In some cases, international organisations deliberately try to avoid becoming entangled in recognition disputes and therefore insist that membership of the United Nations is a formal requirement for accession. For instance, this is the case with the Organisation of Islamic Cooperation (OIC). In other cases, there appears to be a presumption that a new member will also be a member of the United Nations, but this is not formally set out. This appears to be the case with the European Union, where there has been a debate as to whether Kosovo can join even if it is still not a member of the UN. In other organisations, the terms of membership are less clear. For example, the EU is a member of some international bodies, even though it is not a state. This precedent can in turn provide enough ambiguity to allow states that do not enjoy full recognition to be accepted by non-recognising members. For example, the fact that the EU is a member of the European Bank for Reconstruction and Development (EBRD) appears to have been enough to persuade several members that did not recognise Kosovo to vote in favour of its membership, and for some others to abstain, when the issue came before the organisation in 2012. Of course, where there is sufficient political will, steps can be taken to include territories that have not been recognised as members in the proceedings of some international organisations. For example, despite its prohibition on allowing membership for non-UN members, the OIC has admitted Northern Cyprus and Kosovo as observers. For these reasons, parent states may often try to engage with international and regional organisations can become important battlegrounds.

Preventing legitimisation

While preventing the formal recognition of a secessionist territory by other states and stopping it from securing membership of key international organisations are crucial elements of any counter-recognition strategy, they are by no means the end of the story. As noted, it is extremely difficult for a secessionist territory to gain widespread formal recognition by other states. In many ways, a far greater challenge is to prevent the gradual acceptance of a breakaway state by individual states and by the wider international community. Indeed, while recognition is rare, it is far more common that such territories slowly come to be accepted by the international community (Berg and Toomla 2009). This can happen in a variety of ways. For instance, while states and international organisations may not recognise the territory, over time, and depending on the context, they may start to interact with them. In some instances, this can go so far as to amount to recognition in all but name (Ker-Lindsay 2015). Of course, such interaction may not be understood as negating the ongoing claim to sovereignty by the parent state. There may be good reasons for states to want to engage with secessionist territories on an informal basis. For example, there may be pressing issues of concern that require a degree of formal engagement, such as the protection

of citizens living in the territory or the prevention of organised crime and terrorism. However, many parent states will nevertheless regard this ‘creeping legitimisation’ of a contested state as a major concern. Indeed, given the relatively unlikely prospect that the territory will gain formal recognition, it may even come to be seen as a far more pressing concern than the possibility of formal recognition by third parties. Therefore, at the same time as operating formal diplomatic efforts to prevent recognition, parent states will also often engage in considerable efforts to prevent any forms of gradual acceptance.

Legitimation can come in a wide variety of forms. As well as trying to prevent direct interaction between states and secessionist territories, parent states will often try to prevent the territory from strengthening its place on the international stage. One obvious area of concern relates to economic interaction between the breakaway territory and the wider world. This is seen by parent states as particularly problematic insofar as such interaction can provide a basis for financial stability. This in turn is regarded as providing the foundations for long-term sustainability, which, even in the absence of recognition, can make the breakaway territory viable as an entity. For this reason, efforts are often made to ensure that the territory in question remains economically isolated. This may mean trying to prevent direct trade between the territory and the outside world, even though these restrictions can often be fairly easily circumvented with the support of a patron state. It can also mean trying to prevent the development of transportation links, such as direct flights into the territory. Again, while these can often be worked around, such as by flying from within a patron state, as happens between Turkey and Northern Cyprus, it provides an added layer of complication for the breakaway territory that hinders its links with the outside world. The parent state will also try to ensure that the territory remains isolated in many other ways. For example, steps will often be taken to ensure that the breakaway territory cannot participate in various educational and cultural activities. In this context, one of the most heavily contested areas of activity is participation in sporting activities. While there are many who argue that sports should be above politics, in reality the presence of teams from a secessionist territory in international sporting events can be an immensely powerful symbol of their acceptance on the world stage. For this reason, Serbia fought extremely hard to prevent Kosovo from participating in international football competitions and taking part in the Olympic Games. Despite a sustained effort, Belgrade eventually lost both efforts. Kosovo participated at the 2016 Olympic Games in Rio de Janeiro and took part in the qualifications for the 2018 football world cup.

Given the range of activities that can be viewed as conferring a degree of acceptance on the secessionist territory, preventing legitimisation usually requires a far greater range of interventions than preventing recognition. Of course, formal diplomacy will play a part. However, parent states will also engage in wider public diplomacy. In some instances, efforts will be made to launch campaigns to inform public opinion about the issue. Again, this may also be done through formal foreign ministry channels. For example, embassies will often keep a close watch on the domestic situation in the country where they are based and may make representations to national governments when they see something that they believe challenges their sovereignty. They may also take steps to enforce their sovereignty in other ways. This may include efforts to try to prevent figures from the breakaway territory from speaking at universities and other public settings. But such efforts may also involve a greater variety of actors than the foreign ministry. Again, professional lobbyists and diaspora groups may play their part. So too can other parts of the government, such as information and communications agencies, which can organise efforts to ‘enlighten’ wider international opinion.

While it is understood that preventing a secessionist territory from gaining wider legitimisation is an important element of any counter-recognition strategy, this can bring other, potentially greater, problems. While parent states will want to make sure that secessionist entities do not gain gradual acceptance on the world stage, leading to a form of ‘Taiwanisation’, they must equally be careful not to isolate the territories too much. Keeping secessionist territories wholly apart from the international community will often force them to deepen their relationship with a patron state. This in turn makes a settlement all the more difficult as it not only erodes any trust between the secessionist entity and the parent state but can also increase the levels of influence of the patron, which often has little to gain from a settlement that would inevitably erode its influence over the situation. For this reason, it is increasingly recognised by external observers that the notion of ‘engagement without recognition’, as the method of allowing limited external interaction with unrecognised states is now generally known, can be an important tool of conflict management (Berg and Ker-Lindsay 2019). Nevertheless, most parent states remain inherently cautious about external engagement with a breakaway territory in any form, viewing this as a slippery slope towards general acceptance.

The role of international legal and judicial bodies

The final element of a counter-recognition strategy is the use of legal avenues to prevent recognition. These have the potential to have dramatic effects. A review of such activities shows that this route can either focus on challenging the right of independence or cementing the view that the case in question is really about invasion and occupation by an external actor. In the case of the former – challenging the right of independence – the most important case to date was the International Court of Justice (ICJ) advisory opinion on Kosovo. Initiated by Serbia, the UN General Assembly voted to refer the legality of Kosovo’s unilateral declaration of independence to the International Court of Justice. The case attracted significant international attention and was the first and only time that all five permanent members of the Security Council had participated in a case before the Court. (For an analysis of this case see Milanovic and Wood 2015.) In the end, the Court opted for a very narrow reading of the question put before it. It decided that the formal declaration of independence did not contravene general international law. However, and importantly, the Court deliberately avoided taking a position on whether Kosovo was in fact a state. Likewise, it did not take a position on whether the states that had recognised Kosovo had, in doing so, breached their obligation to respect the territorial integrity of Serbia (International Court of Justice 2010). In this regard, the opinion effectively amounted to a stalemate. Third countries could read it as they wanted.

Another option is to argue that the territory is under occupation. One of the most important cases in this regard was the *Loizidou* case brought before the European Court of Human Rights. In this instance, the proceedings were initiated by Titina Loizidou, a Greek Cypriot who had been displaced during the Turkish invasion of the island in 1974. She brought a case before the ECHR on the grounds that she had been illegally deprived of the use of her property. The Court agreed and awarded her compensation. Crucially, the judges ruled that Turkey was liable as Northern Cyprus was not a sovereign state. Instead, the Turkish Cypriot administration amounted to a subordinate administration of Turkey (ECHR 1995). This was a hugely important case inasmuch as it cemented the position of the Cypriot government that the Cyprus Problem was not in essence a secessionist dispute. It was a case of invasion and occupation by an external party. Another important example is

the case brought before the European Court of Justice (ECJ) regarding direct trade with Northern Cyprus. In this instance, proceedings brought by a Cypriot company in the British courts led to the end of direct commercial contacts between the European Union and the 'TRNC' (Talmon 2001). Interestingly enough, the Cypriot government has never felt inclined to take a more direct approach. As officials have noted, it is simply not necessary. The illegality of the 'TRNC' has been explicitly recognised by the United Nations Security Council. Indeed, officials note that it would in fact be very dangerous to pursue a case before the ICJ. As noted, even with seemingly cut-and-dry cases, there is always the potential for a legal shock. For this reason, legal avenues, while potentially beneficial, have to be handled carefully.

Conclusion

As has been seen, there are a variety of elements to any strategy to prevent the recognition of breakaway territories. As noted, these can be divided into four broad areas. In the first instance, any effort must begin with an ongoing claim to sovereignty. This not only means condemning the act of secession; it also means laying claim to the territory and maintaining nominal institutions. While many may find this strange, especially given that the institutions may often be little more than an office in a government building, it nevertheless conveys the message that the parent state has not revoked its claim. Second, there are the formal diplomatic efforts to prevent recognition. As well as the efforts to prevent bilateral recognition by other states, these methods include steps to try to prevent the territory from joining various international organisations. Third, it is important to consider the informal legitimisation of a secessionist territory. While it is extremely rare for a territory that has unilaterally seceded to gain widespread recognition early on, the passage of time may open up the possibility of creeping acceptance. This can take various forms. It can mean gradual integration in the international economy. Likewise, it can mean participation in major international events, especially sporting competitions. Finally, international judicial bodies offer chances to challenge the legality of an act of secession or provide a mechanism to undermine the legitimacy of a breakaway regime.

As one might expect, the strategies adopted with regard to preventing recognition may evolve with time. For instance, in the initial period following a declaration of independence, there may be considerable effort put into preventing recognition. If, after a few years, the prospect of recognition diminishes, then it may be more beneficial to reduce these efforts. Rather than spend large sums mounting a relentless campaign to challenge a threat that doesn't really exist, the focus shifts to maintaining a watch on the situation and responding as and when necessary to acts of legitimisation, which may prove to be a rather greater long-term challenge to the parent state's ongoing claim to sovereignty over the territory in question.

Ultimately, however, efforts to prevent the recognition, or even legitimisation, of a secessionist territory need to be formulated and implemented according to a wider strategy regarding the conflict as a whole. For a start, isolating a seceding territory not only makes it less likely to want to pursue reunification with what it sees as a vindictive parent state, it also forces it more closely into the arms of an external patron state that may not have any interest in seeing the conflict resolved. Moreover, while it may be the case that the parent state is genuinely determined to bring about the reintegration of the secessionist state and is pursuing a counter-recognition strategy to this end, it is not necessarily always the case that there is a genuine wish for reunification. In some instances, a state may engage in these

efforts fully aware of the fact that a settlement is highly unlikely to occur. Indeed, in private, officials may even acknowledge that they do not want this to happen. In these cases, the strategy may be about trying to present an image to the domestic audience that the country has not given up on a territory. This may be for a variety of reasons, such as the economic, historical or cultural significance of a territory, or because of a large domestic constituency hailing from the territory. It may even be a matter of pride. Whatever the reason, in those cases, where there is no genuine desire to reassert effective control over the territory that has seceded, the continuation of a strong counter-recognition policy can prolong a conflict unnecessarily. Perhaps a greater problem is that parent states do not always suffer a cost from opposing secession. (Although in certain cases they do. A case in point is that Serbia's path to full EU membership is likely to be blocked unless it recognises Kosovo.) This means that they can often let the situation continue indefinitely.

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STATE FRAGILITY AND INTERNATIONAL RECOGNITION

Nicolas Lemay-Hébert

Introduction

International recognition is an integral part of the quite restrictive legal definition of the state adopted during the Montevideo Convention in 1933, understood through its fourth qualification as the ‘capacity to enter into relations with the other states’ (the three other qualifications being a permanent population; a defined territory; and a government). Although international customary law circumscribes the international recognition process, the process is also largely political (Newman and Visoka 2018; Visoka 2018). It is interesting to note that the United Nations has no formal criteria for statehood other than recognition by other states – nor is there any provision for ‘decertification’ of statehood in the event of failure to meet some set of standards, either of capability or performance (Herbst 2000; OECD 2009: 66). International practices of state recognition have varied over time, and it is the aim of this chapter to highlight the different phases of the regime of international recognition, especially in relation with the parallel development of the state fragility agenda. Discussions around international recognition and state fragility have generally been structured around a discussion of ‘decertification’ of statehood, or withdrawal of international recognition when certain states do not meet normative standards set by the ‘international community’. I argue here that the understanding of state fragility and benchmarks around statehood provides the cornerstone to understand the contemporary normative evolution of state recognition.

First, the chapter covers the contemporary state failure and state fragility discussion, introducing the ‘consensual’ definition of state fragility and its origins. Second, it directly links the (modern) state fragility discussion with international recognition and statebuilding issues. Two specific issues are discussed in this section. I analyse the birth and progressive consolidation of an international recognition regime – understood as implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations (Krasner 1982) – and the parallel discussion on ‘fresh starts’ after state collapse, advocating for the ‘decertification’ of collapsed states and the recognition of new polities emerging in the process. While providing a very interesting case for an alternative approach to international recognition, the ‘fresh start’ approach has not been followed by international contemporary practice. Finally, the chapter closes on the

very recent discussion of state fragility, tying the concept with resilience and risk. Interestingly enough, this discussion provides new openings for international practice of state recognition and statebuilding inspired by the ‘fresh start’ approach.

From state failure to state fragility

Although there is nothing fundamentally new in the contemporary fragile states agenda,¹ the agenda truly started to gain traction in policymaking circles in the mid-1990s. Gerald Helman and Steven Ratner’s (1993: 5) article ‘Saving Failed States’ played a crucial role in attracting policy and academic attention to ‘failed states’, understood here as ‘a situation where governmental structures are overwhelmed by circumstances’. The authors make a loose distinction between degrees of collapse (failed, failing and newly independent states), and advocate new conservatorships to deal with failed states – thus exemplifying the interconnectedness of the concept of ‘failed state’ with the peacebuilding and statebuilding agenda at that time. The 1990s saw a gradual rapprochement between the development and security fields – what has been termed the ‘security–development nexus’ – under the overarching umbrella of the ‘fragile state’ agenda, primarily through a conceptualisation of security as both the result of and the precondition for development in a broader sense (Duffield 2007). The idea was to go ‘beyond the development model’, with the merger of security and other governance issues (Zoellick 2008). The concept of ‘fragile states’, the term generally preferred by development experts at first, intersected with the concept of ‘failed states’, which was favoured by security experts and diplomats.² The idea that ‘state fragility’ could be a threat to the national security of Western countries gained additional traction after 9/11. Whether they were considered ‘failed’ or ‘failing’ in the US discourse on security, or ‘fragile’ from a development aid perspective, most analysts agreed that new policies for international security would require a focus on the capacity of national governments in the ‘South’ to control security within their territories and to provide essential services to their citizens. The fact that most countries listed as fragile or failed are conflict or immediate post-conflict states also reinforced the interconnection between development and security concerns at that time.

Additionally, there has been a conceptual proliferation to describe the same basic phenomenon: ‘collapsed state’, ‘failed state’, ‘fragile state’, ‘imaginary state’, ‘absent state’, ‘lame Leviathan’ and ‘soft state’, to list just a few neologisms (Grimm, Lemay-Hébert and Nay 2014). Every concept has its own specific focus – for example, ‘lame Leviathan’ or ‘quasi-state’ focus on sovereignty and international recognition issues, while concepts like ‘fragile states’ and ‘weak states’ target service delivery generally and ‘renegade regimes’ and ‘rogue states’ concern state behaviour. Amid this proliferation of concepts, the concept of state fragility has progressively become consensual, especially vis-à-vis more polemical concepts such as ‘failed states’, which carried even more than the other concepts the image of a flawed comparison between developed, successful Western states and the periphery, as well as the image of a collective, societal failure which can be attributed *in toto* to local communities (Lemay-Hébert 2011).

While there is no single consensual definition of state fragility, DFID’s definition of fragile states as ‘countries where the government cannot or will not deliver core state functions, such as providing security and justice across its territory and basic services to the majority of its people’ (DFID 2005) is considered relatively consensual in the field (Lemay-Hébert and Mathieu 2014: 237). Versions of this definition have been and are still used in several UN agencies and by USAID. Different scholars and organisations have come up

with different ways to compile data on fragility and list fragile states over the years; however, despite the differences, there is a consensus on a number of fragile states for 2017/2018, including Afghanistan, Burundi, the Central African Republic, Chad, the DRC, Iraq, Somalia, South Sudan, Sudan, Syria and Yemen.

Statebuilding, state fragility and international recognition

Whereas statebuilding was once forged through ‘blood and iron’ (Tilly 1985) – or capital and coercion – it has progressively evolved to incorporate international norms (Barkin and Cronin 1994). Through what could be called a ‘statebuilding regime’, the international community does not let states collapse and disappear to re-emerge under new form; states are externally bolstered from threats to their international status, even as they are imminently threatened by internal collapse. While, historically, states simply disappeared, divided up into smaller units or conquered by powerful neighbours, collapsed states after 1945 are expected to be rebuilt within the same international borders, even after extended and protracted conflicts. Examples abound, from Biafra to Katanga or contemporary Somalia. Hersch Lauterpacht (1945: 180) captures well the essence of the pre-1945 order when he writes that:

Recognition is not a contract or grant. It is a declaration of capacity as determined by objective facts. These facts are not necessarily enduring. A State may lose its independence or the necessary degree of cohesion as an organized community; a government may cease to wield effective authority; a recognized belligerent may be utterly defeated. In all these cases the basis of recognition disappears, and outside States are entitled and bound to take cognizance of that fact.

While Lauterpacht was contemplating the idea of a withdrawal of international recognition for failed polities, this option does not seem to have made inroads in international practice in the burgeoning post-World War II international regime on state recognition.³ This is in essence the ‘failed state debate’, emerging out of a perceived discrepancy between sovereignty and the *de facto* nature of many states (Jackson and Rosberg 1982; Newman 2009), and this gap is believed to be ‘growing, rather than receding’ (Ghani and Lockhart 2008: 22). Hence, the ‘sovereignists’ (Lemay-Hébert and Mathieu 2014: 235), as a branch of neo-Weberian institutionalism (Lottholz and Lemay-Hébert 2016), concentrate on state sovereignty, emphasising the presence of capable institutions as evidence of a ‘real’ sovereignty. This is reflected in the ‘renaissance’ of ‘sovereignty as responsibility’ (ICISS 2001; Glanville 2011), where states have ‘legal and normative responsibilities for assuring the security of their citizens, protecting property rights and providing public goods to enable the functioning of the market’ (OECD 2009: 11). In this context, ‘underperforming’ states become legitimate targets of statebuilding interventions, with the aim of restoring the state authority over its population and territory (Lemay-Hébert 2017).

This discrepancy between *de facto* and *de jure* statehood is also reflected in different understandings of legitimacy. For the OECD, for instance, ‘legitimacy can also derive from international recognition and reinforcement, although this especially can be at odds with domestic sources of legitimacy’ (OECD 2009: 17). *De jure* states can be recognised internationally without enjoying any stable domestic sources of legitimacy (contemporary Somalia is a good example), whereas other governments may achieve and maintain over long periods of time considerable domestic legitimacy (*de facto* statehood) without being recognised by their international peers (at various times: China, Vietnam, Cuba, North Korea and Iraq; see OECD 2010: 159).

It is important to highlight that other approaches to state fragility and statebuilding exist and try to compete with the contemporary dogmas on these issues. For instance, certain scholars urged the community to look ‘beyond collapse’ to embrace ‘fresh processes of state formation’ (Doornbos 2002: 798) emerging from the ashes of collapsed states. Hence, for this scholarship, state collapse is not ‘the end of social institutions, but almost always the beginning of new ones’ (Eisenstadt 1988: 293). The recommendation for diplomatic recognition that stems from the ‘fresh start’ approach is logically to stop restricting state recognition to *de jure* statehood but to look at the complexity of the *de facto* statehood (and state collapse) around the world. In other words, let the illegitimate states fail so new, more legitimate states can take their stead, pretty much following a *laissez-faire* approach (Luttwak 1999; Herbst 2004). A good example is provided by Andreas Mehler and Claude Ribaux when they state that ‘the collapse of states in crisis need not be prevented, since a “better state” cannot emerge until that collapse has taken place’ (2000: 107). After years of fighting against the tide, we should learn to live with state collapse as a ‘plausible, and perhaps even likely, outcome for some states in the system’ (Raeymaekers 2005: 7). For Scott Pegg (1998: 133), if ‘states in the post-1945 Third World have not been allowed to fail; perversely, this has prevented many of them from succeeding’. It should be emphasised that embracing state collapse so that state formation can ‘start anew’ is not only confined to partitioning states, but also existing states based on contentious and disputed ‘social contracts’, in which local actors hope that a more inclusive state formation process can rise from the ashes of a conflict or a natural disaster. A good example here is the discussion about the ‘refoundation of the state’ (*refondation de l’Etat*) in Haiti after the January 2010 earthquake that completely destroyed the apparatus of the state.

However, ‘fresh start’ approaches have not been followed by international practice, especially regarding diplomatic recognition of new states emerging from the collapse of old ones. In fact, the alteration of borders, which was a constant practice in international relations until World War II, came to be progressively restricted as a practice. The Kaplanian ‘coming anarchy’, where the ‘classificatory grid of nation-states is going to be replaced by a jagged-glass pattern of city-states, shanty-states [and] nebulous and anarchic regionalisms’, didn’t materialise. As Marina Ottaway (2003: 245) put it, in addressing the problem of state collapse, ‘the international community has assumed that it is both possible and essential for all collapsed states to be reconstructed within their old borders’. In that context, states could simply not fail: ‘they could be weak, even nonexistent on the domestic and international scene, but they could no longer disappear’ (Lynch 2004: 17). This is also due to the fact that most of the newly ‘created’ or recognised states have not ‘fared well’ in the contemporary era, with a clear link between newly created states and instability. This has most certainly instituted a dose of caution from an international perspective. Excluding the Pacific micro-nations and the states that have emerged out of the wave of decolonisation in the 1960s and 1970s (which has also brought a dose of instability for the newly constituted states), all of the newly recognised states have faced instability. The new Balkan states that have emerged from the break-up of the Socialist Federal Republic of Yugoslavia in 1992, the Caucasus states that emerged from the break-up of the Soviet Union, and the more recent recognition of South Sudan or Timor-Leste attest of the difficulties that most newly recognised states faced in establishing themselves.

As Mark Zacher (2001: 236–7) suggested, the development of the norm of territorial integrity went through successive phases: the ‘emergence stage’ is marked by a growing advocacy of the new norm by important countries and other relevant actors between the end of World War I and the end of World War II; the ‘acceptance stage’, characterised by

growing support for the norm to a point where the norm is viewed as legally binding by most countries, between World War II until the mid-1970s; and, finally, the ‘institutionalisation stage’, with the integration of the norm in additional international treaties aimed at enhancing its effectiveness and state compliance. The high point of the constitution of this international regime has been seen in the response of the international community to the decolonisation process (Jackson 1993). Colonial territory became the frame of reference for adjudicating competing claims for self-determination and political independence. If the wording of the UN Charter remains fairly vague on this point (recognising both the principles of self-determination and territorial integrity), the principle was first clearly encompassed in the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples. In effect, this resolution circumscribed the application of self-determination, limiting it to overseas colonial jurisdictions in applying the principle of *uti possidetis juris*.⁴ This principle was consolidated normatively by the adoption of the Organisation of African Unity (OAU) Charter in 1963, by the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States (1970) and by the Conference on Security and Cooperation in Europe (CSCE) Helsinki Final Act in 1975, and practically enforced by early peacekeeping operations, most notably the pioneering peace enforcement mission in the Congo in the 1960s (Holsti 2004: 102). These practices resulted in the acceptance of a norm of *sovereignty-as-territorial-integrity* (Barnett and Finnemore 1999: 713), with the enforcement of this principle specifically in Europe and Africa, and by the Western democratic states and the Soviet Union (and, after its dissolution, by the Commonwealth of Independent States), at least at the diplomatic level.

Hence, after a period of vagueness in the interwar years, the self-determination principle found itself gradually constrained by the rise of the territorial integrity principle and its interpretation confined primarily to the rights of peoples living under colonial yoke (non-self-governing territories, in legal terms). This is why the eminent jurists Thomas Franck, Rosalyn Higgins, Alain Pellet, Malcom Shaw and Christian Tomuschat, in their opinion on the legality of the sovereignty of Quebec in case of secession, called the principle of ‘equal rights and self-determination of peoples’ one of the great ‘legal myths’ of the second half of the twentieth century (Franck et al. 2002: 3.03). The definition of the term ‘people’, legally and politically, has been one of the hardest conundrums facing the international community, and the rise of the territorial integrity principle partially resolved the dilemma by closing the Pandora’s box and leaving the keys to the sovereign states to judge which new-found state deserves to be recognised internationally. Hence, the general practice has generally been that secessionist claims were recognised when (i) the secessionist state is listed in the United Nations list of non-self-governing territories; and (ii) the parent state, which stands to lose territory, recognises the new international reality.⁵

More recently, there has been a normative evolution underlining the growing importance of (good) governance processes in state recognition. The secessionist process needs to be done in accordance with the will of the targeted population (for example, through an internationally recognised referendum). Most states have refrained from recognising secessionist claims when there are doubts as to the real aspirations of the people slated for independence, which is a common feature in any secessionist process, or where independence is brought about by outside assistance (e.g. the cases of Katanga, Biafra, the Turkish Republic of Northern Cyprus, Transdniestria, Abkhazia or South Ossetia). However, and maybe more importantly, in the whole process of strengthening the norm of territorial integrity, emphasis was put on the constitution of a viable and pluralist political order, respectful of the fundamental rights of its citizens, especially in relation to the recognised minorities, rather than a recognition *ipso facto* of any separatist movements

emerging from the collapse of the state. Moreover, the self-determination principle has progressively moved from being a collective right to a principle tied to the rise of individual rights (civil and politics) concomitant with the general evolution of human rights: it has been understood as the right to enjoy free and fair participation in a specific political order. The self-determination principle has not been discarded; it is only its interpretation that has evolved. The internal aspect of the principle – understood as the rights of peoples to be sovereigns of their own territories, free from external domination, and the right of the people freely to choose their political institutions and representatives and to participate in the process of governance – has been privileged in contrast to the external aspect of the principle – whether to enjoy complete political independence, or merely self-government. In that context, even the UN parlance of ‘human security’ puts emphasis on how to help states to face the challenges posed by a weakening of its legitimacy and capabilities (Newman 2010).

The cornerstone of this process is what Robert Jackson and Mark Zacher call the rise of the ‘norm of self-determination for the civic nation’ (Jackson and Zacher 1997: 21) that has to be understood, according to them, in conjunction with the norm of territorial integrity. For certain authors, it leads to a ‘right to participate’ for local populations (Franck 1992: 59). To be more accurate, being denied the right to participate in public affairs may lay the foundation for recognition on the international arena. For Jan Klabbers and Rene Lefeber,

there is considerable doctrinal support for legal entitlement to external self-determination, if a people have been deprived of its right of internal self-determination, in particular, if this is accompanied by serious human rights violations. For a right to external self-determination to arise, the violation of the right to internal self-determination must be serious and persistent, and it must not have been possible to enforce the right by judicial means.

(1993: 43–4).

While this principle is still contested nowadays, it has ancient roots (Bukovsky 2002).

State fragility as deficit of resilience: implications for state recognition

The global discourse on state fragility is now moving away from identifying and listing ‘fragile states’ to focusing on ‘situations of fragility’, ‘fragile contexts’ (UNDP et al. 2016: 2) or ‘states of fragility’ (OECD 2016a). Helen Clark, administrator of UNDP, notes that ‘building resilience is now central to the way in which the UN is responding to fragility’, which intends to broaden the scope of analysis in addressing fragility to include subnational and global levels at the same time (Pospisil and Kühn 2016; UNDP et al. 2016: 2). Behind this change of approach, there is a recognition that past approaches (linked to state failure and state fragility) simply backfired. As the executive boards of various UN agencies and programmes noted, ‘the emerging concept [fragile contexts] addresses the stigma associated with “fragile states”’ (UNDP et al. 2016: 3). This is echoed by the OECD, noting that ‘there is an increasing awareness that a binary list does not do justice to the multifaceted nature of fragility’ (OECD 2016b), with the organisation committed to moving towards a universal framework of fragility, phasing out its ‘fragile states’ list by 2017, dropping the ‘fragile states’ label (as used in its *Fragile States Reports* from 2005 until 2014) while including a multidimensional framework around ‘states of fragility’ (*States of Fragility Reports* since 2014). In this new approach, fragility is defined as the ‘combination of exposure to risk and insufficient coping capacity of the state, system and/or communities to manage, absorb or mitigate those risks’ (OECD 2016b: 22).

So, what are the repercussions of this new approach for state recognition? First, the new approach aims for universality in its approach to fragility (OECD 2016b: 19). Rather than limiting its governance to a specific list of fragile states, it builds on the recognition that fragility affects states and societies in different ways. State fragility affects not only developing but potentially all countries. Resilience, fragility and crisis are thereby considered moving points along a spectrum of situations including all states (OECD 2016b), thus leaving no state behind and no area of life untouched. After all, ‘when everything is the source of endangerment, everyone is endangered’ (Evans and Reid 2014: 21). The retreat from one governmentality mechanism – imposing order to societies deemed abnormal or ‘failed’ (Lemay-Hébert and Visoka 2017) – enables the deployment of another form of governmentality, which potentially goes deeper and wider than the previous one (Lemay-Hébert 2019). Second, the move beyond the national level to a combined subnational and regional or global level will arguably reduce the importance of *de jure* sovereignty and international recognition, at least in the interactions of these territories with the international community. It is quite telling that discussions on sovereignty are absent in recent reports on state fragility. As David Chandler has argued, we have witnessed a move from governing interventions designed to address the causes of security problems to the regulation of the effects of these problems (2015). By opening up the realm of possibilities for governmentality practices, the new conceptualisation of state fragility marginalises ‘traditional’ concerns for international recognition and the respect of territorial integrity, as well as the necessity to rebuild collapsed states along their initial borders. If initial borders are still legally recognised, international practice is simply moving towards informality and *fluidity* in the interaction with emerging polities inside collapsed states. This does imply a reinforcement of practices of informal recognition of *de facto* polities, such as Somaliland, which can be understood as a ‘state within a failed state’ (Bryden 2004) and a very important partner in counter-piracy policies in the Gulf of Aden.

Finally, this new approach to fragility and risk also represents an interesting opening for ‘fresh start’ approaches, as discussed above. For Cedric de Coning (2016: 174), an approach informed by resilience ‘needs to be sensitive to the need for societies to self-evolve, including through constructive conflict and competition’. Another link with the ‘fresh start’ approach is through the understanding and conceptualisation of risk. For instance, the World Bank has defined risk as ‘the possibility of loss’ (which is the ‘legal’ or insurance business definition of risk), but also as necessary to the pursuit of opportunity (World Bank 2014: 5), which clearly connects with the ‘fresh start’ approach of state collapse as an opportunity for new, more legitimate polities to emerge. In terms of international practices, we are still far from ‘decertification’ processes of collapsed states, as advocated in the pre-World War II literature and discussed by scholars following the ‘fresh start’ approach. Similarly, *de facto* statehood is unlikely to be connected with *de jure* statehood in ways which would automatically connect internal and international legitimacy sources. However, the resilience discussion, connected with new understanding of state fragility, underlines the fact that practices of powerful states are less constrained with these considerations than in previous years. Western states fully cooperate with specific *de facto* states, as evidenced in the case of Somaliland or Taiwan. In parallel, newly created states display new forms of discourses and practices to gain international recognition in a more fluid international normative regime (Visoka 2018), especially compared with the post-World War II regime of state recognition. Hence, new state fragility conceptualisations will certainly create unexpected ripples on the international recognition regime, ripples scholars would certainly be wise to detect and document.

Notes

- 1 It is worth pointing out that the concept of ‘weak state’, used in its contemporary sense, can be traced back as far as 1915, when Walter Lippmann, adviser to President Woodrow Wilson, wrote that ‘the chief overwhelming problem of international diplomacy seems to be weak states. Weak because they are industrially backward and at present politically incompetent to prevent outbreaks of internal violence’ (Rapoport 1994: 59).
- 2 As exemplified in the use of the concept in speeches made by former UN Secretary-General Boutros Boutros-Ghali and former US Secretary of State Madeleine Albright.
- 3 We will discuss later how this discussion nevertheless influenced the scholarship on ‘fresh starts’ for collapsed states.
- 4 *Uti possidetis juris* is a principle of international law that states that newly formed states should retain the same borders that they had before their independence.
- 5 The fact that the international community has put enormous pressure on Pakistan to recognise Bangladesh’s independence, or, more recently, Indonesia to recognise Timor-Leste’s, highlights the importance of this recognition in the overall process.

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THE DERECOGNITION OF STATES

Gëzim Visoka

Introduction

The creation of new states and their subsequent recognition by other states play an enormous role in world politics. Although there is extensive research on the politics, legality and ethics of state recognition, no work has been exclusively devoted to its revocability or withdrawal. The derecognition of states – defined as a political decision to withdraw a recognition of the international legal sovereignty of a state or government – plays a far more significant role in world politics than we often assume. This chapter examines the theory and practice of state derecognition in world politics. It offers a comprehensive assessment of legal, normative and political theories and surveys practices of state derecognition. It seeks to explore major questions posed by the derecognition of states, such as: how do different scholarly debates conceptualise it? What are the driving forces behind it? How does it affect domestic, regional and international security? Should it be regulated by international law? In the absence of legal and institutional regulatory mechanisms, derecognition – like recognition – remains a highly controversial matter, subject to epistemic and political dissensus and, in practice, at the discretion of states. The question of derecognition is also invoked in relation to governments as well as existing recognised states that fail to fulfil the core criteria of statehood, which is beyond the scope of this chapter (see Naticchia 2017). In theory, the revocation of recognition is seen as impossible unless recognition is reassigned or extended to another entity or unless the original conditions for recognition no longer exist (i.e. loss of statehood capacity). Another circumstance that may explain or justify the derecognition of states is when the claimant state emerges through aggression or loses the core attributes of statehood.

In an attempt to shed light on this under-researched topic, the most viable pathway for making sense of state derecognition is to trace contemporary state practices, actors, justification and effects. Drawing on a comparative analysis of contemporary examples of state derecognition, this chapter argues that derecognising states is not entirely about asserting that a state does not fulfil the core criteria of statehood, nor is it merely an instrument for upholding international institutions and norms on sovereignty and territorial integrity; rather, derecognition has emerged as a foreign policy instrument for advancing the domestic and international self-interest of the derecognising states and their international allies.

Economic benefits, domestic political dynamics and geopolitical interests play a far more significant role in the derecognition of states than the statehood capacity of claimant states, commitment to conflict resolution or other normative factors. The economic bribery and military interests involved in the process of state derecognition significantly undermine the value, norms and principles that govern matters of statehood in the international community. Although the withdrawal of recognition does not instantly result in the unravelling of the sovereignty and independent statehood of a claimant state, it can lead to diplomatic isolation, domestic political turmoil, limited access to international bodies, and exposure to external interference and collective insecurity. State derecognition has far-reaching consequences, not only for the derecognised states but also for those derecognising them. In an attempt to either retain or withdraw recognition, foreign states tend to use domestic political rivalry between the derecognising states to further their own foreign policy interests. This can undermine democratic processes, nurture corruption, and promote the hostile conduct of foreign policy. As state derecognition has far-reaching implications for the international order, it is of pivotal importance to explore different pathways for mitigating the abuse of state recognition in world politics. However, as long as state recognition and derecognition remain at the discretion of individual states, and in the absence of consensual regulatory or institutional frameworks, it is most likely that this controversial practice will continue to persist in the international system.

This chapter first examines how the possibility of reversing the recognition of states is discussed in a wide range of disciplines, including international law, political theory and international relations debates. The chapter then looks at the process and micro-politics of derecognition, looking at the actors involved and the narratives and diplomatic tools used in reversing state recognition. To give an insight into the derecognition of states in practice, the key cases of Taiwan, Western Sahara, Abkhazia and South Ossetia, and Kosovo are studied. The chapter concludes with a critical discussion of the effects of derecognition and the need to develop new perspectives on statehood and state recognition.

The derecognition of states in theory

One of the most under-explored issues in international studies is the revocability of the diplomatic recognition of states. Although derecognition does not feature much in most legal or normative perspectives, a thorough reading of the existing literature shows that there is no consensus on whether states can be derecognised, or on the conditions under which a reversal of recognition would be permissible. Generally speaking, there are three main theoretical perspectives on state derecognition.

The first group of scholars argue that once a state has been recognised as sovereign it cannot be derecognised. The main proponents of this view also subscribe to the declaratory theory of recognition, which has been extensively examined elsewhere in this handbook. Declaratory theorists hold that the existence of a state is independent of recognition as long as that state fulfils certain substantive criteria. The only function of recognition is to acknowledge the existence of a new state as a subject of international law – not to determine its existence as an independent state. Proponents of this view find support in Article 6 of the Montevideo Convention, which stipulates: “Recognition is unconditional and irrevocable”. One of the leading scholars on this subject, Ti-Chiang Chen (1951: 259), holds that “existence once acknowledged is acknowledged; there is nothing to withdraw”, and he argues that a state “continues to exist, independently of recognition or the ‘withdrawal’ of recognition”. Chen (1951: 8) adds: “revocation of

recognition does not affect the legal existence of the recognised entity”. Similarly, James Ker-Lindsay (2012: 17) maintains that “recognition does not make a state. It simply represents a particular and formal procedure that allows states to enter into diplomatic relations with one another.” Stefan Talmon (2005: 125) argues that “the creation of a State cannot be undone by non-recognition alone, and so nonrecognition cannot have status-destroying effect either”. Derecognition would also contradict the initial decision in favour of recognition. Lauterpacht (1944: 385) argues that “to recognize a community as a State is to declare that it fulfills the conditions of statehood as required by international law”. In this regard, once full and formal recognition has been granted, and diplomatic relations have been established, derecognition cannot retrospectively undermine statehood.

Moreover, the derecognition of states is seen as a counterinitiative in circumstances where a country grants *de jure* recognition, proceeds to establish diplomatic relations, opens an embassy and engages in joint political, economic and socio-cultural initiatives (Sharp 2009). Even ending diplomatic relations with the state does not necessarily cast doubt on its existence, or imply derecognition. Alan James (2016: 258, 263) claims that “a breach of diplomatic relations does not imply the withdrawal of recognition”. From this perspective, we cannot talk about *derecognition* – but a *discontinuance* of recognition is “at issue when a recognized government no longer fulfils the conditions of governmental status, i.e. when it no longer exercises effective control over the State’s territory” (Talmon 1993: 262). Yet, it is widely maintained that “only actions unequivocally implying the intention to discontinue recognition, such as the formal or informal recognition of a new regime as the *de jure* government of the State, may be regarded as constituting informal discontinuance of recognition” (Talmon 1993: 263). This notwithstanding, the power of a discontinuance of recognition loses its significance when the derecognising state already has diplomatic relations with the former base state. Under this circumstance, derecognition, on the other hand, does retain some significance if it declares a recognition of the authority and sovereignty of the base state over the claimant state. A derecognition of the claimant state is a re-recognition of the base state that was derecognised in first instance by the recognition of the claimant state.

Most importantly, scholars subscribing to the declaratory theory argue that the derecognition of claimant states does not result in the ending of their independent statehood. Derecognition, they argue, is a political act which does not presuppose the non-existence of a state. For example, Lauterpacht (1945: 179) maintains that

the very idea that the legal personality of a State or the representative capacity of its government should be dependent on the continued good will of other States is deemed to be derogatory to the independence and the dignity of the State and inimical to the stability of international relations.

Derecognition means that the legal existence of the claimant state vanishes only in relation to this particular (derecognising) state. It may continue to exist legally in relation to other states, which continue to recognise it as an independent, sovereign state. Talmon (2013: 231) argues that:

a State, the government of which is not politically recognized by another State, nevertheless remains a subject of international law in relation to the latter State, and all rights and duties stipulated by treaty or customary international law remain in force in the mutual relations between [the two] States.

This notwithstanding, derecognition may become a contributing factor where the legal existence of the state concerned is questioned in relation to the derecognising state or other states that subscribe to this derecognition. The “absence of full membership of the international system of sovereign states does not destine de facto states to pariah status” (Casper- sen 2015: 399). Unless it is a collective derecognition, which can impact severely on country’s existence, claimant states still continue to endure, and also to benefit from the rights enjoyed and the obligations assumed under international law.

The second group of scholars – affiliated with the constitutive theory of recognition – takes an opposing stance regarding the possibility of reversing the recognition of states. Constitutive theorists consider recognition a vital factor in becoming an independent, sovereign state. As David Raič (2002: 83) shows,

it is generally agreed that recognition may constitute an important indication for statehood especially when recognition is granted (primarily) on legal grounds, on a wide scale and by States having a different political system or ideological background and where the statehood of the entity before the recognition was equivocal.

For constitutive theorists, a state exists only when others recognise its sovereign status. Recognition is as important an element as control over a territory, effective government, or a population. Without recognition, states remain isolated and unable to exercise their sovereignty internationally. This is most notably in the case of states’ responsibility not to recognise states and situations in breach of fundamental norms of international law, such as state birth through aggression and violent methods. In this regard, constitutive theorists consider derecognition an important indicator which undermines claims to sovereign equality and independent statehood in international society. Derecognition undermines countries’ ability to engage in diplomatic relations with other states, it undermines their interests and excludes them from multilateral bodies, and complicates the ability of their subjects to travel, to trade or to interact with other states and societies. Moreover, in state practice it is obvious that recognition is more likely to be withdrawn when de facto, provisional recognition is initially granted and no further formal diplomatic or legal interaction has taken place (Talmon 1993).

The third and final group of scholars highlight the unregulated nature of recognition and derecognition in international law and world politics. This perspective which could be labelled as discretionary theory holds that as long as state recognition remains unregulated in international law it will remain a discretionary state practice. Jean d’Aspremont (2012) maintains that “any subject of international law decides for itself how it interprets and construes the facts or the situation that is the object of recognition”, adding that “once granted, recognition can also be subsequently withdrawn if the author changes its interpretation (and policies) or wishes to make it known differently”. In other words, the derecognition of states in practice is also supported by the *Lotus* principle, which permits states to conduct their foreign policy freely insofar it does not infringe on their binding obligations as subjects of international law. Tierney (2013: 376–377) adds that “the generally held view is that recognition is a uniquely political act, operating largely if not entirely at the discretion of states”. This implies that diplomatic recognition could be withdrawn from an effective de jure government for political reasons or diplomatic relations may be discontinued if the original conditions required for recognition vanish. This realist view highlights the role of power politics and abuse of power in the derecognition of states. Bartelson (2013: 111) maintains that:

the struggle for recognition takes place between unequal parties, in which the stronger party is in a position to grant or withhold recognition to the weaker one, and in which the stronger party is likely to perceive demands for recognition as challenges to its standing.

Recognising the potential for abuse with the institution of recognition, Lauterpacht (1945: 180) argued that derecognition in general should be “exercised with a circumspection and restraint even more pronounced than the positive act of granting recognition”, adding that “it cannot properly be used as an instrument of political pressure or disapproval”. Recent work by Chris Naticchia (2017) suggests that, if existing sovereign states fail to fulfil the criteria of statehood set to recognise new states, they should be also derecognised. He stipulates that:

as we ask whether this or that future political entity ought to be recognized as a state, so too can we ask whether this or that current political entity ought to have been recognized as a state – that is to say, we can ask whether its standing, as a recognized member of the international community, ought to be *revoked*.

(Naticchia 2017: 14, emphasis in original)

However, John Dugard (2013: 6) maintains that, as long as international law does not prohibit the withdrawal of recognition, it will be difficult to discipline state practice. This state discretion allows for mingling derecognition, as a declaration of the absence of statehood attributes, with the political intention to end diplomatic relations and pursue self-interest.

Consequently, it would appear that scholarly perspectives tend to stipulate that state derecognition could be permissible under two circumstances. First, when a new state emerges through acts of aggression, thus requiring collective non-recognition or derecognition if deemed necessary to restore the peremptory norms of international law. Raič (2002: 90) argues that “States are under a legal obligation not to recognize effective territorial entities which have come into existence as a result of a violation of one or more specific fundamental rules of international law”. The main concern is the external illegal use of force, or another form of intervention, in a sovereign state to annex a part of the territory without the consent of the host state or without the intention to prevent a humanitarian catastrophe from endangering international peace and stability (see Grant 1999: 30). The second circumstance is when a state ceases to exist as a result of dissolution and succession to another state entity. Normative perspectives tend to argue that a withdrawal of recognition is permissible only when a state loses the core conditions upon which the recognition of its statehood was granted in the first place. This involves no longer having an independent government, effective authority or a defined territory. Chen (1951: 263) maintains that “the only legitimate consideration for the withdrawal of recognition is the disappearance of the requirements of statehood or governmental capacity”. And, even if this is the case, “withdrawal of recognition is conceived as nothing more than the registering of the fact that these [statehood] requirements have ceased to exist” (Chen 1951: 160). Reversing these qualified conditions, then – except in cases where the new state come into existence through aggression and the use of force, or cease to exist as independent states – the recognition of states should be a welcome development in the international arena because it contributes to the expansion of international law’s jurisdiction in grey areas, as well as promoting regional stability and conflict resolution. The derecognition of nascent states that do fulfil the criteria for statehood and can make a legitimate case for independent statehood, on

the other hand, represents an aggressive, irresponsible and devastating attack on the international rules-based order, as it results in the expansion of ungoverned territories, regional instability and fierce rivalry between powers.

These perspectives notwithstanding, the lack of clarity and scholarly consensus is due partly to the fact that existing accounts of state derecognition draw on historical, normative and legal thinking which is outdated and lacks proper empirical examination. To assess the viability of these perspectives, it is crucial to revisit contemporary practices of state derecognition in world politics, which is the purpose of the following section. Moreover, existing perspectives fail to account for the micro-processes, rationales and entangled politics behind the derecognition of states.

The derecognition of states in practice

Given the lack of conceptual guidance in existing literature, the most viable trajectory for tracing the derecognition of states in practice is to explore the actors, processes, rationales and effects linked to this controversial diplomatic practice in world politics.

The subjects of state derecognition

Understanding state derecognition first and foremost means examining which states are subjected to the withdrawal of recognition and which are prone to withdrawing the recognition of other states – although this would not be sufficient without bringing in former base states and regional powers which play a role in determining the positions of all the parties involved. The derecognition of independent statehood is significant in particular to claimant states that are outside the UN system and do not have overwhelming international bilateral or multilateral support. In other words, derecognition primarily applies to claimant states that have secured partial international recognition. They range from those states that have secured recognition from fewer than ten others, such as Abkhazia and South Ossetia, to states that have achieved around 100 or more recognitions, such as Taiwan, Western Sahara and Kosovo. In the case of Taiwan, China sees the island as part of its territory. Taiwan's derecognition process started when China was allowed to take its seat at the UN. In 1963 Taiwan was recognised by 66 states, of which only 17 continue to recognise it as of December 2018 (see Tudoroiu 2017: 209). The People's Republic of China (China) continues to claim it is the only sovereign authority over Taiwan, despite not having had *de facto* control over the territory since its foundation. To date, 37 out of 84 UN member states have withdrawn their recognition of Western Sahara (the Sahrawi Arab Democratic Republic, or SADR), while Morocco, as the occupying power, continues to claim control over it, in breach of international law. Kosovo has recently been added to the list of claimant states that have encountered derecognition by other states. Of the 116 states that originally recognised Kosovo's independence, as of December 2018, 11 states have withdrawn recognition, two of which immediately reinstated their previous decision and re-recognised Kosovo. Serbia continues to claim sovereignty over the territory of Kosovo despite not having had access to it since 1999 (Visoka 2018a, 2018b). Finally, Abkhazia and South Ossetia have been recognised by eight countries, two of which subsequently withdrew recognition. Georgia continues to claim sovereign authority over these breakaway regions in the Caucasus (Ker-Lindsay 2012).

Using derecognition has emerged as a common practice among states in the Global South that gained independent statehood as part of the decolonisation process, continue to

struggle with chronic poverty, or are ruled by semi-authoritarian regimes. Small Caribbean and African states are the main protagonists of derecognition and re-recognition practices, having made the business of recognition one of their foreign policy priorities and a solid source of much-needed development and humanitarian aid (Tudoroiu 2017: 204). Among the most prominent of those involved in withdrawing, renting or switching their recognition of other states are: Burkina Faso, the Central African Republic, the Dominican Republic, the Gambia, Lesotho, Liberia, Malawi, Nauru, Panama, the Solomon Islands, Suriname, Tuvalu and Vanuatu. For these states, derecognition is one of the only available foreign policy assets they can use to reduce their vulnerability, benefit from foreign aid, renew alliances and influence the international system more generally (Thorhallsson and Bailes 2016: 297). In addition to base and claimant state, the regional and global powers also need to be accounted for when discussing state derecognition. Support or opposition from the great powers plays a pivotal role in deepening and entrenching the contestation of claimant states. In relation to Taiwan, China was obviously the main competing authority, and it also utilised its global political and economic status. Despite being among the first countries to withdraw its recognition of Taiwan, the United States remains one of the most vital global allies to seek to use Taiwan as a geostrategic asset to advance its interests abroad. In the case of Western Sahara, the SADR is backed both militarily and diplomatically by Algeria, while Morocco continues to benefit from French and US support in its campaign for derecognition. Kosovo's main allies remain the US and the majority of EU member states, while Serbia is backed by Russia in its pursuit of the derecognition of Kosovo. Finally, Abkhazia and South Ossetia are backed by Russia, while Georgia enjoys strong support from the US and all the EU and NATO member states.

The process of state derecognition

The derecognition of states is not a single act but a complex, lengthy process which consists of three major steps. The first is domestic and international contestation of the claimant state's claim to sovereignty and independence. Domestically, the former base state seeks to undermine the empirical sovereignty of the claimant state by causing political, legal, economic and security blockages to the normal functioning of the society (see Ker-Lindsay 2012; Ojeda-Garcia et al. 2017). This involves not only delegitimising and questioning the historical, legal and factual grounds for statehood but also misrecognising the agency of the political leadership and the community at large seeking independent statehood. It can also involve maintaining an administrative and military presence in certain parts of the contested territory, putting pressure for democratic change by discriminating against the secessionist community, and by supporting a new community of settlers who usually come from the mainland of the base state. The former host state also seeks to destroy the claimant state by blocking strategic economic routes, prosecuting the political leadership and pro-independence activists, and appropriating and exploiting resources. Internationally, the former base state uses its diplomatic network, its status within multilateral organisations and its strategic alliances with influential states to prevent the claimant state from gaining diplomatic recognition, participating in or joining regional or international bodies, or strengthening its international standing by other means. This process also involves exploiting international legal instruments to prohibit the claimant state from accessing the international community.

The second step in the process of state derecognition is to persuade other states to rethink their position on the claimant state. An initial sign of derecognition is when third

countries issue antagonistic statements or flirt diplomatically with the former base state. This has been evident in the case of Western Sahara, where a good number of countries withdrew their recognition through implied diplomatic signalling (Middle East Monitor 2018). The former host state uses political, economic and diplomatic methods to bargain for the derecognition of the breakaway territory. This often entails providing economic and development assistance, deepening bilateral military and security cooperation, and defending mutual interests within multilateral organisations. Consequently, the desire of the former base state to offer economic incentives in exchange for derecognition has encouraged a number of impoverished, post-colonial states to take advantage of this situation and bargain with the highest bidder for a shift in its recognition. The most prominent example is China's "chequebook" or "dollar" diplomacy, which it uses as a foreign policy instrument to entice other states to derecognise Taiwan. Despite the incentives, this stage in the derecognition process can be lengthy, costly and often unpredictable. For example, China worked with several Latin American nations for almost a decade before they derecognised Taiwan and established diplomatic relations with China. It took Panama almost four years to switch diplomatic relations gradually from Taiwan to China. This involved diplomatic interaction with both sides, and with the United States as a regional ally. The involvement of regional and global powers supporting the former base state, such as Russia and United States, plays a crucial role in encouraging the derecognition of claimant states.

The third and final phase in the derecognition process involves severing diplomatic contacts, cutting off bilateral cooperation, freezing recognition and adopting a neutral position. It is expected that, once recognition is withdrawn, official relations and exchanges will no longer take place between the two countries. In most cases, derecognition is formalised by sending a *note verbale* to the former base state, either reaffirming the recognition of its sovereignty over the contested territory or taking a neutral stance pending the peaceful resolution of the sovereignty dispute. However, it is not uncommon for the derecognising state to send the notice for the withdrawal of recognition directly to the claimant state. Countries involved in "renting" recognition, however, seem intentionally to frame their decision (to recognise or derecognise) in vague, ambiguous language so as to keep open the option of switching to the highest bidder. Often, the power to recognise or derecognise states is not explicitly enshrined in domestic legislation, and this is used as a pretext for making uncoordinated decisions on sensitive foreign policy matters. In most cases, such a decision is taken by either the president or the government, depending on which has constitutional power in foreign affairs. Hence, the derecognition of states tends, more often than not, to spark a new domestic political dispute within the derecognising states. When Vanuatu recognised Abkhazia in 2011, for example, conflicting reports came from three governmental instances: while the country's prime minister allegedly signed the agreement on establishing diplomatic relations, a senior adviser sent confusing messages, and the ambassador to the UN "strongly denied Abkhazia's claims that it had been recognized by Vanuatu" (Civil Georgia 2011b). Later on, the Supreme Court of Vanuatu annulled the parliament's decision to recognise Abkhazia, declaring it unconstitutional and invalid on the grounds that Abkhazia had not been recognised by the majority of world's governments and that no settlement had been negotiated between the parties in conflict (*Vanuatu Daily Post* 2011). Following a withdrawal of recognition, claimant states face a serious dilemma about how to respond to such negative developments. Their retaliatory opportunities following derecognition are limited. Apart from expressing regret and cutting diplomatic ties, they are often vulnerable, and restricted in what they can do in return. In most cases, the international community remains silent, and an organised reaction, or sanctions against the derecognising states or

their patron state, are not expected. To counter their derecognition, claimant states and their international allies try to use a wide range of foreign policy instruments, such as offering technical or economic assistance, as well as leveraging their special relations with influential states. In certain instance, derecognition can be revoked and the previous diplomatic relations retained, or afresh recognition could take place at a later stage.

The rationales for state derecognition

The derecognition of states is incentivised and justified in practice by five rationales: economic benefits, domestic political dynamics, geopolitical interests, conflict resolution and statehood capacity. The diplomatic battle for recognition between China and Taiwan has been fought predominantly by using what has come to be known as “chequebook” or “dollar” diplomacy, whereby each side has lured small, impoverished states to recognise it and derecognise its opponents in exchange for economic benefits, trade deals and personal gifts. Unlike in other cases, China’s and Taiwan’s wealthy economies have enabled them to use chequebook diplomacy as a strategy for buying diplomatic recognition and cutting the other side’s ties with the other states. In April 2018, for example, the Dominican Republic decided to derecognise Taiwan and, instead, establish diplomatic relations with China, in exchange for receiving loans and investments worth \$3.1 billion. Vanuatu recognised Abkhazia in 2011, allegedly after Russia offered \$50 million for the country’s signature (Radio New Zealand 2013). Moroccan diplomacy has allegedly used bribery and economic incentives to persuade states to derecognise the SADR, and has attracted Western states and companies to Western Sahara, with its plentiful natural resources, to benefit from the Moroccan exploitation of fishery and minerals there (which is prohibited under international humanitarian law and the law on non-self-governing territory). Smith (2015: 272) calculates that the value of natural resources extracted from Western Sahara between 1976 and 2016 amounts to \$5.65 billion. In 2000, India derecognised the SADR the same year it formalised industrial trade relations with Morocco (White 2015: 52). Barbados froze the recognition of the SADR in 2013 after a visit by Moroccan diplomats and businessmen to this impoverished Caribbean country, suggesting a strong link between economic bribery and derecognition practices (African Bulletin 2013). In late 2017, Russia, together with Serbia, convinced Suriname to withdraw its recognition of Kosovo. Despite claims by Serbia that no economic incentive was involved, Suriname openly admitted that its decision to derecognise Kosovo “represents a good basis for the development of bilateral cooperation between Serbia and Suriname, especially in the field of the economy” (Government of Serbia 2017).

The economic benefits of renting state recognition, combined with the assertive diplomatic campaigns of claimant and former base state, have led to domestic rivalry between the incumbent government and opposition parties in countries implicated in shifting or renting diplomatic recognition. Across certain African and Latin American countries, the question of switching recognition from Taiwan to China, and vice versa, often features in electoral debates, which illustrates how derecognition has become both a foreign policy instrument and a matter that shapes domestic politics too (Casas-Zamora 2009). Tuvalu, for example, retracted its recognition of Abkhazia and South Ossetia in 2014, three years after its former government had recognised Georgia’s two breakaway territories (Civil Georgia 2011a). On coming to power, Tuvalu’s new government rescinded the recognition with the justification that the parliament had not been consulted originally (Civil Georgia 2014). Vanuatu likewise derecognised these two breakaway regions in 2013, when a new government came to power (Civil Georgia 2013). On both occasions, after the derecognition, Georgia established

diplomatic ties with these Pacific islands and undertook to deepen its bilateral relations with them. In 2012, the prime minister of São Tomé and Príncipe recognised Kosovo without consulting the country's president or the national parliament. Once the government changed, São Tomé and Príncipe revoked the recognition of Kosovo and strengthened its ties with Serbia (Balkan Insight 2013). The change of policy on Kosovo in São Tomé and Príncipe, it seems, had nothing to do with Kosovo's satisfaction of the criteria for statehood, but was solely the result of internal rivalry between political parties in the country. In 1997, regime change in Saint Lucia was the main reason for withdrawing from Taiwan the diplomatic recognition originally extended in 1984 (MOFA of Taiwan 2007). In 2007, however, Saint Lucia recognised Taiwan again, after receiving additional economic benefits.

The derecognition of states is also influenced by geopolitical interests. Costa Rica's derecognition of Taiwan was a geopolitical move: it openly admitted that the decision was "not the consequence of an ideological turnaround, or of geopolitical reasons or short term interests", but "an act of elemental realism, an awakening to the global context we are forced to deal with" (Casas-Zamora 2009). Countries beset by historical rivalry and chronic enmity tend to side with the opposing sides in internationalised self-determination disputes. For example, Algeria, Iran and South Africa support the SADR in line with their strategic rivalry with Morocco and its Western allies. In exchange for Russian weapons, missiles and tanks, Venezuela recognised Abkhazia and South Ossetia in 2011 (Felgenhauer 2009). Similarly, Nicaragua recognised South Ossetia and Abkhazia in an attempt to redevelop close ties with Russia. In the present international security environment, movements for self-determination are tarred with the same brush as transnational terrorist groups – not only to legitimise state violence against them but also to generate global support for the derecognition campaign. For example, Morocco uses the discourse of counterterrorism to strengthen its ties with Western allies, denouncing the Polisario and its regional backer, Algeria, as terrorist hubs, while simultaneously expanding its territorial annexation and crushing Sahrawi human rights groups.

Another widely used justification for derecognising states is support for international and domestic efforts for the peaceful resolution of sovereignty disputes. While for some this might signal a withdrawal of premature recognition, it is largely a diplomatic discourse invoked to gain international support for contesting the sovereignty of a nascent state. In this context, derecognition is often used to exert pressure for changing domestic policy or making concessions with regard to conflict resolution between parties in conflict. A good number of states have justified their derecognition of Western Sahara on the grounds that they are supporting the UN-led process to resolve the conflict between the SADR and Morocco. However, it seems that Morocco is using the UN-led talks not exactly to resolve the conflict or to respect the desire of the Sahrawi people for self-determination but to undermine the latter's prospects of recognisable statehood by effectively managing to lure a significant number of states to withdraw recognition and suspend diplomatic intercourse with the SADR authorities. Similarly, Serbia has recently used the EU-facilitated dialogue with Kosovo as a pretext for encouraging states that have not yet recognised Kosovo to delay, or those that have already recognised Kosovo to reverse their decision. The main rationale for Serbia's counter-recognition campaign has been that recognition of Kosovo undermines the conflict resolution process and discourages parties from reaching a consensual agreement in line with international norms and law, which would contribute to international peace and stability. For example, in 2018 Papua New Guinea and Lesotho justified their decision to withdraw recognition from Kosovo on the grounds that they were awaiting the outcome of the EU-facilitated dialogue on the normalisation of relations between Kosovo and Serbia.

Statehood capacity does not appear to be an important factor in state derecognition. Among the recent examples, it has featured only in the case of Western Sahara, where Morocco has advocated for the derecognition of the SADR on the grounds that it lacks the basic elements of statehood, considering them a “ghostly entity” (Arabic News 2000). Morocco has effectively used the argument that the SADR and Polisario are not truly independent because they act as the geopolitical proxies of Algeria, which has hostile relationships with the other countries in the region. In 2013, Panama justified its derecognition of the SADR on the grounds that it had not managed to consolidate the fundamental elements of statehood (territory, population, government and independence) since its proclamation of independent statehood. These examples of rationales behind state derecognition demonstrate that the politics of recognition often have nothing to do with the proclaimed norms, principles and legal rules governing the birth of new states in international society. Rather, economic incentives (chequebook diplomacy), together with the domestic and geopolitical interests of the derecognising states, play a far more significant role in shaping the prospects for recognition or/and derecognition than is often assumed.

The effects of state derecognition

The significance of state derecognition becomes obvious only when its effects in practice are traced. First and foremost, state derecognition tends to have political, legal, economic and human consequences for the claimant state. It is an act of misrecognition, disrespect and humiliation of that state and its society (Taylor 2002: 25). The diplomatic isolation that may result from derecognition undermines the ontological security and national identity of claimant states, and reduces the authority of incumbent governments, thereby undermining both domestic and regional stability. In some instances, derecognition can prolong the undemocratic rule and ongoing state of emergency within claimant states. Nina Caspersen (2015: 298) argues that “recognition remains an existential issue for de facto states and the pursuit of recognition also serves an important legitimating function internally: the promise of future recognition can be used to excuse current shortcomings”. For example, the denial to the Sahrawi people of the right to self-determination for the past 44 years has effectively granted the Polisario unending political authority without a democratic process in place. In other instances, derecognition can improve the democratic performance of the claimant state. In the case of Taiwan, for example, it has had a positive effect on the democratisation process, forcing this contested country to seek international legitimation based on its democratic performance. Nina Caspersen (2012: 70) writes: “The process of de-recognition and the accompanying crisis of international legitimacy provided an important impetus for Taiwan to replace decades of authoritarian rule with gradual democratization.” Similarly, the democratic stability in Somaliland is often attributed to the absence of external recognition: this claimant state has been forced to develop democratic institutions as part of its state survival strategy, an improvement that is appealing to the international community but has not translated to formal recognition.

State derecognition motivated by self-interest certainly does not contribute to promoting human rights, democracy or state responsibility. On the contrary, such a controversial practice not only limits the role of the international community in resolving statehood and self-determination disputes but also gives the former base state greater scope for behaving aggressively towards the claimant state and its subjects. Derecognition denies claimant states the much-needed protection of international law. In this context, derecognition is normatively questionable because there is a danger it may deny

peoples' right to self-determination and prevent them from exercising their group rights (Tudoroiu 2017: 209). It prevents normal diplomatic and economic relations, and impedes membership of international and regional organisations. It undermines the legal protection of the claimant state's subjects and their access to international organisations, including human rights judicial bodies. Derecognition also limits the claimant states' chances of establishing diplomatic contacts, building consular services abroad, concluding bilateral agreements, travelling abroad, and making trade deals. In other words, derecognising states is liable to cause the internalisation rather than the internationalisation of claims to self-determination, and reduces the ability of the international community to monitor the human rights situation in contested territories. This suits the agenda of the former host or occupying state, which is to regard the self-determination dispute as an internal law-and-order matter which does not require international engagement. Derecognition is seen by Morocco, for example, as a free pass to crush political dissent in the occupied Western Sahara by extra-judicial means (see Kingsbury 2015: 254). In effect, derecognition could also undermine the ability of the international community to provide humanitarian aid or respond to the humanitarian needs of affected populations. It also opens up the possibility for the claimant state to join another, neighbouring state (historical kin state), posing the risk of border changes and wider regional instability. For example, the withdrawal by a handful of states of their recognition of Abkhazia and South Ossetia has opened up the possibility that these two claimant states may unite with the Russian Federation. Similarly, the derecognition of Kosovo may drive the country to consider reunification with the kin state of Albania, as a last resort after the failure of Western states to back its quest for full international recognition (Visoka 2018a).

The practice of derecognition has domestic ramifications for the derecognising state too. As derecognition is incentivised by external actors, it can end up destabilising and undermining the sovereignty of the derecognising state by allowing external countries to influence their domestic democratic processes and foreign policy. The struggle to retain or withdraw diplomatic recognition has a direct impact on the longevity of authoritarian leaders, promotes corruption and the misuse of foreign aid, and results in external interference in democratic processes (Tudoroiu 2017: 209). Van Fossen (2007: 139) argues that

a major effect of the Taiwan-China conflict in the Pacific Islands has been to introduce large amounts of foreign money into domestic political activities, which are oriented away from grassroots concerns and the interests of ordinary citizens, whose voting rights are thereby depreciated.

The attempt by the prime minister of Papua New Guinea in 1999 to switch recognition to Taiwan cost him his job, after a domestic backlash favouring ties with China (Rich and Dahmer 2018). Ian Taylor (2002: 129) maintains that "diplomatic competition between the two countries [China and Taiwan] is a diplomatic spat that elites in economically depressed countries in Africa are able to profit from, both financially and politically". In preventing derecognition, Taiwan has even donated aeroplanes and helicopters to Latin American presidents and statesmen for their personal use (see Atkinson 2014: 426). To sustain diplomatic ties between Gambia and Taiwan, the latter provided aid which was hailed by its authoritarian leaders as an investment, and a success for them. As the main states that are engaged in the business of switching diplomatic recognition often endure chronic poverty, by withdrawing their recognition of nascent states they risk provoking a humanitarian crisis locally. When Malawi withdrew its recognition of Taiwan, the latter retaliated by ending its funding

of vital health care projects in the impoverished African nation (Atkinson 2014: 417), where the effects of this move were keenly felt as Taiwan abandoned road construction projects and dismantled health care services and hospital operations.

As can be seen by looking at state practices, derecognition neither resolves self-determination conflicts nor reduces the risk of creating new conditions of fragility inside claimant states and their wider region. On the contrary, derecognition can have a spill-over effect which not only undermines efforts to normalise relations between the parties in conflict but also triggers regional tensions. It creates territorial zones ungoverned by international law and encourages predatory, clientelist and illicit transnational practices. Taiwan, for example, condemned “China’s objectionable decision to use dollar diplomacy to convert Taiwan’s diplomatic allies”, claiming that “Beijing’s attempts at foreign policy have only served to drive a wedge between the people on both sides of the Taiwan Strait, erode mutual trust, and further harm the feelings of the people of Taiwan” (MOFA of Taiwan 2018). Similarly, Kosovo threatened Serbia that it would withdraw from the EU-facilitated dialogue for the normalisation of relations. Kosovo was forced to impose customs tariffs on Serbian products as a retaliatory measure in a hope that would impact the derecognition campaign. The derecognition of Western Sahara prolongs the already protracted conflict, carrying the risk that it will escalate and that neighbouring Algeria, which hosts refugee camps and has a history of antagonism with Morocco, may be dragged into it. Kingsbury (2015: 256) shows that young Sahrawis who have grown up either in the refugee camps or under Moroccan occupation “seem to believe that returning to war with Morocco to reclaim their land is now the only option”. The derecognition of states not only poses challenges to the domestic stability of claimant states but also tends to affect regional peace and broader international stability. In Latin America, the derecognition of Taiwan and the subsequent expansion of Chinese influence, in countries such as Panama and El Salvador, threatened the geopolitical interests of the US in the region: it feared that China might ultimately take control of the Panama Canal and the strategic sea trade. When Haiti recognised the SADR, Morocco withdrew its peacekeepers from this war-shattered country and refused to send any again. In the late 1990s, Macedonia decided to strengthen its economic ties with Taiwan, and in 1999 China retaliated by vetoing the extension of the UN Preventive Deployment Force (Taylor 2002: 128). Two years later, Macedonia relapsed into a civil war that might have been prevented by the UN peacekeepers.

Finally, the chequebook diplomacy conducted by a number of claimant states has damaged the genuine diplomatic efforts of other claimant states, which have not wished to secure recognition by exchanging it for the expected financial bribery or economic aid. It has also created a diplomatic subculture among small states which trade diplomatic recognition with no regard for the far-reaching impact on the right of peoples to self-determination. For example, compared to Taiwan, Kosovo does not have a strong enough economy to offer foreign aid in exchange for recognition. Three states that have derecognised and subsequently re-recognised Kosovo – namely Suriname, Guinea-Bissau and Burundi – are well-known examples of states that engage in renting recognition to various other states. In general, credit for most of its recognitions must go to Kosovo’s proactive diplomacy, coupled with extensive support from powerful and prestigious states. However, the country’s weak economy and its lack of trade with many regions meant that recognition was granted on the basis of intangible prospects of future political and economic cooperation. Kosovo received recognition from these countries, but then failed to continue deepening its bilateral relations with them. Kosovo’s lack of resources for establishing and fostering diplomatic ties with many countries represented a constant threat that, with

growing economic incentives offered by Russia and Serbia, these countries might derecognise its independence. Serbian and Russian diplomats have constantly tried to use their political and economic leverage to prevent, delay or reverse decisions to recognise Kosovo. There are also cases of visits taking place after Kosovo has requested recognition, as well as protest notes being issued when states have accepted Kosovar representatives or taken the decision to recognise Kosovo.

Conclusion

This chapter has examined the theoretical and empirical aspects underpinning the derecognition of states in world politics. Self-determination outside the decolonisation process, and state birth without the consent of the former base state, reduces the prospects for collective recognition. This has resulted in the creation of new contested states with different degrees of international recognition and a limited capacity to survive independently. It is in this context that the practice of state derecognition has primarily affected those states that have declared their independence without the consent of their base state and have failed to secure collective recognition. In most cases, claimant states that are subject of derecognition fulfil the core criteria for statehood and deserve self-determination for historical, legal, political and geopolitical reasons. This chapter has demonstrated that, contrary to legal and normative accounts, derecognition represents an unfriendly act towards claimant states, and that it seems to be invoked more as a foreign policy instrument for advancing self-interest than to uphold the norms of, and necessary conditions for, independent statehood in contemporary world politics. A marriage of convenience between, on the one hand, impoverished states with the entitlement to recognise other states and, on the other, the former base states and their international allies has turned the practice of state recognition and derecognition into an instrument for furthering economic, political and geopolitical interests. Legal, historical and normative considerations tend to be rhetorically invoked to justify derecognition decisions, but in practice they do not play a major role in shaping the contemporary politics of state-becoming in the world. While diplomatic recognition was invented in the first place by Western colonial powers keen to exert control over their former colonial subjects and determine who had the chance to become a sovereign state, nowadays derecognition has become a common practice among underdeveloped post-colonial states in Latin America, Africa and the Pacific. The oppressed have become oppressors. The lack of regulation of state recognition allows derecognising states – which often lack core statehood attributes themselves – to (ab)use other states with their sovereign equality in the international system and to derecognise claimant states which often do fulfil the basic criteria for statehood.

Chequebook diplomacy and rental recognition are not sustainable practices, as they turn international recognition into a tradable diplomatic commodity which can be shifted depending on self-interest, government change or who the highest bidder is. The politics of switching recognition appears to be purely a product of domestic politics and economic incentives. The diplomacy that dictates retaining or switching recognition is highly unpredictable, corruptive, and prone to promoting domestic and international instability. At best, derecognition has emerged as a delinquent act, insofar as the state withdrawing recognition inhibits other states' rights and diminishes obligations under international law, thereby failing to administer the international law and contributing to international anarchy and conflict. The abuse of state derecognition risks reducing recognition from being an important feature of external certification and the acceptance of new states in international society to being a politically and economically motivated foreign policy instrument of states. State

derecognition promotes international disorder by emphasising self-interest rather than common interests such as peace, justice and development, as well as by disassembling the international norms, institutions and rules governing diplomatic relations by disregarding the rules of proper diplomatic behaviour, exploiting vulnerabilities and promoting unfair terms in relationships. Moreover, the derecognition of states for political self-interest amounts to unilateral interference in the normal functioning of fledgling states. It can amount to indirect participation in the conflict between the claimant and base states. States that constantly rent diplomatic recognition have become pariahs that constitute a source of disorder in international society. It therefore seems reasonable to suggest that the derecognition of states for domestic selfish, political or economic interests, with no regard for the norms, values or principles of statehood in world politics, may amount to an act of international delinquency.

Despite the destabilising effect of arbitrary practices of state derecognition, there is no international institutional mechanism for penalising states involved in this malignant practice. One option would be to scrap the practice of state recognition and derecognition in world politics because it enables foreign governments to interfere in the sovereign matters of other states. In an age of inhospitable reaction to secession, this option could be problematic, as it might encourage further political fragmentation and violent conflicts. However, as state derecognition seems largely to be driven by economic self-interest, with far-reaching consequences, another option would be to sanction the irresponsible derecognition of states, namely by withdrawing recognition from those that abuse their discretionary right to recognise or derecognise other states. Grounds for derecognising states can be found in the very practice of the collective non-recognition of states, which sanctions aggressive acts perpetrated by them. The derecognition of states is destabilising not only for the claimant state but also for the derecognising states themselves, and the wider international community. Hence, states that rent recognition out of self-interest are unlikely to be peace-loving nations. Unjustified and unprincipled derecognition could be considered an act of aggression against the claimant state and against broader international peace and stability. Notwithstanding this, in world politics the chances of regulating state recognition through legal and institutional mechanisms remain slim. It seems that arbitrary derecognition by states will continue to remain a black hole in international law, and an unpredictable, destabilising foreign policy instrument.

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CONTESTED STATES AND THEIR EVERYDAY QUEST FOR RECOGNITION

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Introduction

A number of conspicuous phenomena in contemporary world politics escape the conventional (binary) legal understanding of international recognition. For instance, what do we make of the strenuous efforts invested by contested states (Geldenhuis 2009), i.e. state-like entities short of international recognition, in their *sui generis* diplomacy in Brussels? On the one hand, lawyers remind us that the European Union (EU) cannot recognise states; international law is clear that only states may recognise their peers and legal equals. On the other, the ‘Brussels bubble’ is known to be buzzing with contested states’ representatives striving to make their voices heard and engage with the EU institutions and adjoining actors. Even the Unrepresented Nations and Peoples Organization has its headquarters there (McConnell 2017: 143). What is the point of this strategic choice if their primary concern is the pursuit of international recognition and such recognition is supposed not to be on the menu? The debate remains open and it has been rightly pointed out that, while the EU ‘does not recognise states in the traditional sense’, ‘it can generate common positions amongst its members which have a significant effect upon the foreign policy actions of these states and also steer global opinion – and sometimes practice – on particular cases’ (Newman and Visoka 2018: 780).

This chapter proposes a conceptual-analytical alternative to address this conundrum, which is to shift the focus from conventional international recognition to what is here referred to as *transnational recognition*. This involves overcoming at least three divides that constrain our understanding of recognition in world politics, i.e. the domestic vs. international gap in terms of levels of analysis, the state vs. non-state dichotomy in terms of actorness and the binary either/or view of state recognition in international law. As such, our approach is part of a multidisciplinary effort among international relations (IR) scholars, area studies experts and human/political geographers to reorient the conceptual and praxiological boundaries of state recognition as a scholarly and policy field.

Complementarily, the chapter introduces a second concept that is useful for approaching transnational recognition from the angle of the contested states’ agency and struggles therefor, and how these are manifested in their regular patterns of interaction with, and self-representation vis-à-vis, other international/transnational actors: *contested state diplomatic practices*.

In ontological terms, contested states are inherently liminal international actors living in a no man's land or state of transition, 'betwixt and between' the usual binary categories of state and non-state actors (Corcuff 2012; Mälksoo 2012; McConnell 2017). Empirically, by focusing on *what they do* rather than *what they are*, the practices perspective provides a productive analytical lens to challenge structural legal-institutional accounts of the international relations of contested states, which often fail to do justice to their agency and to explain change. When put into practice, the ontological liminality of contested states translates into largely hybrid diplomatic practices. Proposed in critical diplomatic studies as a way to overcome the decreasingly useful distinction between so-called 'old' (state) and 'new' (non-state) diplomacy, the notion of 'hybrid diplomacies' acknowledges the role of 'a multitude of different actors as both intertwined with each other and co-constitutive of the ongoing transformation of diplomatic practice' (Constantinou, Cornago and McConnell 2016: 52). Although contested states certainly care about the state vs. non-state distinction when it comes to their existential status and political aspirations, the same dividing line becomes routinely blurred in their everyday diplomatic practices, which stand out for their hybridity.

The following two sections elaborate on the concepts of transnational recognition and contested state diplomatic practices, drawing from the literature on recognition, transnationalism, international practices, liminality and hybridity in IR. Then, these concepts' empirical potential is illustrated through two case studies examining the diplomatic practices carried out by the representatives of Palestine and Western Sahara in Brussels. Three fundamental empirical questions are addressed: how have Palestinian and Sahrawi diplomatic practices towards the EU developed and changed over the past two decades? How do they differ from each other? How do the everyday interactions involved affect issues of recognition, that is, can we talk about an unconventional/unstructured social form of international recognition through some sort of 'practice upgrade'?

Transnational recognition and bridging gaps

The rationale and potential effects of the diplomatic practices of contested states cannot be understood on the basis of the conventional (binary) legal understanding of international recognition. The alternative analytical avenue proposed here consists in switching to the concept of transnational recognition (Fernández-Molina 2019), and thereby incorporating key insights or corrections from the scholarship on transnationalism. Whether one looks at the original neo-liberal definition of transnational relations as 'contacts, coalitions, and interaction across state boundaries that are not controlled by the central foreign policy organs of governments' (Keohane and Nye 1971: xi), or the new transnationalism's refocus on 'regular interactions across national boundaries when at least one actor is a non-state agent' (Risse-Kappen 1995: 3), three core themes and analytical commitments emerge: first, crossing borders, which applies to both substantive state boundaries and the more subtle, intellectual ones posed by levels of analysis in IR; second, highlighting the role of non-state actors; and, third, prioritising process over stasis – as also emphasised by the literature on liminality. Based on this and on a general understanding of recognition as 'a social act' whereby 'another actor ... is constituted as a subject with a legitimate social standing' (Wendt 2003: 511), transnational recognition may be defined as a social and relational process cutting across state borders and involving both state and non-state actors, which results in the constitution (identity formation and social status building) of a given actor in world politics.

The transnational reinterpretation of recognition in world politics appears a productive way of bridging the gap between two strands of scholarship whose dialogue has remained so far limited in spite of important points of intersection. The first of these is the social theory of recognition, which was developed in the 1990s in parallel by continental critical theory (Honneth 1995), and the Anglo-American ‘politics of recognition’ school (Taylor 1994), building on Hegel’s concept of the ‘struggle for recognition’ and his emphasis on the idea that the constitution of a subject’s self-identity inherently depends on the interaction with, and acknowledgement by, other autonomous subjects. The second strand is the literature on the recognition of states in IR, which has remained heavily influenced by the classical debate on statehood in international law, pitting the declaratory theory against the constitutive theory (Crawford 2006; Oeter 2015), and largely isolated from developments in social theory. A burgeoning strand of scholarship inspired by social theory of recognition has recently emerged in IR, mostly within the constructivist school (Wendt 2003; Lindemann and Ringmar 2012; Daase et al. 2015). Yet, to date, its empirical applications have primarily focused on (mis)recognition and ‘disrespect’ as drivers of state behaviour causing inter-state hostility and war (Lindemann 2010; Duncombe 2016). This has left aside, among other things, the fundamental and ontologically prior problem of the recognition of statehood, as well as recognition dynamics affecting non-state or non-fully-state state actors.

More specifically, three blind spots stemming from unwarranted dichotomies are still in the process of being overcome within the IR scholarship on recognition. These efforts may benefit from the transnationalist emphasis on crossing borders, foregrounding non-state actors and prioritising process. First, in order to cross borders, the divide that needs to be reconsidered is that of the domestic vs. the international levels of analysis. Despite their common sources, a certain disconnect can be observed between the domestic focus and methodological nationalism of the ‘politics of recognition’ and the peacebuilding literature on recognition (e.g. Allan and Keller 2012; Aggestam and Björkdahl 2013; Strömbom 2014), on the one hand, and the fundamental attention to inter-state relations prevailing in the IR current, on the other. The missing link of the chain here are relations of recognition that cut across boundaries and levels of analysis – recognition processes occurring ‘*across, between and beyond* the state’ (Brincat 2017: 2). This transnational expansion seems to be fully consistent with the foundations of recognition theory. As some of Honneth’s followers have rightly pointed out, there is nothing in his theory that ‘precludes the possibility of struggles for recognition expanding any given cultural horizon across the boundaries of political, ethnic, or religious communities’ (Heins 2012: 213).

The second dichotomy that needs to be overcome in studying transnational recognition is the one between state and non-state actors. In this case, the applicability of recognition theory to inter-state relations in IR has been subject to some debate due to the ontological problem of anthropomorphising the state, or the difficult conceptual transfer ‘once we switch from the level of group struggles to relationships between nation-states’ (Honneth 2012: 27). As a result, it is non-state actors that have always had it easier for recognition theorists, while the traditional IR understanding of state recognition has remained constrained by the rigid black-and-white terms of international law. The point made here is that the recognition needs and aspirations of state and non-state actors do not appear to be that dramatically different when ‘looking at international politics from a Hegelian perspective’ (Ringmar 2012: 11). Logically, this is even more the case for liminal international actors such as contested states, which conduct their ‘diplomacy at the margins’ (McConnell 2017) as part of their struggle for international/transnational recognition in any possible form. Third, and related to the prioritisation of process over stasis, it is necessary to

overcome the conventional binary view of international recognition in either/or terms – either an actor (i.e. a state) is recognised or it is not – due to the aforementioned legal reductionism. The alternative is to acknowledge that there exist unstructured, social and relational forms of international/transnational recognition that are analytically distinct from the legal one. Social-relational recognition is a process rather than a permanent feature, and has the potential to be ‘incrementally accumulated by multiplying the quantity and quality of international engagement’ (Bouris and Fernández-Molina 2018: 321), that is, through diplomatic practices.

Diplomatic practices of contested states

When it comes to contested states, we are facing a number of ontologically liminal international actors lacking full recognition in the conventional sense, whose activity in world politics revolves around their struggle for recognition and tends to be based on a particular, largely hybrid repertoire of diplomatic practices. Their ambiguous nature and status make even their labelling in academic literature challenging. Most of the overlapping concepts used to refer to the heterogeneous universe of contested states or parts thereof, including *de facto* states (Pegg 1998), quasi-states (Kolstø 2006) and unrecognised states (Caspersen 2012), share an emphasis on these political entities’ territorial control, functional capabilities and limited or lacking international recognition. The territorial element included in their definitional criteria tends to push to the margins or exclude those contested states that do not possess substantial control over (most of) the land they claim, such as Palestine and Western Sahara/Sahrawi Arab Democratic Republic (SADR). On the other hand, the greater flexibility of looser terms such as contested states (Geldenhuis 2009) makes it harder to find a lowest common denominator besides the international contestation of their status. In fact, it may be argued that what is ontologically shared by all contested states as politics is liminality. As coined in anthropology, the notion of liminality originally refers to the rites of passage and to ambiguous spaces or situations that are ‘betwixt and between’ regular categories and points of reference (see Thomassen 2009). Liminality therefore describes the nature of contested states in terms of both temporality – as their struggle for self-determination and sovereignty, irrespective of its length, is perceived to be a state of transition – and positionality and status within the Westphalian system, i.e. sovereignty (Rumelili 2012: 497) – as they challenge the binary state vs. non-state categorisation.

Then, when we shift our gaze to what practitioners do, the ontological liminality of contested states tends to materialise in a certain range of diplomatic practices. International practices have been defined as ‘socially meaningful patterns of action which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world’ (Adler and Pouliot 2011: 6). The emerging literature on practices in IR looks at international relations through performative lenses, breaking it down into sets of competent patterns of activity that are anchored in the material world and continually in process, socially (re)generated through knowledge embedded in action and the ‘logic of practicality’ (see Pouliot 2008; Bueger and Gadinger 2015). This approach has been productively applied, among other spheres of activity that constitute or ‘make’ world politics, to the study of diplomacy (Pouliot and Cornut 2015). Diplomatic practices stand out for their relational and processual nature: ‘Diplomacy is not merely a practice that deals in relations between pre-constituted political entities. Rather, these relations are seen as constitutive of, and ontologically prior to, these entities’ (Sending, Pouliot and Neumann 2015: 7). Moreover, and crucially for structurally marginalised liminal actors

such as contested states, the very play of diplomatic practice may strengthen the agency of those who perform it, for it endogenously generates 'emergent power' in the form of social skills and competences (Adler-Nissen and Pouliot 2014).

Combining all of these ingredients, the concept of contested state diplomatic practices (Bouris and Fernández-Molina 2018) refers to the basic performative ingredients of what contested states view as their diplomacy and the everyday, patterned and competent activities of individual agents or representatives that act as their 'diplomats' (see also Visoka 2018, 2019). These essentially consist of contacts, communications and interactions, and need therefore to be approached from a relational perspective. Within the wider category of diplomatic practices – all of which share the aim of 'representing a polity vis-à-vis a recognised other' (Sending, Pouliot and Neumann 2011: 528) or 'to the outside world' (Pouliot and Cornut 2015, 299), those associated with contested states stand out for two reasons, i.e. their hybridity in transcending the dichotomy of 'old' (state) vs. 'new' (non-state) diplomacy and their structure-generating properties in terms of recognition. Regarding hybridity, contested states present the paradox of combining a strong desire for the 'old' diplomacy's *ius legationis* due to *what they are* (liminal actors), for this right has been traditionally monopolised by actors possessing the sovereign statehood they cherish, with the routine blurring of the state vs. non-state boundaries in *what they do* (hybrid diplomatic practices). The post-colonial notion of hybridity is useful for capturing how the contested states' liminal nature and position translates into specific diplomatic practices that are '*neither the one nor the other*' and thus '[alienate] our political expectations' (Bhabha 1994: 37).

Furthermore, an additional form of hybridity comes from the fact that there may be both reproductive and transformative ways for contested states to *practise* liminality in their diplomacy:

Although their very being challenges the established social distinctions, they may engage in representational practices that reposition them in one of the existing categories, with an overall reproductive effect on structure, and/or they may practice their liminality in a subversive manner by reproducing their own ambiguity.

(Rumelili 2012: 497)

In other words, reproductive diplomatic practices are those whereby contested states 'respond to the ontological insecurity engendered by liminality' by '[reinforcing] and [reproducing] the existing social categories' (Rumelili 2012: 503), that is, by mimicking "official" state diplomacy as the "gold standard" to aspire to' (McConnell, Moreau and Dittmer 2012: 805). By contrast, transformative diplomatic practices enable liminal actors to perform and capitalise on their own political inbetweenness, taking advantage of the state vs. non-state muddling – for instance, investing their efforts in activities conventionally associated with non-state activism, campaigning and lobbying.

Second, in line with the concept of transnational recognition as well as the perspective of liminality, contested state diplomatic practices possess structure-generating properties that feed into these actors' struggles for recognition. This explains other international actors' usual concern about implied or 'creeping recognition' being inferred from any of their dealings with contested states, which they try to justify as constituting 'engagement without recognition' (Ker-Lindsay 2015; Ker-Lindsay and Berg 2018). Actually, according to a social-relational view of recognition, 'engagement without recognition' is never absolutely possible as a matter of fact, and irrespective of intent. Conversely, the spectre of 'creeping recognition' would not be fully justified based on a strictly legal, binary

understanding of international recognition – just like the strenuous diplomatic efforts of contested states to engage the EU institutions in Brussels would not make sense. Contested state diplomatic practices matter because they happen in a context of liminality, and the beauty of liminality lies in being ‘unstructured and highly structuring’ (Thomassen 2009: 20) or an “‘unstructured” origin of structure’ (Mälksoo 2012: 488). Their potential for change is twofold. Not only do these practices contribute to constituting and endogenously empowering (Adler-Nissen and Pouliot 2014) the liminal actors that perform them within the diplomatic field, but they also allow them to accumulate transnational recognition in unstructured, social and relational forms that range along an incremental continuum – as opposed to conventional/legal international recognition. This is relevant to debates in the international practices literature about whether, and how, ‘the ordinary unfolding of practice [generates] transformations’ (Adler and Pouliot 2011: 18). Moreover, as will be shown in the case studies below, some contested state diplomatic practices may have a counterintuitive impact on the sphere of ‘high politics’ in spite of these actors’ structural disadvantage, suggesting that bottom-up practice-led change has structure-generating properties.

Contested statehood in Palestine and Western Sahara

Palestine and Western Sahara are two notable and exceptional cases, which differ from the wider universe of contested states in that they have not resulted from secessionism but rather from deviant/thwarted decolonisation processes and the ensuing foreign occupation of their territories. Their liminality has also become protracted due to the deadlock of their respective conflict resolution attempts initiated in the 1990s, thus confirming the paradoxical argument put forward by Pace and Pallister-Wilkins (2018) that liminality can also be permanent.

The reasons behind Palestine’s contested statehood can be traced back to the 1993 Oslo Accords, which led to the creation of the Palestinian Authority (PA) as a proto-state with limited territorial control for a supposedly interim period (Bouris 2014). With the Oslo Accords, the West Bank was divided into three areas: it was only in Area A (17.7%) that the PA was given full administrative and security control. In Area B (21.3%), the PA was only given civil control, while Israel maintained security control. In Area C (61%), Israel would retain full responsibility and control (Bouris and Kyrus 2017: 758). Despite its inability to fully control the territory it claims, in 2012 the UN decided to ‘upgrade’ Palestine from ‘non-member observer entity’ to ‘non-member observer state’, thus paving the way for the Palestinians to join a number of international bodies and organisations. The upgrade also reconfirmed that Palestinians enjoy what Geldenhuys (2009) has called ‘titular recognition’ – recognition of their *right* to statehood. In the case of Western Sahara, the SADR was proclaimed in 1976 by the Polisario Front. In the case of the SADR, which has been recognised since its proclamation by 84–85 UN member states and still upholds diplomatic relations with around half of these, there is also some level of ‘titular recognition’, but this is significantly lower than that of the Palestinians and has a distinct non-Western bias. Despite this, since 1979 the Polisario Front has been officially considered by the UN ‘the representative of the people of Western Sahara’ (UN General Assembly 1979).

The structural differences between Palestine and SADR as well as variation in terms of recognition are closely linked to the respective degrees of institutionalisation of their relations with the EU. This also has reverberations with regard to the level of social interaction and recognition and EU officials are aware of the ‘political capital’ which contested states’

representatives derive from interaction with them (Bouris and Fernández-Molina 2018: 313). The legal basis for the relations between the EU and the PA is the Interim Association Agreement (AA), signed in 1997 with the Palestinian Liberation Organization (PLO) on behalf of the PA. Since Palestine's upgrade at the UN, an effort has been initiated by Palestinian officials to push the EU to offer Palestine a full AA, a move which has also received the backing of France.¹ Under EU rules, though, such an agreement can be offered only to sovereign states, although France has argued that the EU has a full AA with Kosovo despite the fact that it is not recognised by all 28 EU member states. In the case of Western Sahara, the EU has an AA with Morocco but not with Western Sahara; in the latter case the EU and its member states have adopted a twofold non-recognition policy whereby they do not recognise Moroccan sovereignty claims over Western Sahara but neither do they recognise the SADR or maintain any formal contact with the Polisario Front (Fernández-Molina 2017).

These structural and legal differences are reflected in the diplomatic practices of the Palestinian and Sahrawi representatives 'on the ground'. The physical representation of the Palestinians in Brussels was before the UN upgrade named 'Palestinian Delegation', a label which could be used by any other actor. However, after the UN upgrade, as well as a number of EU member states' decisions to grant a higher diplomatic status to the Palestinian representatives, the Palestinian representation was renamed to 'Mission of Palestine to the Kingdom of Belgium, the EU and Luxemburg'. Although such label resembles more a 'state' diplomatic representation the label 'state' is still missing, contrasting with the Mission of the State of Palestine to the UN.² Contrary to this more 'official' standing, the status of the Sahrawi representation in Brussels is much more liminal. There are two representatives of SADR: a SADR delegate-minister for Europe and a Sahrawi diplomat who introduces himself as the 'Polisario Front's representative in Brussels' (Bouris and Fernández-Molina 2018: 314). The human resources of the Sahrawi diplomacy are limited to these two men and sometimes a non-Sahrawi assistant while they also use the services of Independent Diplomat (ID), a non-profit consultancy firm which among other things also advises unrecognised states in developing their diplomatic capabilities (Ross 2007).

Palestinian and Sahrawi diplomatic practices in Brussels

When it comes to the practices that are carried out within this context, the European Parliament (EP) has always played an 'interesting role'³ within the EU institutional ecosystem, especially with regard to contested state diplomacy, as its open nature and rules facilitate the organisation of different events where contested states' representatives can be present and also interact with other EU officials. This is part of a broader 'parliamentary diplomacy' (Stavridis and Jančić 2017) which enables participants to avoid concerns about recognition. This is the reason why the EP has long been prioritised as a venue by both Palestinian and Sahrawi diplomats. Despite this, non-state actors and non-governmental organisations (NGOs) were initially the ones most involved with the EP. That is the case of the Mattin Group in the case of Palestine, and Western Sahara Resource Watch (WSRW) and ID in relation to Western Sahara. Mattin and WSRW worked independently from Palestinian and Polisario representatives and they always stressed their autonomy as civil society organisations. On the other hand, not only has ID, as a professional consultancy (Seabrooke 2015), been supporting the Polisario Front in establishing contact and arranging meetings with a number of members of the EP, but its staff would also accompany the Polisario Front representatives in these meetings (Bouris and Fernández-Molina 2018: 315). The practices of the Mattin Group and WSRW were based on legal arguments and on an effort to

activate normative latency to regulate the EU's 'own practices'.⁴ One of the effects that this activation had was the shift of focus on some side effects, or 'low politics' (Fernández-Molina 2017) that Israel's and Morocco's occupation policies had, such as dubious economic activities and human rights violations. As such, they tried to take the discussion out of the realm of 'foreign policy' and focus on different aspects of human rights violations which would eventually contribute to the delegitimisation of Israel's and Morocco's occupations.

The success of these practices and their contagion were the catalysts behind the adoption of new practices and 'new ways of doing things' of the Palestinian and Sahrawi representatives who in the beginning were reluctant to new ideas and they preferred their 'old school' diplomatic practices. The result of this was a blurring of boundaries between the practices of diplomacy and activism (McConnell 2017: 140), which constitutes transformative diplomatic practices. Neither the Palestinian nor the Sahrawi representatives hesitate to describe their activities at the EP as 'lobbying' and for all of them the EP remains the 'easiest place to lobby' in Brussels. They spend significant amount of time at the EP, in meetings with different MEPs and among the routine aspects of their activities they 'walk the corridors, knock on the doors, speak to assistants, post leaflets through the doors' (Bouris and Fernández-Molina 2018: 316). What is interesting is that the Sahrawi representative gains access to the building of the EP by wearing a brown badge, which is the one reserved for lobbyists, and grants unimpeded access to all the EP buildings, public meetings, committee meetings and hearings. In other words, the 'price' of gaining access is the sacrifice of attributes of statehood and the willingness to accept treatment as any other non-state actor, which is a meaningful sign of hybridisation. Despite commonalities, there are also significant differences in the diplomatic practices of the Palestinian and Sahrawi representatives at the EP and these mainly come from a structural asymmetry in their legal-institutional frameworks of relations between them and the EU. For example, in the EP there is a 'Delegation for Relations with Palestine', while there is only an 'Intergroup on Western Sahara'. The main difference is that delegations are considered 'official bodies' which maintain relations with parliaments in non-EU countries, while 'intergroups' are formed by MEPs as a forum to exchange ideas but they do not have any formal character. Despite this, they still remain significant, as they provide for the opportunity to hold 'official meetings', which can help raise awareness (Bouris and Fernández-Molina 2018: 317).

Outside of the EP, and despite their willingness to adopt more hybrid diplomatic practices and use to their advantage the state of liminality in which they are, Palestinian and Sahrawi representatives still view themselves as 'diplomats'. As such they acknowledge the importance of more 'reproductive' diplomatic practices that mimic conventional state diplomacy. In the words of a senior Palestinian diplomat, 'If you look like a state, act like a state and behave like a state – then you are probably a state'.⁵ The main targets of these reproductive diplomatic practices have traditionally been the Council of the EU and the EU member states' permanent representations in Brussels. The main aim of 'targeting' the Council is twofold: on the one hand, the effort to 'provoke debate' and try to influence and shape as far as possible the discussions of the Committee of Permanent Representatives to the EU (COREPER) and on the other hand to attempt and obstruct a further deepening of relations between the EU, Israel and Morocco – lately with a particular focus on these economic and sectoral cooperation agreements which fail to define the explicit territorial scope and differentiate between Israel and Morocco 'proper' and the territories, which are considered occupied by international law. After the Palestinian upgrade at the UN, Palestinian diplomats pushed and persisted for their name to be changed to 'Palestine' and this was eventually accepted by COREPER. Sahrawis were also successful to some extent towards

the Council in 2011, when they tried to prevent the passing of the protocol regarding the extension of the EU–Morocco fisheries agreement, which eventually failed ‘by a whisker’ due to Germany’s last minute U–turn (Bouris and Fernández-Molina 2018: 318–319). The *demandeurs* of these meetings are always the Palestinian and Sahrawi representatives and in most cases these meetings take place in the official EU member states’ premises. Contrary to the findings elsewhere in the literature (McConnell 2017: 144), this does not raise any significant concerns about recognition. Meetings usually involve senior officials, and EU member states which are considered ‘friendly’ or ‘neutral’ are prioritised. This is based on an approach, on behalf of contested states’ representatives, to minimise ‘wasted efforts’ i.e. ‘don’t bother asking the French and the Spaniards’ about Western Sahara (Bouris and Fernández-Molina 2018: 319).

Except for the Council, Palestinian and Sahrawi diplomacy also targets the European External Action Service (EEAS) which is now seen as an institution which potentially has the power to challenge EU member states’ national diplomacies not necessarily in a material sense but at a symbolic level (Adler-Nissen and Pouliot 2014). Contested state diplomatic practices towards EEAS are similar to the ones underpinning the interactions with the Council and EU member states’ permanent representations. While there are no concerns about recognition which prevent EEAS officials from receiving contested states’ representatives, this is mainly due to the hybridity and liminality guiding their being – the Polisario Front’s representative, for example, would be ‘received as an individual, just like anyone can be received at EEAS’ (Bouris and Fernández-Molina 2018: 319). Despite this, the level of ‘recognition’ has important reverberations for the European diplomats who try to avoid any action which might be considered a social form of recognition. The issue is much more sensitive in the case of the Sahrawis; the Palestinians enjoy a higher degree of ‘titular’ recognition. In April 2016, for example, the SADR minister of foreign affairs – a very ‘sensitive’ post for interaction with any contested state (Ker-Lindsay 2015: 278) – was visiting Brussels but was treated with ‘radio silence’ by several EU institutions and did not manage to secure a meeting with the EU high representative Federica Mogherini (Hooper 2016; Bouris and Fernández-Molina 2018: 320). Contrary to this, such an avoidance has never happened with the Palestinian president, who can always guarantee unimpeded access to the current high representative and her team.

Conclusions

This chapter has introduced the concepts of *transnational recognition* and *contested state diplomatic practices*. The former provides a non-legal broadening of, or escape route from, the conventional understanding of (international) recognition in world politics, which is necessary in order to account for recognition dynamics cutting across state borders and involving non-state actors – or non-fully-state state actors such as contested states. The more specific notion of contested state diplomatic practices places the focus on the agency and performative dimension of the struggle for recognition pursued by these contested states in the diplomatic field. In this respect, the chapter has demonstrated that contested state diplomacy has benefited from a hybridisation of practices which has been made possible by their liminal actorness. As such, the ambivalence of being ‘betwixt and between’ (Turner 1969: 95) and ‘neither the one nor the other’ (Bhabha 1994: 37) applies to both what contested states are (liminal international actors) and also what they do (hybrid diplomatic practices). Adopting a practice approach has helped us explore another important aspect of international recognition, namely social recognition. Such an

approach allows us to scratch below the surface of the conventional legal view of international state recognition and to capture more unstructured, social and relational forms of recognition through a 'practice upgrade'. Existing definitions and approaches to date insufficiently ascribe agency to contested states and also fail to explain what happens in-between these processes. While diplomacy and recognition play a significant role in world politics, a practice approach allows us to delve into the cracks of the current international system and analyse the 'black box' of contested states and especially *how* their representatives practice their everyday diplomacy.

An interesting implication of our empirical findings is that, in the performance of contested states, struggles for social-relational transnational recognition and international (state) recognition in the traditional sense are not mutually exclusive but usually go hand in hand with each other. This mixture is reflected in the coexistence of transformative and reproductive diplomatic practices in the everyday interaction between Palestinian and Sahrawi representatives and EU institutions in Brussels. Unapologetic resort to practices akin to non-state lobbying in the EP does not preclude the mimetic desire to 'look like a state, act like a state and behave like a state' when dealing with other EU institutions such as the Council, the EU member states' permanent representations and the EEAS. Such a paradox suggests that a turn to transnational recognition, as such, would not decrease the likelihood for overcoming the international contestation surrounding the recognition of statehood and the many conflicts arising from this in world politics.

By focusing on transnational recognition, contested states diplomatic practices and the everyday interaction between Palestinian and Sahrawi representatives towards EU institutions, this chapter seeks to open up new research horizons which, building on the cross-fertilisation of the study of diplomacy with practice theory (Pouliot and Cornut 2015), may shift the analytical focus from sovereign to contested states. Such an approach ascribes agency to contested states cracking into the micro-politics of the 'state' and its making, which is not seen as a static object/process but as the result of everyday practices, performances and processes always in motion.

Notes

- 1 Interview with EEAS official, 12 September 2016, Brussels.
- 2 Interview with Palestinian official, 31 August 2016, Brussels.
- 3 Interview with Sahrawi official/diplomat, 7 October 2016, Brussels, and interview with advisor to Polisario Front Representation to EU, 31 August 2016, Brussels.
- 4 Skype Interview with Matting Group Representative, 13 June 2018.
- 5 Interview with Senior Palestinian Diplomat, 22 May 2017, The Hague.

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PART IV

Case studies of contemporary state recognition

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PALESTINE

Yaser Alashqar

Introduction

This chapter focuses on recognition and statehood politics in the context of conflict and national liberation struggles. It explores Palestine's struggle for representation, membership and statehood recognition at the international level. Palestinian efforts to gain international representation and recognition started in the 1970s and reached their peak in 2012 when the United Nations (UN) General Assembly voted to admit Palestine into the world organization as a non-member observer state. As such, the main argument in this chapter is that this critical and recent development at the UN level has presented major implications in the area of law and politics for the Palestine quest for recognition and statehood. As will be analysed, these implications include legalizing the statehood struggle, promoting accountability and redress, supporting conflict resolution, changing power dynamics, evolving the territorial rights framework and increasing the involvement of European national parliaments in Palestine's continuing struggle for recognition and statehood.

Palestine's application to become a member at the UN attracted both international support and opposition. As will be discussed later, Palestinian leaders saw it as a strategy to advance Palestine's membership and statehood agenda through the UN given the failed negotiations with Israel and the continuation of the Israeli occupation. International support, on the other hand, has been framed in the context of justice, equality, right to self-determination and the two-state solution to the Israeli–Palestinian conflict. However, the US, Israel and their allies opposed the Palestinian attempt to seek membership at the UN and framed their opposition in the context of violations of the Israeli–Palestinian peace agreements, unilateralism and delegitimization of Israel.

To unpack this historical context and examine the recent developments, including the implications of accepting Palestine as a non-member observer state in the UN, this chapter is divided into three sections. First, an overview of Palestine's struggle for representation and recognition from the 1970s to 2011 is presented and discussed. The Oslo peace process in the 1990s and associated developments at the domestic and international level in the context of Palestinian statebuilding are also examined in this section. Second, the events of 2011 and 2012 concerning the Palestinian strategy, positions and applications to gain membership of the UN and statehood recognition are addressed, including the importance of UN

membership, the arguments of opposing and supporting states, and methods and forms of statehood recognition. The critiques of the statehood discourse in the Palestinian case are also examined in this section. Third, the legal and political implications of admitting Palestine to the UN as a non-member state are analysed. Finally, the conclusion provides a summary of the main arguments and the analysis presented in the chapter. The following section presents an overview of Palestine's struggle for representation and recognition from the 1970s to 2011.

The struggle for representation and recognition

The shared trauma of the Nakba ("Catastrophe"), which is the word that Palestinians use to describe the loss of their land and the creation of Israel in 1948, brought the Palestinians closer together in terms of their national identity and collective consciousness, despite the fact that they were physically dispersed all over the Middle East and beyond the region (Khalidi 1997). It was this collective identity and consciousness as an oppressed people with a national and just cause that led to the re-emergence of Palestinian nationalism in the mid-1960s. These developments put the Palestinians back on the political map of the Middle East and beyond. The reformation of the national movement had been enhanced by a new middle-class leadership in exile, which organized political structures like Fatah and the Palestine Liberation Organization (PLO) and excluded the elitist leaders who had failed during British rule of Palestine and the Nakba (Khalidi 1997). The PLO represented different nationalist factions and Fatah became the largest and leading faction in this political structure. In the context of armed struggle and nationalist politics, the PLO–Fatah became the major Palestinian political force in exile from the mid-1960s onwards and it launched guerrilla and cross-border attacks against Israeli targets. The PLO–Fatah also attracted a vast popular support and allegiance from the Palestinian diaspora and refugees inside and outside Palestine.

In the early 1970s, the Arab League officially recognized the PLO as the legitimate and sole representative of the Palestinian people. Building on its affirmation of the "inalienable rights of the people of Palestine" in the late 1960s (United Nations General Assembly 1969), the UN General Assembly moved in the same direction in October 1974. It recognized the PLO as the legitimate representative of the Palestinian people and their national aspirations by adopting Resolution 3210 (United Nations General Assembly 1974a). Prior to this regional and international recognition of the PLO in the early 1970s, Palestinian representation was largely absent at the international level. The issue of who represented the Palestinian people was also a part of internal disputes among some key Arab states which wanted to support or claim Palestinian representation for their own political interests. It was the recognition by the Arab League and the UN of the PLO as the legitimate representative of the Palestinian people that put an end to the contested battle for Palestinian representation and settled this issue regionally and internationally (Barnidge 2016).

As a result, the UN General Assembly adopted a further resolution (3237) in November 1974 which invited the PLO to participate as an observer in "the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations" (United Nations General Assembly 1974b). The observer status is divided into five categories: (i) permanent observer missions of non-member states; (ii) observer status for national liberation movements; (iii) observer status for regional organizations and groups of states; (iv) observer status for specialized agencies; and (v) observer status for non-governmental organizations (NGOs). Therefore, the PLO gained observer status in its

capacity as a national liberation movement (Eden 2013). This initiated a critical phase in which the Palestine's cause as a national liberation and self-determination issue began to receive international recognition. It also facilitated access for the PLO to the UN as a means of establishing Palestinian national identity and advancing the Palestinian aspirations for recognition and the right to self-determination at the international level. For example, on 23 September 1982, in a letter to a private counsellor-at-law, the UN Office of Legal Affairs stated that a review of the procedural practice of the UN shows that:

The Palestine Liberation Organization now has a unique status in the United Nations with extensive and continuing rights of participation. Even outside the United Nations framework, the overwhelming majority of states formally recognize the PLO as the representative of the Palestinian people and have established direct links with it on a bilateral basis, sometimes even granting it full diplomatic status.

(Mission of the State of Palestine to the UN 2013)

Moreover, the formation of the Palestinian legal personality in the international arena represented one of the major consequences following the settlement of the battle for Palestinian representation and the increasing recognition of the PLO at the UN and external level. There are some other historical developments which also strengthened the Palestinian legal personality in the international arena and supported the right to self-determination for the Palestinians. These include the emergence of the PLO on the geopolitical stage in the Middle East as a strong and independent actor following the Arab–Israeli war in 1967 and the Israeli occupation of Gaza and the West Bank including East Jerusalem. These areas became known as the occupied Palestinian territories. Another major factor in the formation of the Palestinian legal personality and the achievement of international recognition is the negotiations between Egypt and Israel, which led to the Camp David Accords in 1979. The major parties, including Israel and the US, acknowledged the centrality of the Palestinian issue in the conflict resolution process in the region (Barnidge 2016).

In addition, the European Economic Community, forerunner of the European Union, accepted the role of the PLO as a key party in future negotiations and recognized the legitimate rights of the Palestinian people through the adoption of the Venice Declaration in 1980 (European Economic Community 1980). This position formed the basis of the future European Union policy on conflict resolution in the Israeli–Palestinian context. Finally, capitalizing on the first Palestinian Intifada (uprising) in the occupied territories against Israeli occupation and seeking to advance the statehood agenda, the PLO in exile presented the Declaration of Independence in November 1988. It declared the establishment of an independent Palestinian state in Gaza and the West Bank with a capital in East Jerusalem. Over 100 countries have recognized the state of Palestine based on the Declaration of Independence in 1988 (Kattan 2011). In political terms, the acceptance of building Palestinian statehood in the occupied territories of Gaza and the West Bank represented an informal recognition of both the existence of Israel by the PLO and the two-state formula as a possible resolution to the Israeli–Palestinian conflict.

Despite US–Israeli opposition, the UN General Assembly (1988) adopted by a majority vote Resolution 43/177 in December 1988. This resolution recalled the special responsibility of the UN to find a just solution to the question of Palestine and simultaneously acknowledged the PLO's proclamation of the state of Palestine. Additionally, in accordance with the resolution, the UN decided to change the designation of the PLO within the UN system and replace it with the name “Palestine” without any change to the PLO observer

status achieved since 1974 (United Nations General Assembly 1988). In effect, the UN acknowledgement of the Declaration of Independence and the state of Palestine in 1988 consolidated the Palestinian legal personality and its legitimate presence within the international states system. It is all of these critical developments throughout the 1970s and 1980s that influenced both the evolution of Palestinian representation and the emergence of the Palestinian legal responsibility with international recognition. In examining further the Palestinian struggle for representation and recognition, the following section examines the internal context at the Israeli–Palestinian level including the Oslo peace process in the 1990s and the developments prior to the Palestine’s quest for the UN membership and statehood recognition in 2011 and 2012.

Oslo peace process and after

The period of the 1990s saw the signing of the Oslo Agreement between Israel and the PLO. Israel recognized the PLO as the legitimate representative of Palestinian people and accepted the creation of the Palestinian Authority in Gaza and the West Bank under the PLO leadership within a peace process framework. The PLO, in return, renounced the use of violence and recognized the right of Israel to exist in peace. The official launch and signing ceremony of the Oslo process took place at the White House in September 1993. Optimism increased and the majority of the public in Israel and Palestine declared their support for the peace process, as Jane Corbin, who provided a detailed study of the Oslo negotiations, points out (Corbin 1994). However, the central issues in the Israeli–Palestinian conflict such as security, borders, Jerusalem, refugees and Palestinian statehood were postponed for future negotiations. The Oslo peace process witnessed the complete and full formation of the Palestinian legal personality in the international political and legal arena. As Robert Barnidge points out, by September 1993, the international legal personality of the Palestinian people “had unquestionably crystallized, and a dispute settlement process rooted in bilateral negotiations has become entrenched” (Barnidge 2016).

Reflecting further this unquestionable political identity and the establishment of the Palestinian Authority as a self-rule government in Gaza and the West Bank through the Oslo peace process, the UN General Assembly adopted Resolution 52/250 in July 1998 regarding the enhancement of Palestine’s participation in the work of the United Nations (United Nations General Assembly 1998). Paul Eden (2013) comments that the UN allocated rights and privileges to Palestine that had previously been designated for member states. As Eden (2013) illustrates further, the UN resolution also entitled Palestine to be seated immediately after non-member states and ahead of all the other observers, and their allocation of seats was increased to six from two. According to the Mission of the State of Palestine at the UN, the 1998 resolution “upgraded Palestine’s representation at the UN to a unique and unprecedented level, somewhere in between the other observers, on the one hand, and Member States on the other” (Mission of the State of Palestine to the UN 2013).

However, despite this significant upgrade the UN level, the period of the 1990s did not lead to the creation of an independent Palestinian state through direct negotiations between the Palestinian Authority and Israel. Commenting on the futile negotiations during the Oslo process, Graham Usher elaborates:

Israeli negotiators continually focused on the nature of the specifics of Palestinian self-government – such as the nature of an autonomous authority, its structure and legislative power – while avoiding any discussion of substantive issues such as the

applicability of UN Security Council Resolution 242 to the process [which demanded Israeli withdrawal from the occupied Palestinian territories] or the idea of transition from the interim period of Palestinian self-government to a final status settlement [leading to Palestinian statehood].

(Usher 1997)

In this context, as Robert Rothstein further points out, the failure of the peace process to address these central issues by postponing them to future negotiations “has created serious defects in the state-building process and deepened internal Palestinian divisions” (Rothstein 1999). Moreover, as Sara Roy explains in *Failing Peace*, the Oslo peace process changed the political, economic and physical landscape of the Palestinian territories and increased rather than alleviated Palestinian dispossession, deprivation and repression. Therefore, as Roy concludes, not only did the Oslo arrangements preclude a just political settlement to the Israeli–Palestinian conflict but they also “formalized and institutionalized the occupation” in Gaza and the West Bank (Roy 2007).

The year 2000 witnessed the collapse of the Oslo peace process and the Palestinian hopes to achieve an end to Israeli occupation and establish a Palestinian state eroded in the following years. Internal divisions and polarization in Gaza and the West Bank have also increased since 2007 as a result of the power struggle between the major factions, Hamas and Fatah. As a result, Palestinian political representation has been split. Hamas has its own government structures in Gaza and Fatah–PLO is in charge of the Palestinian Authority government in the West Bank. Hamas has built a network of support based on community engagement, armed resistance against Israel and sustained critiques of Fatah and their failure to achieve Palestinian rights and national independence through negotiations with Israel. This difficult internal reality has been complicated further by the launch of Israeli major military assaults on Gaza since 2009 and the subsequent massive level of destruction and civilian victims (Finkelstein 2018). At the internal Israeli political level, the challenges became significant. Israeli right-wing parties have increased their political power in recent years and their opposition to the creation of Palestinian statehood and ending Israeli occupation is rooted in Zionist politics, religious ideology and ethnic nationalism. Their radical transformation of the Israeli sociopolitical system has been ongoing since 2009 (Benn 2016).

Seeking to maintain the statehood project and their political survival in such challenging conditions, internally and at the Israeli–Palestinian level, the Palestinian Authority prime minister, Salam Fayyad, declared a new government plan in 2009. The goal of this plan focused on institution-building and the establishment of Palestinian statehood in two years. The overall strategic and political purpose, as Fayyad pointed out, was to “build up the institutions and infrastructure of the Palestinian state-to-be” (Fayyad 2009). The institutional achievements of Fayyad’s plan created positive reactions at the international level. The Quartet (the European Union, the UN, the United States and Russia) for the Middle East Peace Process endorsed the new statebuilding initiative and the stated timeframe for the establishment of a Palestinian state (Elgindy 2011). In addition, reaffirming similar conclusions by the World Bank, the Office of the UN Special Coordinator for the Middle East Peace Process presented in 2011 a major report which contained key findings on Palestinian statebuilding efforts. The report concluded that the Palestinian governmental functions in key areas are “sufficient for a functioning government of a state” (United Nations 2011b).

The same report also noted that Israel occupation and associated policies of settlement expansions, checkpoints, military and economic control, cutting off Gaza from the West Bank and East Jerusalem from the Palestinian territories, and the severe restrictions on the

movement of people and goods have all represented major obstacles towards the realization of Palestinian statehood and independence. Furthermore, Israel has created a complex regime of control and transformed the Palestinian occupied territories into “probably the most monitored, controlled and militarized place on earth”, as Israeli anthropologist and political activist Jeff Halper observes (Halper 2015). It is within this overall context of political impasse, permanent occupation, militarization, systematic control, internal polarization, a deep sense of despair and futile negotiations that the Palestinian Authority sought to advance the statehood project and gain UN membership in 2011 and 2012. This prompted some observers to describe the UN initiative as an “alternative peace strategy” (Usher 2011). Other observers have believed that the Palestinian Authority leadership sought to strengthen their negotiation status (Elgindy 2011). The following section examines the Palestinian attempt to seek membership in the UN in 2011 and 2012 including strategic objectives, the importance of UN membership, arguments supporting and opposing Palestine’s membership, methods and forms of statehood recognition and critiques of the statehood discourse.

The UN applications and the quest for membership and statehood recognition

In September 2011, Mahmoud Abbas, in his capacity as the Palestinian president and chairman of the Executive Committee of the PLO, submitted an application to the UN secretary-general requesting UN membership on behalf of the State of Palestine. The application and accompanying explanatory notes framed the question of seeking Palestinian membership at the UN upon the UN resolutions and “Palestinian people’s natural, legal and historic rights” (United Nations 2011a). The application made a clear reference to UN Resolution 181 in November 1947, which proposed the partition of Palestine into a Jewish state and an Arab state as a method of conflict resolution in the region, and Resolution 43/177 in December 1988 concerning the Declaration of Independence of the State of Palestine in November 1988 and the UN formal acknowledgement of the Declaration. In addition, the application contained a commitment to a negotiated settlement with Israel on the basis of the internationally agreed vision of “two-States living side by side in peace and security” (United Nations 2011a).

In particular, the Palestinian official position on the UN admission and recognition of Palestine was informed by a number of legal and political arguments, including: (i) the UN partition plan and the international call for the creation of a Jewish and Arab Palestinian state in Palestine since 1947; (ii) the various and subsequent UN resolutions affirming the right of the Palestinian people to self-determination and statehood; (iii) the consistency of Palestine’s recognition with the Oslo peace agreement and the Declaration of Principles, which acknowledged the mutual political rights of both sides; (iv) recognition of Palestine is a legal and non-violent action that supports the application of international law to the occupied Palestinian territories; (v) the enhancement of the possibility of reaching a negotiated settlement through recognition and UN membership; (vi) the protection of the two-state solution by affirming Palestine’s right to statehood and independence, and enhancing international responsibility towards the Palestinian inalienable rights to political, social, cultural and economic development in their own state; and finally (vii) Palestine’s fulfilment of the statehood criteria including its capacity to enter into relations with other states and the existence of a permanent Palestinian population and a defined Palestinian territory on the basis of the 1967 border (PLO Negotiations Office 2011: 2–4). The Palestinian arguments were grounded in the area of law and politics and, as will be discussed later, they gained

international acceptance and contributed to the successful admission of Palestine to the UN as a non-member observer state.

The UN Charter indicates clearly a number of conditions to join the organization. Article 4 states that membership in the UN is “open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations” (United Nations 1945). UN membership presents certain privileges and benefits at the legal and political level. First, admission to the UN means that state members belong to the most prominent intergovernmental organization in the world. Second, UN member states are also parties to the Statute of the International Court of Justice and have access to international institutions and mechanisms of justice. Third, membership provides states with voting rights at the UN and this includes voting on General Assembly draft resolutions. Fourth, membership allows states to become a member of the principal organs of the UN such as the Economic and Social Council and the Security Council (Al-Zoughbi 2013). However, the UN does not recognize states. It admits states to membership based upon recommendations of the Security Council and the endorsement of the General Assembly. While the admission of new member states to the UN remains an area of competence and responsibility shared between the Security Council and the General Assembly, the decision about the admission of new members and their fulfilment of the UN criteria mentioned in Article 4 has become subjective and influenced by political rather than legal considerations (Al-Zoughbi 2013).

Aware that admission to the UN is open to states, the Palestinians advanced an approach in which admission and membership can reinforce their international legal personality and entitlement to statehood (Burgis-Kasthala 2014). Another major goal was concerned with internationalizing the conflict with Israel and securing access to international organizations. Not only did the Palestinian officials see the question of membership as a strategy to advance recognition and Palestinian statehood at the global level but also identified it as a major route to accountability. According to the Palestinian leader, Mahmoud Abbas, the admission of Palestine to the UN would pave the way for the “internationalization of the conflict” and the pursuit of claims “against Israel at the United Nations, human rights treaty bodies and the International Court of Justice” (Abbas 2011).

Israel rejected the Palestinian application at the UN and said it “would violate existing bilateral Palestinian-Israeli peace agreements” (Mission of Israel to the UN 2011). In addition, Israeli prime minister Benjamin Netanyahu declared in his speech to the UN in 2011 that Israeli security needs have to be addressed in a peace agreement before any step towards Palestinian statehood is taken (Netanyahu 2011). Amos Yadlin and Kobi Michael, of the Israeli Institute for National Security Studies, described the Palestinian UN initiative as an effort to “to blacken Israel in international institutions, undermine its legitimacy, and deny the historic national connection of the Jewish people to the Land of Israel” (Yadlin and Michael 2017). Similarly, the US administration under Barack Obama showed a strong opposition from the outset to the Palestinian strategy at the UN. It framed this opposing position in the context of delegitimization and isolation of Israel at the UN. In his address on the US Middle East policy in May 2011, Obama warned the Palestinians that “efforts to delegitimize Israel will end in failure” (Obama 2011). Jonathan Schanzer points out that the US regarded the Palestinian UN strategy as a strong rejection of both the Oslo Accords and the US role as the central broker for diplomacy in the Israeli–Palestinian context (Schanzer 2013). Therefore, the Obama administration and Congress adopted tactics which aimed at countering Palestine’s initiative for membership and statehood recognition. The US Congress, for example, passed a resolution in July 2011 threatening to block the \$500 million in

annual US aid to the Palestinian Authority if the UN membership was pursued (Usher 2011). In addition, following the admission of Palestine into the United Nations Educational, Scientific and Cultural Organization (UNESCO) as a full member in October 2011, the US withdrew approximately \$60 million in financial support for the organization (McMahon and Masters 2012). Therefore, as Josh Ruebner points out, the Obama administration mobilized the US resources to defeat the PLO's bid for statehood recognition and full membership in the UN. The deeper goal, according to Ruebner, was connected with ensuring continued protection of Israeli interests and guaranteeing impunity for Israel at the international level as a strategic ally (Ruebner 2016).

The failure of this attempt in 2011 as a result of the US opposition and the threat of using its veto power at the Security Council level led the Palestinians to move the battle for membership and statehood recognition to the General Assembly. In November 2012, the Palestinian application at the UN General Assembly demonstrated success and Palestine was granted the status of a non-member observer state with a majority vote (United Nations 2012). Although this status represents partial membership within the UN system and does not entail the creation of statehood, the key significance is the word "state" and it has led some observers to consider the admission of Palestine by the UN is *de facto* recognition of Palestinian statehood (Charbonneau and Nichols 2012). The status of a non-member state also advances Palestine's struggle for recognition and access by qualifying it to join a range of international agencies and treaties. As will be discussed later in this chapter, this carries special significance.

The key reasons for this successful result at the UN General Assembly included the lack of requirement for approval from the UN Security Council, the absence of a US veto and the fact that the Palestinian issue enjoys a majority support at the UN General Assembly level (Berzak 2013). On this occasion, 138 out of 193 UN member states supported Palestinian statehood and nine voted against, including Canada, the US and Israel for the reasons outlined previously. The US representative to the UN, Susan Rice, described the UN vote as "unfortunate and counterproductive" as well as leading to "further obstacles in the path of peace". In the same setting, Canada also referred to the Palestinian initiative as a "unilateral step" and declared its opposition prior to the UN vote (United Nations 2012). Israeli prime minister Netanyahu warned that any UN vote is "meaningless" and his defence minister, Ehud Barak, described Palestine-related events at the UN as "an impending diplomatic tsunami" (Elgindy 2011).

The supporting states included, for example, Turkey, China, Russia, Norway and France. Expressing the position of Turkey, Turkish foreign minister Ahmet Davutoğlu stated at the UN that establishing a just, peaceful and harmonious future means to "stand behind the Palestinian bid to become a non-member observer state". The representative of China declared that his country supported the admission of Palestine to the UN and regarded it as "another positive step in Palestine's progress towards statehood". Russia described the UN vote as a significant contribution towards "reinstating historic equality". The Norwegian representative stated that Norway had voted in favour of the resolution because the "Palestinian people had the legitimate right to self-determination". The representative of France explained that, by voting to recognize Palestine as a non-member observer state, "France had voted in favour of a two-State solution, Israel and Palestine, living side by side in peace and security, within secure, internationally recognized borders" (United Nations 2012). Commenting on European positions, Valentina Azarov points out that the support for the UN resolution in November 2012 by European states was a "strong indication of the fact that Israel's legal and political narrative is becoming increasingly

unconvincing” (Azarov 2013). In fact, UN membership for Palestine meant recognition of statehood, historical injustices, and the right to peace, freedom and development for the future. Expressing the meaning of statehood at the Palestinian level, Palestinian historian Walid Khalidi illustrates eloquently:

[Palestinian independent and sovereign state] is likely to effect a psychological breakthrough with the Palestinians under occupation and in the Diaspora. It would lead them out of the political limbo in which they have lingered since 1948. It would end their anonymous ghost-like existence as a non-people. It would terminate their dependence on the mercy, charity or tolerance of other parties, whether Arab, Israeli, or international. It would be a point of reference, a national anchor-age, a center of hope and achievement.

(Khalidi 1978)

However, in addition to employing a wide range of policies and measures to preclude state-building in Gaza and the West Bank as discussed previously, Israel responded to the recognition of Palestinian statehood at the UN by imposing punishment measures in the Palestinian territories. These included blocking vital sources of funding by withholding the transfer of tax revenue collected on behalf of the Palestinian Authority, severing contacts with Palestinian officials and expanding Israeli settlements in the occupied Palestinian territories. Referring to this punishment strategy, Pnina Sharvit Baruch pointed out not only that such actions could cause harm to the Palestinian population in Gaza and the West Bank but that they would also harm Israel’s interests at the international and domestic level (Baruch 2012).

The Palestinian Authority, on the other hand, has employed practical methods and taken significant steps to promote the Palestinian quest for statehood and utilize the UN recognition of Palestine as a non-member observer state. In April 2014, President Abbas, for example, signed Palestine’s accession to 15 international conventions including the Fourth Geneva Conventions of 1949, the Vienna Convention on Diplomatic and Consular Relations and a number of other human rights conventions (Palestine Liberation Organization 2014). Palestine also continues to engage in international relations and has established active diplomatic relations with over 120 countries and maintained diplomatic missions in these countries (Erikat 2013). Another method for asserting Palestinian statehood and achieving recognition is related to international organizations. Palestine had previously joined and become a member of regional and international bodies including the Non-Aligned Movement, the G77, the League of Arab States, the Organisation of Islamic Cooperation and the Economic and Social Commission for Western Asia (Erikat 2013). Following admission to UN membership in 2012, Palestine enhanced its engagement with international organizations and joined, for example, the International Criminal Police Organization in 2017 (Interpol 2017). It has also acceded to the UN Conference on Trade and Development, the UN Industrial Development Organization and the Organization for the Prohibition of Chemical Weapons in 2018 (United Nations 2018). Membership in international organizations has been employed as a significant method to support both Palestine’s statehood recognition and institutional presence in the regional and global arena.

In addition, most states which recognized Palestine have demonstrated their recognition through a number of forms including the official acknowledgement of the Palestinian Declaration of Independence in 1988, providing public support for Palestine’s membership and admission to the UN in 2012 and entering into diplomatic relations with the state of Palestine. In addition, many European nations upgraded the status of Palestinian diplomatic

missions throughout 2011, showing further support and recognition of Palestinian statehood. Examples of these countries are Cyprus, Greece, Ireland, the United Kingdom, Spain and Denmark (Schanzer 2013). In the previous year, July 2010, French foreign minister Bernard Kouchner announced that his government decided to upgrade the status of the General Delegation of Palestine in France to the “Palestinian Mission” with a resident ambassador as the head of the mission (United Nations 2010). In October 2014, Sweden also made a formal declaration in which it officially recognized the state of Palestine (Government Offices of Sweden 2014). Nonetheless, having established recognition and partial membership at the UN as a non-member state, one of the critical questions that emerged in this context is concerning the credibility and legitimacy of the Palestinian Authority’s statehood discourse. This critique is examined in the next section.

Critique of statehood discourse

Critical perspectives have emerged in response to the quest of seeking the official admission of Palestine and statehood recognition at the UN. There was a strong concern about the status of Palestinian refugees in the statehood discourse among the refugee population inside Palestine and in the diaspora. Therefore, some Palestinian academics and activists demanded clarity from the Palestinian Authority. As a result, the Palestinian leader, Abbas, had to attach a covering letter to the UN application confirming the status of the PLO as the legitimate representative of the Palestinian people and specifying clearly in an amendment that the Palestinian application to the UN was consistent with the rights of Palestine refugees. This confusion and the lack of strong public support developed in response to the Palestinian Authority’s failure to consult with the Palestinian refugees and ground the UN initiative in a genuine national consensus (Usher 2011).

At the internal political level, Hamas also initially opposed the UN bid. Although it cited Palestinian rights and the lack of consultations, as the reasons for the opposition, the initial position of Hamas reflected their power struggle with the Fatah–PLO-led Palestinian Authority in the West Bank and political distrust more than their opposition to the statehood discourse in principle. Since 2006, Hamas has declared publicly its acceptance of the establishment of a Palestinian state on the 1967 borders in Gaza and the West Bank with East Jerusalem as a capital. Therefore, as the international developments unfolded in relation to statehood recognition and potential benefits for Palestinians in their battle against Israeli domination, the position of Hamas shifted in favour. “We support any political move in the international arena that highlights Israel’s crimes and advances the rights of our Palestinian people,” a Hamas spokesperson stated (Strickland 2014).

Ali Abunimah, a writer and commentator on Palestinian affairs, strongly criticized the UN initiative. He considered it to be a way for Palestinian official leadership of the Palestinian Authority to improve its diminishing standing and provide further concessions to Israel in future negotiations (Abunimah 2011). Sari Nusseibeh, a Palestinian political activist and academic in Jerusalem, also voiced scepticism about the Palestinian statehood discourse. In *What Is a Palestinian State Worth*, Nusseibeh (2011) stresses that there is no “absolute need” for Palestinians to have an independent and separate state. Instead, he explains further, a more credible and effective alternative to Israeli occupation and hegemony over Palestinian territories is to actively seek a binational and single state based on citizenship and civil rights approaches. Jonathan Schanzer points out that the statehood approach had critical flaws including failed Palestinian efforts to statebuilding and the Western interest in promoting Abbas and the PLO to counter the growing influence of Hamas in Gaza. Moreover,

Schanzer suggests that the Palestinian manoeuvre at the UN lacked vision and critical reform and it essentially did not represent a viable strategy for the creation of a functioning democratic state (Schanzer 2013).

Some observers also disputed the validity of the UN recognition of Palestine based on the statehood criteria in international law. According to the Montevideo Convention, these criteria and requirements are: (i) a permanent population; (ii) a defined territory; (iii) an effective government; and (iv) the capacity to enter into international relations with other states including the ability to fulfil obligations under international treaties (Grant 1999). The critique in the Palestinian case is related to Israeli rule of Palestinian territories and the political divisions between Hamas and Fatah including the existence of two separate Palestinian administrations in Gaza and the West Bank. Accordingly, it is suggested that UN statehood recognition is given to an “imaginary and aspirational” state which does not exist in reality (Rosen 2011).

However, as John Quigley (2010) observes, this critique is not valid for a number of reasons. Firstly, the requirement for government control of territory in the Palestinian situation should take into account that Israel has not claimed sovereignty over occupied Palestinian territories. Secondly, the Hamas–Fatah conflict raises only questions about the legitimacy of governing institutions under Palestinian law. Third, as Quigley (2010) illustrates further, statehood is not invalidated because of the internal governance split. Both Korea and Vietnam have in their history experienced a split in administration, but they remained states in effect. In this context, the admission of Palestine as an observer state at the UN level has had significant implications for Palestine’s struggle for recognition and statehood in the key area of law and politics. These are examined below.

Implications of membership and statehood recognition: legal and political aspects

In legal terms, there has been an evolving interest and increasing awareness at the internal Palestinian level about the importance of continuing with the legal struggle in the international arena. The Palestinian issue has represented continuity and discontinuity in its dynamic relationship with politics and law. Throughout the 1970s and 1980s the Palestinians showed a strong interest in the UN legal system as a strategy to advance representation and the right to self-determination for Palestinians. However, the period of the 1990s witnessed a shift from law to politics and a changing interest in political engagement with Israel, the US and the international community. Therefore, while the Oslo process in the 1990s was a turn away from law, the new Palestinian strategy to advance the statehood struggle through the UN recognition and membership in 2011 and 2012 represented a major turn and return to international law following the failed politics of Oslo (Burgis-Kasthala 2014). According to Palestinian leader Abbas, the quest for Palestine’s membership and recognition at the UN would play a strong role in promoting the Palestinian issue and the conflict with Israel as a “legal matter, not only a political one” (Abbas 2011). Therefore, in persisting with the international law discourse, Palestinian lawyers, activists and intellectuals are certainly “contributing to a growing legalization of political debate within Palestine” (Burgis-Kasthala 2014).

Another practical and significant implication in this legal context is connected to international organizations and accountability. By achieving the status of a state, Palestine has been able to gain access in international institutions including the International Court of Justice (ICJ) and the International Criminal Court (ICC). This, for example, has allowed

the Palestinians to seek accountability for Israeli illegal actions in Gaza and the West Bank and lodge charges of war crimes against Israel at the ICC (International Criminal Court 2015). The ICJ has previously shown an interest in the question of Palestine and issued in 2004 an advisory ruling about the illegality of the wall built by Israel on Palestinian land in the West Bank. Subsequently, it reaffirmed the right of Palestinians to reparations and self-determination in the occupied territories (International Court of Justice 2004). In addition, given the admission of Palestine to the UN and statehood recognition, stronger possibilities rest with the evolving involvement of the ICC in the Palestinian issue. The role of international institutions is increasingly being recognized in relation to upholding international law in states which are experiencing conflict and human rights abuses. Moreover, according to Valentina Azarov, bringing the conflict into the ICC and providing victims in Palestine with direct recourse to justice could deter Israel's practices and facilitate action by international governments and organizations to protect Palestinian human rights. Azarov (2013: 252) elaborates further:

The absence of access to local mechanisms for justice and accountability for Palestinian victims of international law and human rights violations has resulted in the creation of a culture of impunity and contempt towards the right to human dignity of the Palestinian people. While the Israeli government and its institutional practice were, at least for some time, beyond reproach, Palestine's recent engagements through international law [i.e. the UN membership and applications to the ICC] have held considerable sway over this long-standing dynamic.

In this context of seeking responsibility and ending impunity, international legal institutions provide new venues for reinforcing international justice and confronting Israel in a legal field which could result in positive and binding rulings (Berzak 2013). Finally, a key implication for the UN recognition of Palestinian statehood in the area of law is promoting legal alternatives to conflict resolution in the Israeli–Palestinian context. The role of the UN and its organs in the international system is vital to the settlement of political and national conflicts through informal and formal methods. These include mediation, peacekeeping missions, conflict settlement mechanisms and the adoption of Security Council and General Assembly resolutions which may provide directions and guidelines to conflict resolution (Väyrynen 1985). This applies to the Palestinian issue, where the UN resolutions since 1947 have provided guidance on the question of Palestine including partition as a basis for resolution, right of return, self-determination for Palestinians and, more recently, statehood recognition. With the growing awareness of the importance of legal discourses in international law and the return to law in the Palestinian situation, the role of the UN and its associated institutions are expected to acquire a stronger role in facilitating conflict resolution in the Israeli–Palestinian context.

In political terms, one of the key implications for Palestinian membership and statehood recognition at the UN is related to altering power relations between Israel and Palestine. Transforming the power imbalance in the political and diplomatic engagement with Israel represented a critical objective for seeking the UN membership. President Abbas stated in 2011 that Palestine, following UN admission, “would be negotiating from the position of one United Nations member whose territory is militarily occupied by another” (Abbas 2011). Since the Oslo Accords, the PLO has acknowledged officially the right of Israel to live in peace and security, but Israel has not reciprocated and recognized Palestinian statehood through formal negotiations. However, following the UN membership, the transformation of

this unequal political relationship at the state level has become an emerging reality. The issue is no longer between a state and a non-state actor and Palestine has now the capacity, as a recognized state, to transform the relationship with Israel on the basis of sovereign equality (Erikat 2013). The PLO's changing approach on the need for mutual statehood recognition following the UN initiative is evidence in point. The PLO's current peace proposal and vision for peace with Israel includes the recognition of Palestinian statehood and Palestine's right to exist within the two-state formula (Palestine Liberation Organization 2014).

Palestinian statehood recognition has also long-term implications for territorial rights including future political and economic relations between Palestine and Israel. Palestine could demand an end to Israeli military occupation and settlements as a breach of its sovereignty and invoke the right of states to self-defence (Berzak 2013). In addition, Palestinian statehood allows Palestine to decide on its political future including association with Israel or confederation with Jordan (Quigley 2010). Palestine also has the right to pursue Israel at the international level and demand the liberation of its economic and territorial resources. In reality, sustainable development and economic progress in the Palestinian case is not possible without Palestinian control over the four key areas of natural resources, national borders, a territorial link between Gaza and the West Bank and national economic policymaking (Samhouri 2017). Therefore, political liberation in the context of Palestinian statehood and international recognition has the potential to facilitate economic liberation.

Finally, a major political implication of Palestinian statehood recognition at the UN level is the emergence of the role of European national parliaments in Palestine's struggle for statehood. Parliaments in many countries in Europe including France, Portugal, Spain, Italy, Greece, Luxemburg, the United Kingdom and Ireland have adopted in recent years motions and calls for their representative governments to act on the issue of statehood recognition for Palestine. The parliament of the European Union voted for a similar resolution. The resolution states that the European parliament supports "in principle recognition of Palestinian statehood and the two state solution" (European Parliament 2014). However, these parliamentary motions have included some weaknesses. They represented recommendations and the non-binding nature of parliamentary motions has not traditionally compelled respective governments to implement them or change their foreign policy (Martins 2015).

Nonetheless, the engagement of national parliaments in the question of Palestinian statehood and international recognition represented a strategic shift at the European public and political level. In particular, this shift is illustrating a growing sympathy and recognition of Palestine. It is also "coupled with a deepening disconnect with Israel and a more independent attitude toward US foreign policy" (Javed 2015). In this context, engaging parliaments should be understood as a key route by activists and solidarity groups to move the debate about the recognition of Palestinian statehood from the international (UN) arena to the national level in Europe. In doing so, they can put pressure on their representative governments to recognize the legitimacy of Palestinian statehood. The legitimacy war involving public opinion, courts of law and representative institutions has been launched for a long time in the international arena of activism to advance justice and national rights in the cause of Palestine (Falk 2014). Therefore, involving parliaments emerged as key political implication of Palestine's continuing struggle for recognition and legitimacy at the international level.

Conclusion

This chapter focused on the politics of recognition and statehood in the context of national conflicts and struggles. The analysis explored Palestine's struggle for representation,

membership and statehood recognition at the international level. The discussions demonstrated the dynamic and changing relationship between law and politics in the Palestinian case of statehood struggle. In this context, the study reviewed and examined the Palestinian quest for representation and recognition since the 1970s. The analysis established the factors which enhanced the recognition of both Palestinian representation and legal personality in the international arena. These factors have included the emergence of the PLO as an independent actor at the geopolitical level in the Middle East, the Arab League and UN recognition of the PLO as the legitimate representative of the Palestinian people, the negotiation of the Camp David Accords between Egypt and Israel, the European recognition of the PLO and the Palestinian right to self-determination, the Declaration of Independence by the PLO in 1988 and the signing of the Oslo Agreement between the PLO and Israel. All of these crucial developments contributed to the full formation of the Palestinian people's legal personality and influenced their struggle for representation and statehood recognition. The period of the Oslo peace process in the 1990s and subsequent developments at the domestic and international level in the context of Palestinian statebuilding were also analysed. In addition, the discussions examined Palestine's applications for membership in 2011 and 2012 including associated positions and strategic objectives, the importance of the UN membership, the arguments of opposing and supporting states, and practical methods and forms of Palestinian statehood recognition. The critiques of the Palestinian statehood discourse were also explored and addressed from a local and international perspective.

Finally, the analysis identified key implications concerning the UN admission of Palestine and recognition of statehood in the area of law and politics. In legal terms, these implications have included the increasing awareness and legalization of the statehood struggle at the Palestinian level, seeking accountability against Israel and promoting conflict resolution through mechanisms of international justice. In political terms, the implications have involved the emergence of the "sovereign equality" discourse in the Palestinian attempt to alter the power imbalance between Israel and Palestine, the evolution of the territorial rights framework including future political and economic relations between Israel and Palestine, and the involvement of European national parliaments in Palestine's continuing struggle for representation and recognition.

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28

TAIWAN

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Introduction

Why do some countries recognize Taiwan while others do not? Furthermore, does formal diplomatic recognition still matter in the face of Taiwan's success in informal relations? International relations, at least since the Treaty of Westphalia (1648), relies heavily on the concept of state sovereignty. States acknowledge others' sovereignty in many ways, but the most explicit means is through formal diplomatic recognition, or, as Krasner (2009) declared, 'the golden ring that political leaders hope to grasp.' However, diplomatic recognition is not automatic and no state is required to recognize another state. Nor does diplomatic recognition require substantive relations or even the establishment of a physical presence in the host country.¹ However, as states remain the primary unit of analysis in international relations (Waltz 1979), lack of recognition creates a formidable challenge. Recognition generates expectations of treatment as sovereign equals; lack of recognition provides no such guarantees.

Complicating recognition are cases in which two states claim the same territory in part or in whole. Here the Republic of China (ROC), more commonly known as Taiwan, faces an uneven playing field, as the People's Republic of China (PRC) will not consider dual recognition. As such, states must choose which 'China' to recognize, with few willing to forego relations with the PRC. Taiwanese officials to varying degrees view recognition as evidence of the continuation of the ROC after the Nationalists (Kuomintang) lost control of the mainland in the civil war and thus use recognition in part to downplay the need to declare itself independent from China. While an informal truce during the Ma Ying-Jeou administration led to no countries switching recognition from 2008–2016,² cooler cross-strait relations with the election of Tsai Ing-wen make the likelihood of greater diplomatic isolation more likely. Five have already left during her presidency: Sao Tome and Principe, Panama, the Dominican Republic, Burkina Faso and El Salvador. Focusing on formal diplomatic relations, Taiwan is now more diplomatically isolated than apartheid-era South Africa and fewer European states recognize Taiwan than did the Japanese puppet government of Manchukuo (1932–1945). However, despite concerns that a rising China would force remaining states to drop recognition of Taiwan, states have not left Taiwan *en masse* and most recognizing states in 2017 were the same as in 1989 (Atkinson 2017; see also Table 28.1). We argue the

Table 28.1 Countries granting Taiwan (Republic of China) diplomatic recognition (as of 1 July 2019)

1. Belize	10. Palau
2. Eswatini	11. Paraguay
3. Guatemala	12. St. Kitts and Nevis
4. Haiti	13. St. Lucia
5. Honduras	14. St. Vincent and the Grenadines
6. Kiribati	15. Solomon Islands
7. Marshall Islands	16. Tuvalu
8. Nauru	17. Vatican City (Holy See)
9. Nicaragua	

importance of analyzing Taiwan's diplomatic recognition over time to identify factors influencing recognition rather than a snapshot in time or an overreliance on case studies. In addition, the ability of Taiwan to obtain many of the benefits of diplomatic recognition in the absence of formal relations challenges whether formal recognition of Taiwan remains the 'golden ring' as Krasner claimed.

Under normal conditions, one would expect Taiwan to receive diplomatic recognition from most other sovereign states as Taiwan appears to meet most common prerequisites such as the conditions laid out in the Montevideo Convention.³ These standards usually focus on elements of internal sovereignty—is the state in control of a given territory and does it have a permanent population?—and external sovereignty—does the state have the ability to engage in international relations and do other states treat it as a state? Many *de facto* states fail to clear one or more of these requirements. However, Taiwan clearly exhibits internal sovereignty, especially after democratization, as Taiwanese across the political spectrum accept the government in Taipei as the legitimate authority and representative of Taiwan. To quote John Bolton, 'arguing that Taiwan does not qualify as a "state" ignores the unmistakable evidence' (Bolton 2000). While one may view Taiwan as maintaining a limited form of external sovereignty due to limited formal recognition (Clapham 1998) other states are willing to treat it as a state even if not using the exact terminology.⁴

Unlike pariah states, Taiwan's external sovereignty concerns are a result not of its own actions. China's efforts to diplomatically isolate Taiwan, a territory it views as a renegade province that must eventually return to mainland China, limits Taiwan's ability for greater recognition. Prior to Taiwan's democratization, the country would frequently break ties with a country that extended recognition to China, creating a somewhat self-imposed isolation. Since 1994, Taiwan has appeared willing to accept dual recognition; however, China has rejected such measures. Grenada for example attempted to recognize both China and Taiwan in July 1989, with the Marshall Islands also attempting dual recognition in 1998 (Van Fossen 2007). China also waited three weeks to break off relations with Kiribati in 1997, when the country switched recognition to Taipei, with a similar delay by China when Nauru recognized Taiwan in 2005. However, few countries are willing to even test

the waters of dual recognition, especially in East and Southeast Asia (Leifer 2001: 178), and no major power has considered such attempts in decades. For example, in 1964, France established relations with China but did not break relations with Taiwan immediately, with China ultimately goading Taiwan (through Hong Kong press) to break relations with France (Zhao 1996: 129). The United Kingdom maintained a consulate office in Taiwan until 1972, despite recognizing China in 1950 (Berridge 1994: 47). The last country to consider dual recognition, South Africa, ultimately broke relations with Taipei for Beijing (Taylor 2000).

However, despite these limitations, Taiwan's informal relations continue to expand. Ker-Lindsay (2015: 267) asks 'just how far is it possible to engage with states that are not recognized?' The Taiwan case suggests an ability for 'engagement without recognition' (Cooley and Mitchell 2010). Furthermore, even countries recognizing China over Taiwan often engage in diplomatic gymnastics to avoid an explicit position on Taiwan's sovereignty, opting for terminology that 'acknowledges' Chinese claims to Taiwan rather than concurring with China's position. Most recently, for example, major US airlines have begun classifying Taipei's airport code by city alone with reference to neither Taiwan nor China⁵ Hampering a broader understanding of Taiwan's diplomatic recognition is a literature that relies heavily on single case studies or regional analyses (Payne and Veney 2001; Atkinson 2010; Alexander 2011), rather than attempts to identify broader trends historically. In the first quantitative study of Taiwan's diplomatic recognition, Rich (2009a) identifies broad trends from 1950 to 2007, although data limitations⁶ and an inability to control for the role of aid and loans limit the study's predictive power.

In terms of Taiwan's diplomatic recognition, three often-overlooked factors deserve attention. One, unlike in other cases of disputed recognition claims, the rationales behind diplomatic relations appear to differ, especially after the Cold War, resulting in part in greater instability in diplomatic recognition. Second, few analyses focus on the handful of countries that have now remained with Taiwan for decades despite increased pressures to switch and what this may say about future efforts at maintaining or expanding formal recognition. Finally, with the rise of unofficial relations, one must question to what extent formal relations of politically and economic minor states is necessary to maintain Taiwan's claims as a sovereign state.

Rationales for diplomatic recognition

Figure 28.1 contextualizes Taiwan's historical battle for recognition and shows the raw number as well as the percentage of countries recognizing Taiwan from 1950, the first full year after the establishment of the PRC, and 2007, the last year before the diplomatic truce. In 1950, Taipei hosted twice as many embassies as Beijing (Copper 1997: 517). While recognition declined with Taiwan's expulsion from the United Nations to approximately half of that during its peak, the percentage of countries granting formal recognition largely stabilized by the 1980s. Much of the gradual growth in the 1950s to the 1960s came from newly independent countries as both Taiwan and China scurried to gain recognition. Furthermore, Taiwan unilaterally broke relations with countries frequently in the 1970s after the countries established relations with the PRC, without clear evidence of the PRC demanding such a condition at the time (Mengin 1998). This suggests that an opportunity existed for dual recognition, but Taiwan's own refusal precluded this. With entry into the UN and broader political and economic rise, China no longer needed to consider dual recognition.

Figure 28.1 Taiwan's diplomatic recognition (1950–2007)

Source data from: Rich (2009a)

The rationales for countries to recognize Taiwan have shifted over time. Taiwan's anticommunist credentials aided in the maintenance of relations for much of the Cold War, further assisted by its seat in the United Nations (UN) and diplomatic recognition from the United States. However, with their replacement in the UN by the PRC in 1971, countries increasingly chose Beijing over Taipei. Even after Taiwan dropped its objection to dual recognition in 1991, this did little to influence recognition. Taiwan's post-1979 diplomatic recognition peaked at 30 countries in 1995–1996, but the last major powers staying with Taiwan all left before the decade's end. This includes Singapore in 1990, Saudi Arabia and South Korea in 1992, and South Africa in 1998.

Without ideological rationales underpinning recognition anymore, Taiwan must find other means to entice countries to switch and stay. Some have suggested shared democratic appeals as a new foundation (e.g., Peterson 1997; Larus 2008), building off claims of state legitimacy in the post-Cold War period deriving from one's democratic status and cementing Taiwan's domestic political authority to its democratic political legitimacy.⁷ For example, Franck (1992) suggests the rise of a post-Cold War norm that ties acceptance of states to whether the state maintains the consent of its people, while Murphy (1999) identifies a growing rhetoric linking democratic legitimacy as one of several factors (e.g., stability, development) to influence recognition.

Prime Minister Solomon Mamaloni echoed such a democratic rationale, stating that the Solomon Islands only establishes relations with democracies (Kabutaulaka 2010: 140), although the country currently maintains an embassy in Cuba. Democratic sensibilities plays upon Taiwan's own democratic experience and, in recent years, most recognizing countries have been rated free or partially free by Freedom House, with Swaziland as the notable exception.⁸ However, Hu (2015: 19) argues that many of these democratic partners maintain 'strong authoritarian traditions.' Moreover, Taiwan's own democratic transition did little to prevent similarly transitioning countries like South Korea and South Africa from breaking relations and a clear majority of democracies now recognize China. Even if democracies may be naturally inclined to recognize a fellow democracy, clearly other concerns trump this democratic affinity for most in this case.

A cursory glance at the type of governments recognizing Taiwan shows a clear shift with the end of the Cold War. Using Rich (2009a) data for 1950–2007, we can address the level of democracy in recognizing countries versus nonrecognizing countries using Polity scores,⁹ ranging from –10 to 10, with –10 to –6 rated as an autocracy, –5 to 5 an anocracy, and 6–10 a democracy. Table 28.2 identifies the average Polity score based on recognition during and after the Cold War and helps to identify regime effects on the likelihood of recognition. During the Cold War, the average Polity score for recognizing countries was close to 0, consistent with a mix of democratic and authoritarian countries, yet higher than for nonrecognizing states. However, after the Cold War the average score for Taiwan’s diplomatic partners increased slightly, while the average for nonrecognizing countries increased by three points. Table 28.2 also includes the average absolute difference in Polity scores between Taiwan and countries to identify if Taiwan was more likely to be recognized by similar regimes. The answer here too is contingent on the era, with the absolute difference declining three points in the post–Cold War era while not substantive change among the nonrecognizing states.

Others argue that Taiwan has found a niche diplomatic market among small states. The foreign policies for small states receive remarkably little scholarly attention (e.g., Keohane 1969; Baehner 1975; Kassimeris 2009). While definitions of small states vary considerably based on whether geography or population is the main determinant (see Vital 1969), several scholars note that many of Taiwan’s diplomatic partners would be classified as small countries (e.g. Hu 2015). Thirteen of the 51 small states identified by Boon and Ardy (2017) recognize or have recently recognized Taiwan; however, Rich (2009a) does not find size to correlate with diplomatic recognition.

Taiwan challenges many common assumptions about diplomatic recognition. Recognition is commonly viewed as the purview of powerful countries choosing to recognize or withhold recognition toward less powerful ones, often making recognition contingent on domestic changes in the best interest of the recognizing state. Yet the Taiwan case shows that most of the states in recent years recognizing Taiwan are politically and economically minor players in international relations, some with populations the size of a small city, and heavily dependent on international assistance to the point that one may question their status as a sovereign state.¹⁰ In addition, where states rarely revoke diplomatic recognition once

Table 28.2 Average Polity scores for recognizing and nonrecognizing countries 1950–2007 (all countries)

	<i>Recognizing</i>	<i>Not recognizing</i>
	<i>Taiwan</i>	<i>Taiwan</i>
<i>Polity</i>		
Cold War	–0.19	–1.52
Post–Cold War	0.39	2.73
<i>Polity difference</i>		
Cold War	8.03	6.5
Post–Cold War	4.99	6.6

established, many countries, mostly postcolonial and/or semiauthoritarian with weak states have switched recognition between Taiwan and China multiple times. Three states currently recognizing Taiwan—Nauru, St. Lucia, and Nicaragua—have switched to China only to return, with only the later basing this in part on ideological grounds. Ten other countries have switched recognition at least twice.¹¹ The Central African Republic switched recognition five times, suggesting that recognition in some cases is viewed not in terms of signaling sovereign equality but purely on transactional terms. These patterns suggest that diplomatic recognition in the Taiwan case is often according to short-term rationales, lacking the deeper significance commonly assumed in the literature. Additionally, increased Taiwanese investment in a country does not guarantee that a country will maintain relations with Taiwan, as was noted in 2007 with Costa Rica.

Furthermore, whereas diplomatic recognition historically comes as the result of ideological rationales (e.g., Cold War bipolarity) or a broader political calculus, existing research suggested that economic factors weigh heavily on the decision to recognize and maintain relations with Taiwan. For example, Rich (2009) suggests that, as countries become more export-oriented, they are more willing to recognize China over Taiwan. Thus, advising others to follow the path of Taiwan's own rapid economic development via export-oriented industrialization appears self-defeating and may undermine Taiwan's diplomatic goals, although little evidence suggests that states are necessarily explicitly aware of the export-recognition nexus.

In contrast, the economic incentives behind the often-derided 'dollar diplomacy' is far more explicit and difficult for Taiwan or other states to claim ignorance as Taiwan for decades has provided various forms of economic aid and technical assistance to recognizing countries, as well as at times nontransparent assistance to government officials to maintain recognition. Both major parties in Taiwan—the Kuomintang (KMT) and the Democratic Progressive Party (DPP) explicitly deny tying aid to recognition, but the size of the literature on 'dollar diplomacy'¹² and the frequency in which critics use the term at the very least suggest that aid and recognition commonly correspond even if correlation is not causation.

Taiwan's success in using aid to bolster recognition largely relied on identifying the few countries that did not see relations with China as crucial to their political or economic interests and being willing to provide larger financial incentives. However, this created multiple problems. Rather than encourage deeper substantive relations as typically expected with diplomatic recognition, 'dollar diplomacy' encourages economically oriented states, especially ones in financial trouble or in political crisis, to create a bidding war. Frequent scandals followed efforts to entice diplomatic relations or to keep existing partnerships. For example, Papua New Guinea's prime minister announced switching recognition to Taiwan on July 5, 1999, only to resign four days later following Chinese and Australian backlash (*The Economist* 1999), while in 2006 Taiwanese efforts to woo Papua New Guinea again resulted in fraud charges against the Taiwanese intermediaries that wired \$29.8 million (*New York Times* 2008).

The extent to which aid buoys Taiwan's diplomatic recognition remains hard to ignore and appears to be the most important economic factor influencing recipient countries (Lee 1993; Chan 1997). This is a particularly difficult one to measure owing to the historic lack of transparency of many forms of Taiwanese assistance. Thus, scholars must rely on the reporting of recipient countries rather than the donor. Taiwan is frequently the largest donor to its Caribbean partners and a former Taiwanese ambassador to the Dominican Republic, a country that recently switched recognition to China, claimed the Caribbean nation frequently pressured Taiwan for more assistance (Cole 2018). Likewise, Pacific island countries maintain some of the highest per capita foreign aid rates in the world, and Taiwan

contributes to this pattern (MacDonald 1986). For example, Taiwanese aid to the Marshall Islands equaled roughly one-fourth of the country's per capital income in 2005–2008 (Chien et al. 2010). Brant (2013) claims that the Gambia left when Taiwan did not meet 'exorbitant' request for aid in 2013, while Vanuatu threatened to switch if aid requests were not met.

Historically, if one state breaks relations with Taiwan, this simply freed up monies, often already allocated for the explicit purpose of diplomatic relations, to lure a state to break from China. For example, following Panama's switch in recognition in 2017, Taiwan appeared to commit more aid to Guatemala and Belize, assuaging worries that other partners in Central America would leave *en masse* (Financial Tribune 2017). Much as Taiwan reallocated funding following Panama's switch, it also did so after Costa Rica switched diplomatic recognition in 2007. Taiwan's increased aid package to the Dominican Republic following Costa Rica's switch allowed Taiwan to strengthen recognition and discourage another state in the region from switching. Now that the Dominican Republic has switched, Taiwan will likely earmark and reallocate these funds to bolster other ties in the region and discourage another country's switch.

'Dollar diplomacy' disproportionally aided Taiwan as long as China was unable or unwilling to provide similar or larger offers or until the political calculus of recognizing states changes so that ignoring China becomes a liability rather than a decision. With China's growing economic clout, China's willingness to provide larger incentives limits the potential number of countries willing to consider Taiwan. An additional limitation to Taiwan's efforts is that China's own 'dollar diplomacy' efforts are coupled with its UN Security Council influence and its ability to veto actions favorable to Taiwanese diplomatic partners. China vetoed peacekeepers for Guatemala in 1997 and Macedonia in 1999. As China continues to offer increasingly large aid and assistance packages, however, states are unlikely to replicate this behavior in the near future. This was evidenced by Burkina Faso's dramatic switch in recognition to China in May 2018 (Horton 2018), after their foreign affairs minister affirmed his ties to Taiwan and rejected a \$50 billion-dollar proposal from Beijing in 2017 (*The Straits Times* 2018). Ultimately, even if there is a subset of countries willing still to consider a diplomatic switch, engaging in 'dollar diplomacy' once again simply shifts agency to countries acting in their own short-term self-interest rather than in the interest of Taiwan.

Why do some countries stay with Taiwan?

Even with the pressures and economic incentives to recognize China, several countries appear content with Taiwan. Two Pacific microstates—Palau and Nauru—have framed recognition in part due to concerns about Chinese influence. Haiti remained with Taiwan, even after China took the unusual step of providing \$4.4 million in humanitarian assistance after the 2010 earthquake to the nonrecognizing state (Stallings 2017). With the departure of Burkina Faso, Swaziland remains the sole country in Africa recognizing Taiwan, with relations in no small part determined by the preferences of the absolute monarch, King Mswati III.

Taiwan's diplomatic partners remain concentrated in three regions: Oceania, the Caribbean, and Central America. Central America is the clearest example of regional success for Taiwan, the only location where most states recognize Taiwan and where before 2007 all seven states recognized Taiwan. Several factors may explain this success, from ideological similarities during the Cold War and Taiwan's willingness to assist in military training for many Central American administrations, to similarities in democratization as well as the establishment of a series of free trade agreements (FTAs). Taiwan strengthens these relations

further by regional intergovernmental organizations in which Taiwan not only helps to fund but maintain observer status. Taiwan's involvement in Central American regional organizations, such as the Banco Centroamericano de Integración Económica and the Central American Parliament, helps Taiwan maintain relevance in the region. Just as Taiwan's position and funding of many of these institutions further incentivize Central American countries to remain diplomatic partners, it is possible that Taiwan could implement a similar strategy in Oceania in order to strengthen ties with Pacific partners (Rich and Dahmer 2018). Taiwan already maintains involvement in the Council of Regional Organizations of the Pacific and the Pacific Island Forum Secretariat, among other organizations in this region. More broadly, not only has Taiwan couched its enduring relations in the region in terms of democratic similarities, but also both sides frequently refer to their status as smaller states as a common bond.

Although some of Taiwan's relations appear well-grounded, this does not suggest that China could not woo long-standing partners, as evident in the switch of Panama in 2017 and the Dominican Republic and El Salvador in 2018. In fact, while Taiwan maintains involvement in many regional organizations in Latin America, China hosts a forum with the Community of Latin American and Caribbean States, which comprises 33 countries in total and includes all nine diplomatic partners of Taiwan in the region. As part of this forum, China has also emphasized the importance of integrating Latin American and Caribbean countries in the Belt and Road Initiative, among other forms of economic integration, which may incentivize other seemingly secure countries to switch. Yet, despite overt claims otherwise about holdouts, China's broader goals regarding Taiwan may be best served by not trying to persuade a mass desertion among remaining diplomatic partners. In fact, were Taiwanese diplomatic partners to leave at once, this may intensify pro-independence sentiment in Taiwan, which would see the move as shedding the remnants of the ROC legacy. Mass desertion, although consistent with Beijing's 'One China' policy, would increase cross-strait tensions and potentially lead Taiwanese leaders to consider more controversial means to protect their claims of sovereignty, including constitutional reforms and possible name change to the Republic of Taiwan. Nor does isolating Taiwan aid in changing the prevailing trend in Taiwan of declining support for eventual unification with China or even identifying as Chinese.¹³

Is diplomatic recognition passé?

Taiwan's desire for formal recognition clearly strengthens its claims that the ROC is a continuous sovereign state despite no longer having control or claiming to retake territories controlled by the PRC. As Taiwan's ambassador to Swaziland, Thomas Chen, said, 'formal recognition is very important. If you want to be a sovereign state internationally, you need it' (McKenzie and Swails 2018). Diplomatic recognition also prevents China from further isolating Taiwan or worse, taking Taiwan by force, without an international response and treating any action toward Taiwan as domestic without an international response. The appearance of maintaining if not expanding formal recognition also plays into domestic partisan politics as no administration wants to be painted by the opposition as weak on defending Taiwan's national interests. However, other than sovereignty-reinforcement intangibles, the tangible benefits of formal recognition are less clear. For example, previous efforts to use diplomatic partners to petition for Taiwan's reentry into the UN rarely led to even half of recognizing states following through on such actions (Rich 2009b), perhaps concerned about China's ability to block humanitarian assistance with their Security Council veto. Nor would a new declaration of independence and a name change to the Republic of Taiwan

solve the problem as such a move would still require countries to choose between relations with Taiwan or China as long as the latter views the former as Chinese territory.

Nor does Taiwan's limited recognition prevent broader economic interactions, although the lack of recognition prevents traditional forms of FTAs. Furthermore, Taiwan maintains FTAs with countries that are not diplomatic partners and some that maintain a large trade volume with the PRC, including New Zealand and Singapore. Additionally, Taiwanese FTAs with both Panama and El Salvador have remained virtually unchanged since both countries switched to recognize the PRC. However, the ability of China and Taiwan to agree to reach economic agreements such as the Economic Cooperation Framework Agreement despite one side not recognizing the other's sovereignty claims shows that creative means are available for cooperation even in the absence of formal diplomatic relations. The lack of clear tangible benefits becomes even clearer when evaluating the historic patterns of a select number of countries willing to switch recognition without a fundamental change in Taiwan's international space, whether measured in terms of entry into international organizations or through broader political and economic ties. Just as a major power would not be viewed as fundamentally worse off if a small nation broke diplomatic relations, Taiwan's vulnerability in this regard is greatly overstated. Additionally, from an international security perspective, maintaining all remaining relations is not as crucial as some might believe. Currently, Taiwan's formal relations may not provide any explicit security benefit. Several diplomatic partners do not have militaries, including the majority of Central American allies, and some of those who do rely on Taiwanese military investment, training and even donations of weaponry and aircraft. Furthermore, none of Taiwan's diplomatic partners serve as a deterrent to Chinese aggression (Rich and Dahmer 2018).

Diplomatic recognition clearly limits certain expressions of Taiwan's sovereignty. Though Taiwan's diplomatic partners have petitioned for the country's inclusion in the United Nations in the past, as of 2017 all applications for inclusion were 'dead.' Additionally, this limits Taiwan's observer status in UN-affiliated organizations, such as the World Health Assembly and the UN climate control convention. However, inactivity as China pursues formal recognition of these holdouts risks signaling that China can more aggressively pursue steps to limit Taiwan's activities, including perhaps unofficial relations. For example, its inability to join many intergovernmental organizations like the UN or coordinate with the World Health Organization (WHO) without Chinese permission reinforces the Chinese-preferred narrative of Taiwan as a renegade province. For example, it was only after Beijing's approval that the UN-affiliated WHO was able to send a mission to Taiwan during the SARS epidemic of 2003, though Taiwan desperately needed assistance. However, unlike many other cases of disputed states with limited formal recognition from the vast majority of countries, Taiwan remains well entrenched in the international community.

A focus on formal diplomatic relations also underappreciates Taiwan's international economic if not political integration. Unlike most states with limited diplomatic recognition, Taiwan maintains substantive unofficial relations through trade offices, offices that function as embassies in all but name. Cabestan (1998) argued that most countries by the 1990s paid lip service at best to China's 'One China' model. By January 2018, Taiwan maintained unofficial relations with over 50 states, including every major power other than China. Trade missions, for example, have historically been tolerated by China as, in their position, they do not suggest Taiwanese statehood or the host's recognition of statehood. Taiwan maintains more *de facto* embassies in nonrecognizing countries than many states have embassies abroad in total.¹⁴ Nor has the lack of formal relations prevented the majority of countries from allowing Taiwanese visa-free entry. Currently Taiwanese citizens are able to enter

166 countries without a visa, compared to only 21 for Chinese citizens. Furthermore, China's growing political and economic clout has not fundamentally reduced Taiwan's unofficial relations. For example, the US risked hurting relations with China with the 2018 Taiwan Travel Act (TTA), which 'encourages visits between officials of the United States and Taiwan at all levels.'¹⁵ Rather than a reduction of informal relations, the TTA further erodes the distinction between recognition and unofficial relations while consistent with the charade of the latter. Similarly, the opening of a new enlarged American Institute in Taiwan building in 2018, approved under the Obama administration, reinforces American commitment to relations with Taiwan. With growing informal relations, the Taiwan case raises the question to what extent a state can receive the benefits of recognition without recognition itself.

Conclusion

As long as states seek formal diplomatic recognition, there remain incentives for states to exploit this as a tool for their own gain, whether through political or economic means (see Peterson 1997: 3). The paucity of countries that grant formal recognition of Taiwan appears to undermine Taiwan's claims of sovereignty. Yet, despite the end of the diplomatic truce and recent switches, it remains unlikely that Taiwan's remaining partners will all leave for Beijing in the near future. Taiwan presents an intriguing case of contested diplomatic recognition and means to work around Chinese efforts to limit efforts suggestive of Taiwanese sovereignty. In particular, through the rise of unofficial relations, Taiwan receives most of the benefits of formal relations, save formal state-to-state visits, without the costs associated with a declaration of independence or a name change to the Republic of Taiwan, actions that potentially would result in a fourth crisis in the Taiwan Strait.¹⁶ Although China has increased pressure on Taiwan's trade offices in nonrecognizing countries, Taiwan still has the potential to expand upon these efforts as well as to expand city-to-city connections that tie countries together without any direct discussion of sovereignty necessary. To extend this blurring of official and unofficial relations, it remains unclear what Taiwan would gain, other than formal embassies and state-to-state visits, if nonrecognizing states were willing to enact a 'Two Chinas' or 'One China, One Taiwan' framework and attempt dual recognition.

The rhetoric about Taiwan and diplomatic recognition also needs reevaluation (Rich and Dahmer 2018). Frequently Taiwanese media and officials refer to a country switching diplomatic relations in terms of losing an ally, an unusual narrative that does not equate diplomacy with more substantive alliances but treats each loss as a major blow to Taiwan's political and economic interests. Instead of perpetuating this victimization narrative, Taiwan would be better served focusing its efforts to deepen relations with existing diplomatic partnerships and to enhance informal relations with states so that the distinction between formal and informal relations blurs further. In addition, dual recognition, through it appears improbable in the short term, deserves greater attention. Dual recognition, whether as a 'Two Chinas' or 'One China, One Taiwan' framework have a long history and dual recognition was once considered as a negotiation point by Richard Nixon (Riccards 2000). Nor does dual recognition preclude either unification or formal independence in the future. Several argue, using the previous example of dual recognition of divided Germany after 1971 and that of the Koreas currently encourages unification through confidence building measures and viewing diplomacy outside of a zero-sum game (McCord 2017). The case of Taiwan remains one of limited formal diplomatic recognition yet extensive efforts by Taiwan and others to enhance informal relations to the point where the distinction can be lost by the casual observer. If we call such relations a success for Taiwan, the question

remains whether the Taiwan example provides a roadmap for other states with limited diplomatic recognition. Taiwan has been greatly assisted not only by Cold War anomalies but its own economic clout to maintain formal relations, the latter a factor that provides each Taiwanese administration with a tool to entice other states that most other disputed states simply do not have at their disposal. That said, the Taiwan case study suggests means to, if not overcome, then certainly mitigate the effects of being a state with limited formal diplomatic recognition through the pursuit of creative unofficial relations.

Notes

- 1 Rich (2011) found that, out of 194 countries, the average country only maintained 44 embassies, with over 30 maintaining fewer than ten embassies.
- 2 The Gambia unilaterally broke relations in 2013, but China did not recognize it until 2016.
- 3 Hillier (1988) points out that states may use any criteria they wish in determining which states to recognize.
- 4 Taiwan's democratization and the end of the Cold War have produced, perhaps ironically, a situation in which Taiwan transitioned from comparatively higher external sovereignty and lower internal sovereignty to the opposite. See Rich 2009.
- 5 Sui-Lee Wee (2018) 'Giving In to China, U.S. Airlines Drop Taiwan (in Name at Least)', *The New York Times*, 25 July 2018, Online. Available: www.nytimes.com/2018/07/25/business/taiwan-american-airlines-china.html Date accessed: 26 July 2018.
- 6 For example, Rich relies on Polity scores as a measure of democracy as it covers the entire time period, but Polity fails to score countries with a population of less than half million residents, several of which have consistently recognized Taiwan.
- 7 Buchanan (2002) separates conceptions of political legitimacy and political authority, arguing the limits in which the former requires democracy.
- 8 Freedom House does not rate the Holy See (Vatican).
- 9 For more on the Polity Project see www.systemicpeace.org/polityproject.html
- 10 In many cases, Taiwan paid for the recognizing state's embassy in Taipei.
- 11 This excludes two cases—Vanuatu and Papua New Guinea—where recognition of Taiwan lasted days before switching back to China.
- 12 A cursory search of Google Scholar for sources that include 'dollar diplomacy' and 'Taiwan' return 1,340 sources, with 600 sources that include 'checkbook diplomacy' and Taiwan. Date of search: June 1, 2018.
- 13 According to data from National Chengchi University's Election Study Center, since 2009, a majority of Taiwan's citizens view themselves as Taiwanese, roughly a third as both Chinese and Taiwanese, and less than five percent only identifying as Chinese. Election Study Center (2018) 'Taiwanese/Chinese Identification Trend Distribution in Taiwan (1992/06~2017/12)', Online. Available: <https://esc.nccu.edu.tw/course/news.php?Sn=166#> Date accessed: 1 July 2018.
- 14 As of June 2018, Taiwan maintains such offices in 53 countries.
- 15 Congress.gov (2018) 'Taiwan Travel Act', Online. Available: www.congress.gov/bill/115th-congress/house-bill/535 Date accessed: 23 January 2019.
- 16 The three crises refer to clashes over offshore islands in 1954–1955 and again in 1958, with the third crisis in 1995–1996 following the US granting a visa for President Lee Teng-hui to speak at Cornell University.

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WESTERN SAHARA

Irene Fernández-Molina and Matthew Porges

Introduction

The Sahrawi Arab Democratic Republic (SADR) claiming the non-self-governing territory of Western Sahara is of such a unique nature as a contested state that it appears stronger in terms of constitutive statehood than of declaratory statehood. The reason for that is that it does not possess substantial control over most of the land it claims, which has long been occupied and annexed by Morocco, and it operates instead on a largely extraterritorial basis from the Sahrawi refugee camps on Algerian soil. In practice, the SADR functions as a hybrid between a state-in-exile and a *de facto* state, drawing international recognition from multiple overlapping sources.

This chapter provides a comparative insight into the particular features of Western Sahara/SADR as an outlier within the universe of contested states, and the small print of international recognition and statehood stemming from them. Following a historical background on Western Sahara's historical struggle for statehood, the conceptual debate will be addressed as to why the SADR escapes all of the usual categories, while sharing some features with *de facto*/quasi/unrecognised states on one hand and states-in-exile on the other. This will lead to consideration of the mixed effect that the combination of foreign occupation and extraterritoriality has on the SADR's statehood under international law. Next, the multiple territorialities of Western Sahara/SADR will be unpacked by discussing the effective situation of the Moroccan-annexed Western Sahara territory, the Algerian-based Sahrawi refugee camps, where the Polisario Front and the SADR have their extraterritorial headquarters and primary area of governance, and the so-called 'Liberated Zone' that the last two actors control in Western Sahara proper. Finally, these territorialities will be connected to three partially overlapping sources of international (non-)recognition, i.e. the non-recognition of Morocco's sovereignty claims over Western Sahara, the recognition of the Polisario Front as a national liberation movement and a conflict party, and the partial recognition of the SADR as a sovereign state.

Western Sahara's historical struggle for statehood

Western Sahara is a former Spanish colony in North Africa. Lying on Africa's Atlantic coast, Western Sahara is bordered by Morocco to the north, Mauritania to the south and east, and

Algeria to the north-east. It is comparable in size to the United Kingdom, or to the US state of Colorado. Much of the territory is characterised by low, rocky desert, with a few small mountains and oases. Historically, the territory's inhabitants have been Hassaniyya-speaking nomadic pastoralists who have come to be called Sahrawis; they are an Arab-Berber ethnic group. There is no precise territorial correspondence between the areas inhabited by ethnic Sahrawis and the political Western Sahara defined along colonial borders (Zunes and Mundy 2010: 92–3). Rather, people who broadly fit the ethnic definition of Sahrawi have historically lived in southern Morocco, Algeria, Mauritania and Mali as well as in Western Sahara. Nevertheless, the overwhelming majority of Western Sahara's pre-colonial inhabitants were Sahrawis, and Western Sahara exists at the centre of the traditional Sahrawi range. From 1884 to 1975, Western Sahara was a Spanish colony, existing for the first time as a fixed territorial unit with delineated borders. The Spaniards, lacking the resources of adjacent colonial regimes such as France, mainly limited their control to coastal cities and enclaves, and for the most part allowed the desert interior to exist on its own. Although there were occasional clashes between the Spanish and Sahrawi nomadic groups, there were also instances of cooperation; Sahrawis served in the Spanish military, worked in cities, and sometimes participated in local politics (Hodges 1983).

By the 1960–1970s, amid a global drive towards decolonisation, Spain came under increasing pressure to relinquish its colonial hold on what was then known as Spanish Sahara, which was listed by the UN as a non-self-governing territory. Although the territory had a notional right to self-determination, Morocco aggressively pursued its own claim as part of a larger irredentist narrative invoking a historical 'Greater Morocco', which included parts of Algeria and Mauritania as well. Partly in response to Moroccan irredentism, Mauritania subsequently made its own claim on the territory. However, a fact-finding mission by the UN concluded that there was 'overwhelming support' among the population for independence under the leadership of the Polisario Front (*Frente Popular de Liberación de Saguía el Hamra y Río de Oro*), a Sahrawi nationalist movement founded in 1973. These three conflicting claims – Moroccan, Mauritanian and Polisario – were brought before the International Court of Justice (ICJ). In a 1975 advisory opinion, the ICJ concluded that, while there existed 'legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara', these '[did] not establish any tie of territorial sovereignty' which would overrule 'the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory' (International Court of Justice 1975) – a decision that Morocco contested, launching the so-called Green March over the territory (Wilson 2016: 18–9).

Notwithstanding the ICJ opinion, Spain unilaterally withdrew from the territory later in 1975, partitioning it between Morocco and Mauritania. The Polisario Front immediately began a two-front guerrilla war, hoping to secure the territory for an independent Sahrawi state. Initially, Polisario's performance in the war was impressive for an outnumbered, out-gunned guerrilla movement. Sahrawi knowledge of the deep desert and reliance on traditional hit-and-run tactics resulted in some spectacular raids deep into Mauritania or in southern Morocco. By 1979, unable to sustain the cost of a deeply unpopular war, Mauritania withdrew and made its peace with Polisario. Morocco, initially focused on retaining control of a series of coastal enclaves and a phosphate mine at Bou Craa, pivoted towards a novel counterinsurgency strategy. Starting with its relatively small area, Morocco constructed a defensive wall, or 'berm', which it gradually expanded outwards in concentric circles. While the berm did not entirely prevent Polisario raids, it did slow them down, as Sahrawi fighters had to take time to clear minefields or find ways around barriers, and this

gave Morocco more time to respond. By the mid-1980s, the wall had been pushed deep into the interior, and the war was at a stalemate (Hodges 1983). With the permission of the Algerian government, Polisario had set up a series of refugee camps just across the border in the Algerian province of Tindouf in 1976. Tens of thousands of Sahrawis migrated to these camps with the outbreak and the continuation of the war.

In 1991, with neither side able to make significant military progress, a ceasefire was brokered by the UN along with a Settlement Plan that provided for a self-determination referendum for the indigenous Sahrawi people, which was accepted by both parties – though with no prior agreement on the electorate entitled to vote. Not coincidentally, Morocco had been promoting since 1976 the settlement in the area of Western Sahara under its control of 200,000–300,000 Moroccan citizens, a significant part of which were actually ethnic Sahrawis from southern Morocco. This settlement policy's original aim of 'Moroccanising' Western Sahara and creating demographic facts on the ground gained additional strategic value on the eve of the voter identification process conducted by the UN Mission for the Referendum in Western Sahara (MINURSO). In an attempt to secure a favourable electorate, Morocco sponsored over 100,000 applicants who claimed to be natives of Western Sahara but were eventually rejected by MINURSO (Jensen 2012: 89–90). The flood of new claimants made the referendum significantly more complicated; within a few years, it had effectively been abandoned, while Moroccan formal annexation and infrastructure development entrenched its occupation of the western three-quarters of the territory.

Since that time, Morocco has continued to administer most of the territory of the former Spanish Sahara. The Polisario Front, having established the SADR as a state-in-exile, continued to control the easternmost part of their claimed territory in addition to the refugee camps around Tindouf in Algeria. The 1991 ceasefire between the two sides has largely held, turning Western Sahara into a frozen conflict (Chávez Fregoso and Živković 2012) where 'the violence stopped, but the underlying interests of the formerly warring parties have neither been abated nor addressed' (Perry 2009: 36; see Smetana and Ludvík 2019). Under Moroccan occupation, many Sahrawis experience violent repression and economic discrimination (Porges and Leuprecht 2016). Humanitarian conditions in the refugee camps are also challenging. Although a series of Sahrawi protest movements in the Moroccan-occupied territory have emboldened nonviolent Sahrawi resistance (Fernández-Molina 2015), the conflict appears entrenched, with little prospect of significant movement in the near future short of a return to war.

A hybrid of a state-in-exile and a *de facto* state

As a result of this background, the SADR shares important common features with what Scott Pegg calls '*de facto* states' (1998), as well as with Pål Kolstø's 'quasi-states' (2006; see also Jackson 1993) and Nina Caspersen's 'unrecognised states' (2012) – territories/entities that have 'achieved *de facto* independence' and whose 'leadership is seeking to build further state institutions and demonstrate its own legitimacy' while lacking full international recognition as independent states (see also Caspersen and Stansfield 2011: 1–2). The SADR meets Pegg's definitional criteria of having an organised political leadership backed by popular support, the capacity to provide governance and governmental services to a certain population, the self-assigned capacity to enter into relations with other states and the aim to achieve widespread international recognition of its sovereignty (Pegg 1998: 26). However, contrary to most of the strange political creatures that are usually grouped in these three overlapping categories, the SADR does not possess substantial control over the territory it claims (Kolstø

2006: 725–6; Caspersen 2012: 8), three-quarters of which have been *de facto* controlled and annexed by Morocco since 1976/1979. The second key difference is that the SADR has *not* been ‘unable to achieve any degree of substantive recognition’ from the international society (Pegg 1998: 26), for it has been recognised since its foundation by 84–85 UN member states and it currently maintains diplomatic relations with around 40 of these.

Western Sahara/SADR fits better but still strikes as being an atypical case within the wider conceptual universe of ‘contested states’ – a looser term that leaves the politics’ territoriality aside and focuses instead on the ‘internationally contested nature of their purported statehood’ (Geldenhuys 2009: 3). This is because in this instance, and only somewhat like in Palestine, statehood contestation does not stem from secessionism but from occupation by a historically and legally separate neighbouring state in the context of deviant or thwarted decolonisation process. Furthermore, the Moroccan occupation and annexation of most the Western Sahara territory has led the SADR to operate as a primarily extraterritorial state-in-exile (Wilson 2016: 10; see also McConnell 2016) from its operational base in the Tindouf refugee camps in south-western Algeria. The combination of foreign occupation and extraterritoriality has a mixed effect on the SADR’s statehood under international law. On one hand, foreign occupation has reinforced it from the perspective of the constitutive theory of statehood, which emphasises criteria of legitimacy and external collective endorsement, i.e. recognition by other states – if only as a reaction against the perceived illegitimacy of Moroccan sovereignty claims. On the other hand, extraterritoriality undermines the SADR’s statehood in terms of the declaratory theory prevailing in modern legal doctrine, which prioritises purely functional/effectiveness features such as the 1933 Montevideo Convention criteria (Oeter 2015; see Crawford 2006), and therefore the SADR’s actual ability to govern the Moroccan-annexed territory. This being said, the SADR’s extraterritoriality is not absolute due to its control over the easternmost 25% of Western Sahara proper – which Sahrawi nationalists refer to as their Liberated Zone, aware of its importance in terms of declaratory statehood. Also, in terms of population, the SADR institutionally reaches out to Sahrawis living under Moroccan control, as well as further afield, through its Ministry of the Occupied Territories and the Saharawi Community Abroad. This form of recognition is not just symbolic, even more so in the case of the Polisario Front, whose Popular General Congress grants all those Sahrawis political participation rights on an equal footing with their refugee counterparts, and includes a Commission of the Occupied Territories and the Intifada of Independence (Fernández-Molina 2019: 423–4).

Admittedly, the conceptual and comparative debate remains largely academic, for, in the policy domain, labels such as *de facto*, quasi, unrecognised, contested state and so on are rarely applied to Western Sahara/SADR, which tends to go unclassified (Bouris and Fernández-Molina 2018: 308–9). For one, UN documents do not usually mention the state-like SADR as such, and avoid any description or labelling of Western Sahara beyond ‘non-self-governing territory’. UN General Assembly and Security Council resolutions refer to the latter as simply ‘Western Sahara’, adding, especially since 2006–2007, a very diplomatic mix of ‘self-determination’ and ‘political solution’ language with the aim of pleasing both parties. For example, all of the recent UN General Assembly resolutions on the ‘question of Western Sahara’, such as the one passed in December 2018, identically refer in their preamble to the ‘inalienable right of all peoples to self-determination and independence’ while ‘recognising that all available options for self-determination of the Territories are valid as long as they are in accordance with the freely expressed wishes of the people concerned’. Based on this, they express support for the UN-led negotiation process negotiations ‘with a view to achieving a just, lasting and mutually acceptable political solution, which will provide for

the self-determination of the people of Western Sahara' (UN General Assembly 2018: preamble and paragraph 2). This last phrase is literally taken from Security Council resolutions (see e.g. UN Security Council 2018). In the case of the more detailed reports of the UN secretary-general, the territorial object of the dispute is called 'Western Sahara' or simply 'the Territory'. More specific references to the different sites or territorialities of the conflict are made by distinguishing between 'east of the berm' (Polisario-controlled zone) and 'west of the berm' (Moroccan-annexed territory), or employing neutral geographical terms such as Laayoune (capital of the Moroccan-annexed territory), Tindouf (site of the Sahrawi refugee camps) or Rabouni (camp where most of the SADR administration is located) (UN Secretary-General 2018). When it comes to the European Union (EU), the dispute over Western Sahara has been sometimes categorised as one of the 'protracted conflicts' that pose a security challenge in the European neighbourhood – along with those in Israel-Palestine, the South Caucasus and Moldova/Transnistria (European Commission/High Representative 2011: 5). As will be discussed below, the most interesting common point in international policy discourse on this conflict is that the description of the Moroccan presence in Western Sahara as 'occupation' has virtually become taboo for Western actors and the UN.

Territorialities of Western Sahara

In other words, the multiple *territorialities* of Western Sahara need to be discussed in plural and as an essential requirement for understanding the subtleties of the recognition of the SADR as a state.

Western Sahara under Moroccan occupation

While the former Spanish Sahara is classified by the UN as a non-self-governing territory and therefore officially subject to a decolonisation mandate (San Martín 2010: 5), about three-quarters of the territory is currently under Moroccan control, formally annexed and administered as part of the kingdom's 'Southern Provinces'. No country officially recognises Morocco's claim to Western Sahara. As a result, there is a limited international presence in Moroccan-annexed Western Sahara other than the MINURSO, a UN peacekeeping mission which originally exists to carry out the self-determination referendum but is now mainly tasked with monitoring the ceasefire on both sides of the berm. MINURSO, notably, is the only UN peacekeeping mission without a human rights monitoring mandate – attempts to include such a mandate from 2009 to 2013 were thwarted by Moroccan diplomacy and its supporters at the UN Security Council (Fernández-Molina 2016: 68–72). On the other hand, the Moroccan *de facto* control is reinforced and implicitly legitimated through international economic cooperation with Morocco over Western Saharan resources (fish, phosphates etc.), including the series of such agreements between Morocco and the EU. The ongoing (at the time of writing) conflict between the European Commission, which has repeatedly shown a willingness to sign agreements with Morocco that include resources originating in Western Sahara, and the European Court of Justice, which has ruled that such agreements are illegal, is a point of intersection between *de facto* and *de jure* international politics (Porges 2018).

It is difficult to know how many Sahrawis indigenous to Western Sahara live in the Moroccan-occupied territory today. The total number of inhabitants is somewhere over half a million, with Moroccan settlers representing a majority – there have been few, if any, empirical surveys of the population in recent years, due largely to Morocco's strict control

of research carried out there. Rhetorically and legally, the Polisario Front/SADR has a claim on Western Sahara, both as its legitimate authority in the eyes of the UN and because Sahrawi nationalism is constructed around this territory. Diplomatically, messaging has tended to focus on the illegality of what they term ‘occupation’, and of trade agreements concluded with Morocco over resources originating in Western Sahara. A Polisario press release issued in response to the UN Security Council’s extension of the MINURSO mandate in October 2018, stated, in part,

The Non-Self-Governing Territory of Western Sahara has been illegally occupied by Morocco since 31 October 1975. ... It is critical that the Security Council uphold unequivocally the legal status of the Territory and preserve its territorial integrity. ... The Frente POLISARIO – whose *raison d’être* is to uphold the inalienable and sacrosanct rights and national aspirations of the Sahrawi people – will accept nothing less than the full respect for the inalienable right of our People to self-determination and independence.

(SPS 2011: 1)

All available evidence suggests that there is considerable support for Sahrawi statehood among Sahrawis living under occupation – though it is, once again, difficult to know how many (Porges and Leuprecht 2016). Polisario/SADR’s claim on Western Sahara has a discursive role even though the possibility of a Sahrawi state there in the short term is remote. This claim, and its legal backing, provides political legitimacy in the camps. Discursively, it has a complex relationship to Sahrawis living under occupation; the relationship between Polisario/SADR and Sahrawi resistance in the occupied territory certainly requires further research, but researchers should be careful not to uncritically elide these categories.

SADR in Algeria

Separately from the territory of Western Sahara, Polisario/SADR administers five refugee camps, an administrative town, and the desert around them in the Algerian province of Tindouf with the permission of the Algerian state authorities. Although Polisario exercises some sort of *de facto* sovereignty by delegation in the area immediately surrounding the camps, some security responsibilities are shared with Algeria. The population here is probably around 120,000 – the camp administration is reluctant to allow census-taking inside the camps. Figures run from 90,000 to 173,000; Oxfam has estimated 120,000 as a low-end figure between all camps (Porges’s interview with Oxfam representative, Rabouni, 2016). Some population estimates use resource distribution in the camps such as food, fuel, and some other resources provided by the World Food Programme (WFP), Oxfam, the UN High Commissioner for Refugees (UNHCR), and the Algerian government, while the UNHCR bases its estimates on satellite imagery. Because some percentage of the population retains nomadic ties outside of the camps for part of the year, any particular population estimate is likely to be a snapshot rather than a definitive count (Porges’s fieldwork notes, Tindouf, 2016; Wilson 2017: 84–5).

Sahrawi refugees in the camps may travel freely in Algeria, and Algerians may visit the camps with permission from the government. In some years, when areas around the camps are fertile, Algerian nomads may graze their herds around the camps and use the camp markets and water supplies. There is also some degree of movement between the Liberated Zone – the easternmost quarter or so of Western Sahara, which remains under Polisario/

SADR control – and northern Mauritania, where another several thousand Sahrawi refugees live. Most Sahrawis live in the camps, and not in the Liberated Zone, for two reasons. First, crossing an international border, into Algeria, allows the population to be classified as refugees under the 1951 Refugee Convention, whereas those in the Liberated Zone would be internally displaced persons (IDPs). Refugee status allows for the provision of UNHCR/WFP humanitarian aid (since UNHCR has a minimal mandate for IDPs) and for various other rights and protection services pertaining to refugee status, but not directly extensible to IDPs (Porges's interview with Oxfam representative, Rabouni, 2016). Second, the initial camps, near Tifariti in the Liberated Zone, were subjected to napalm attacks by Morocco in 1975–1976 (Chamberlain 2005: 24). Placing the camps in Algerian territory makes Morocco less likely to attack them in the event of a war, as was the case in 1975–1991, for fear of provoking an Algerian response. Algeria's support for the Sahrawi nationalist project allows the refugees to leverage the international border for their cause.

Conversely, Polisario/SADR's presence in Algeria has limited international legal standing, and is entirely at the permission of the Algerian government. Polisario/SADR has no legal claim on the territory, although in practice it controls the area around the camps – visitors from Tindouf will readily observe the replacement of Algerian military escorts with Polisario soldiers about halfway between the airport and Rabouni, the administrative centre of the camps. A government exists in the camps, complete with a parliament, local elections, redistribution and so on (see Wilson 2016). The state-like functions of Polisario/SADR inside the camps are numerous:

from the early days of exile, the Frente Polisario organized health, education and food distribution committees not merely as a temporary management strategy for the camps, but primarily as a political and ideological strategy for progressively establishing the basis of a future Saharawi state.

(San Martín 2010: 112).

In addition to food and fuel aid, the SADR receives some financial aid directly from Algeria, and thus has no need to directly tax its population, although, as Wilson (2016) has noted, labour policies have some analogies to taxation and redistribution in the camps. Although Polisario/SADR claims Laayoune, in Moroccan-occupied Western Sahara, as its ultimate capital, Tifariti, in the Liberated Zone, is used as a temporary one. The main seat of camp governance, however, is within the camps, where most Sahrawi officials live. It is here that most diplomatic relations – including those with the African Union – are situated. Unlike in the occupied zone, the camps are a rich site of international activity (Isidoros 2018: 37–45). There are UNHCR and WFP offices, among many other NGOs and charities active in the camps, and MINURSO has a nearby site. From the vantage point of the camps, Polisario/SADR is a partially recognised state, and the governing structure of a series of refugee camps.

The liberated zone

Governance practices in the easternmost region of Western Sahara are somewhat understudied in the literature. Most researchers of the Western Sahara conflict give it a brief treatment but rarely depart, physically or conceptually, from the refugee camps. The area is remote and less safe than the camps, and the Polisario Front/SADR tends to limit access to it for those reasons. It nevertheless occupies an important place in the Sahrawi national project,

and has been the site of a post-war restoration of nomadic activity (Volpato and Howard 2014; Wilson 2017). The Western Sahara territory is divided by the Moroccan berm, but the berm is not any sort of international border. The Liberated Zone's legal status is the same as the rest of the former Spanish Sahara – part of a non-self-governing territory from the UN's perspective – but it differs from the Moroccan-occupied territory in that its *de facto* administration is not Moroccan but rather Polisario/SADR.

The nomenclature is notable here. Polisario/SADR calls this the Liberated Zone, or 'free zone'. Moroccan literature tends to minimise its size, or deny its existence altogether. MINURSO consistently refers to it as 'east of the berm', without acknowledging Polisario's control. There is a buffer zone extending five kilometres east of the berm, in which neither Moroccan nor Polisario military personnel are permitted. MINURSO records several violations of this restriction every year by both sides, perhaps most notably the murder of a Sahrawi nomad by Moroccan soldiers in February 2016. Sahrawi nomads do routinely enter the buffer zone. Rhetorically, Moroccan literature often attempts to elide the buffer zone and the entire Liberated Zone – sometimes claiming that Morocco has deliberately left a narrow strip between its area and the Algerian border – although this is not the case, and the area is quite large, though its precise size is difficult to estimate (Volpato and Howard 2014). The population size is harder to estimate here than in any of the other territorial segments of the conflict. Some estimates place the population around 30,000–40,000 (Sevilano 2010). There are several fairly substantial towns – most notably Tifariti – and there are many places in the territory with schools and hospitals. As with the camps, population estimates are complicated by a constant nomadic interchange between the camps, the Liberated Zone and northern Mauritania. In fertile years, or at certain times of year, the population swells, and at other times it dwindles. The SADR's minister of the Liberated Zone estimated in an interview that about 8–10% of Sahrawis are permanently nomadic (Porges's interview with SADR's minister of the Liberated Zone, Rabouni, 2016). Combining this figure with the territory's sedentary population, Polisario military bases, and Mauritania's entering the territory suggests that estimates of 30,000 are not outlandish.

Beyond MINURSO, international presence in the territory is virtually absent. During periods of flooding, UNHCR/WFP has occasionally provided limited aid in the Liberated Zone. NGOs and charities are also rare or absent. The Mauritanian train from Zouerate to Nouadhibou briefly passes through a corner of the Liberated Zone (with the permission of Polisario/SADR) so there is at least one international agreement which acknowledges the *de facto* status of this territory. Unlike the occupied zone, the Liberated Zone is unambiguously Polisario-friendly, with ubiquitous SADR flags and graffiti, and SADR checkpoints and administrative personnel visible in all major towns. The border between the Liberated Zone and Mauritania's northern province of Tiris Zemmour is large and, because of the huge distances and low population density, difficult to control. Some degree of informal border-crossing is permitted to nomadic herders seeking pasture on either side. The most formalised crossing occurs at the Mauritanian town of Bir Moghreïn, with most of this cross-border movement facilitating ongoing passage to or from Zouerate. Although Sahrawis from the camps are permitted visa-free access to Mauritania, Polisario does monitor and control the transport of food aid, fuel and livestock into Mauritania.

Three forms of international (non-)recognition

The multiple territorialities of Western Sahara and the SADR are correlated with three distinct yet partially overlapping forms of international (non-)recognition, which in order of

strength are the following: the non-recognition of Morocco's sovereignty claims over the territory of Western Sahara, the recognition of the Polisario Front as a national liberation movement and one of the two parties to the Western Sahara conflict, and the partial recognition of the SADR as a sovereign state.

First, the international non-recognition of Morocco's sovereignty claims over Western Sahara is a direct consequence of the territory's official UN designation as a non-self-governing territory subject to a decolonisation process. Interestingly, Western Sahara is the only territory on the UN list of non-self-governing territories for which the 'administering power' box is vacant. This anomaly results from Spain having officially declared itself 'exempt from any responsibility of any international nature in connection with the administration of the Territory' since it vacated it in early 1976.¹ The administering power vacuum has stirred up legal controversy between those who deem the Spanish relinquishment of responsibility *de jure* untenable – arguing that the Madrid Accords violated article 73 of the UN Charter and failed to be endorsed by the UN General Assembly (Soroeta Licerias 2016: 208–9; see Soroeta Licerias 2014) – and proponents of the position that, in view of the facts on the ground, 'Morocco should be classified as the *de facto* administrator of the territory' (Torres-Spelliscy 2014: 236). In any case, even the latter argument refers to a *de facto* and in theory temporary situation. The bottom line in terms of legal sovereignty is that no country in the world has ever taken the step of formally recognising the Moroccan claim to Western Sahara, including the many political supporters and economic partners of Morocco, which in practice regularly contradict this position through the backdoor. This represents a failure of Moroccan foreign policy, whose foremost goal over the last four decades has been to obtain formal international recognition, that is *legalisation*, for the *de facto* annexation of this territory (Fernández-Molina 2016: 46).

A stronger albeit less consensual internationally delegitimising claim is the view that the Moroccan (military) presence in Western Sahara constitutes occupation. The UN General Assembly described it as such in two resolutions in the early years of the conflict (UN General Assembly 1979: para. 5; UN General Assembly 1980: para. 3). This means that, in addition to decolonisation law based on the right to self-determination (Articles 73–74 on non-self-governing territories of the Charter of the UN, plus the two UN human rights covenants of 1966), Western Sahara would be subject to international humanitarian law including the law of occupation (IV Hague Convention of 1907, IV Geneva Convention of 1949 and 1st Additional Protocol), and Morocco should be treated as an occupying state whose 'hostile army' exercises authority over a territory without title to sovereignty.² However, although many international lawyers support this position, arguing that the legal statuses of non-self-governing territory and occupied territory are not mutually exclusive (Wrange and Helaoui 2015: 40; see also Soroeta Licerias 2016: 231; Saul 2015), the politics of the conflict has made the word 'occupation' practically disappear from the diplomatic vocabulary of international powers and international organisations, including the UN. The exception that confirms the rule was Secretary-General Ban Ki-moon's one-off reference to Western Sahara's 'occupation' during a visit to the region in March 2016 (UN Secretary-General 2016), which led Morocco to accuse the UN of abandoning its neutrality and expel dozens of MINURSO staff in retaliation, amid an unprecedented diplomatic crisis (Porges 2016; Reuters 2016).

Second, the international recognition of the Polisario Front as a national liberation movement and conflict party was formally sanctioned by the UN General Assembly, following the lead of the Organisation of African Unity (OAU), in two resolutions of 1979 and 1980. The first of these described this group as 'the representative of the people of Western Sahara' and recommended that it 'participate fully in any search for a just, lasting and

definitive political solution of the question of Western Sahara' (UN General Assembly 1979). The second one urged direct negotiations between Morocco and the Polisario Front, 'representative of the people of Western Sahara' (UN General Assembly 1980). The official two-party structure of the conflict was further ratified – and accepted by the parties themselves – with the Settlement Plan resulting from UN peacemaking efforts, which both Morocco and the Polisario Front agreed to in 1991 (see UN Secretary-General 1990, 1991). This act of mutual recognition ran contrary to the Moroccan long-held position that Western Sahara would actually be a regional conflict with Algeria as the kingdom's real contender – pulling the strings of the Polisario Front as a tool for its own pursuit of regional hegemony. The very labelling of the nature and geopolitical scale of the Western Sahara conflict has been a continuous bone of contention (Fernández-Molina 2017a: 13–4). Rabat's arguments about the regional nature of the conflict and the Algerian party-ness resurfaced following King Mohammed VI's accession to the throne in 1999 and his gradual disengagement from the Settlement Plan/self-determination referendum roadmap. Thereafter, every UN attempt to convene negotiations has been met with Moroccan calls to bring Algeria to the negotiation table as a full-blown party (Reuters 2018), thereby distorting the conflict's internationally recognised party structure.

Third, when it comes to the international recognition of the SADR as a sovereign state, the balance sheet is certainly mixed but not close to zero as in the case of Pegg's *de facto* states (1998: 26). While having a weaker international standing than the Polisario Front, the SADR has been recognised since its foundation by 84 or 85 UN member states and continues to maintain diplomatic relations with approximately 40 of these. This represents a non-negligible level of 'titular recognition', which has been defined as 'the wide formal acceptance (at multilateral level) of an entity's *right* of or title to statehood ... as in the cases of Palestine and Western Sahara' (Geldenhuys 2009: 25). Reasons for recognising the SADR have always been primarily normative in nature rather than driven by distinct political interests. The first of them lies in the *uti possidetis* principle of international law as applied to African decolonisation, i.e. enshrining the intangibility of state borders inherited from colonialism. The second one is based on anticolonialism and the view that the Moroccan annexation of Western Sahara constitutes an anomalous continuation of European colonial control, and therefore failed decolonisation, of what is often called 'Africa's last colony' – an argument that had strong resonance in the Non-Aligned Movement during the Cold War. The only purely interest-based motivation for recognising the SADR may have been at times the convenience, especially for some African states, of upholding good relations with a regional power and rich energy-exporter such as Algeria. More recently, after the turn of the millennium, Polisario/SADR have endeavoured to bring up to date their classical legal and anticolonial arguments by refocusing on the denunciation of Morocco's human rights violations and legally doubtful economic exploitation of the natural resources of the annexed Western Sahara territory. This novel 'low politics' international strategy (Fernández-Molina 2017b: 227–8), which combines the parliamentary and judicial routes, has succeeded in provoking unprecedented diplomatic crises between Morocco on one hand and the UN, the US and the EU on the other (Fernández-Molina 2016: 68–72). At any rate, this has had a greater effect in terms of upholding the international non-recognition of Morocco's sovereignty claims over Western Sahara than in increasing the international recognition of the SADR as such.

In response, Moroccan foreign policy has tirelessly sought to persuade states in Africa and Latin America – the two main historical pools of Sahrawi statehood supporters – to 'withdraw' or at least 'freeze' their recognition of the SADR, even though Article 6 of the 1933

Montevideo Convention establishes that the recognition of a state is ‘unconditional and irrevocable’.³ Moroccan efforts have proven to be successful in around half of the cases.⁴ Two significant waves of recognition withdrawals have taken place in the late 1990s, after the new personal envoy of the UN secretary-general for Western Sahara, James Baker, stepped up efforts to revive the conflict resolution process (Smith 2010: 39), and one decade later, following the launch of Morocco’s Autonomy Plan for the disputed territory, surrounded by a vast diplomatic and lobbying campaign in 2007 (Fernández-Molina 2016: 63–4). At any rate, none of the recognition and recognition withdrawal figures invoked by the parties are fully reliable, for they have been continuously embroiled in the conflict’s diplomatic and propaganda battles, and in some cases inferred from inconsistent political declarations, raising doubts in relation to the ‘question of intent’, which is critical to state recognition (Ker-Lindsay 2015: 275–6). In any case, a clear pattern emerges from the list of past and present recognisers of the SADR, namely its distinct non-aligned bias. African members have always stood out as the most numerous. At present, they include the continent’s two regional powers, Nigeria and South Africa; Algeria, Libya and Mauritania in the Maghreb; and about 15 more mainly non-Francophone southern and central African countries. Particularly much talked-about and harmful to Moroccan interests was South Africa’s recognition of the SADR in 2004, not only for Pretoria’s regional and global influence but also because of the out-of-season timing of the decision, two decades after most SADR recognitions.

In this late case, the official justification of the decision invoked conflict resolution efforts and the need to reenergise the UN-led peace process, supported also by the African Union (AU). The joint communiqué of the ministers of Foreign Affairs of South Africa and the SADR (SPS 2004) stated:

the two countries reaffirm their commitment towards the implementation of the UN/AU Peace Plan for Western Sahara and consider that speedy holding of a just, transparent and democratic referendum of self-determination constitutes the only viable way which both parties to the conflict agreed to and which received the supports of the entire international community,

In Latin America, the SADR is currently recognised by Mexico, Cuba, Belize, Honduras, El Salvador, Nicaragua, Panama, Venezuela, Guyana, Ecuador, Bolivia and Uruguay. Beyond Africa and Latin America, the list includes ten countries in various parts of Asia (Yemen, Syria, Iran, Afghanistan, India, North Korea, Cambodia, Laos, Vietnam and East Timor) and a handful of Oceanian microstates. The only two European states to have recognised the SADR, both in the mid-1980s, are the former Yugoslavia and Albania. In other words, no Western state as such has ever taken such a step – just as the Soviet Union and its Warsaw Pact allies avoided it during the Cold War. The Western European country that has been the closest to this is Sweden, where the parliament passed a motion recommending to recognise the SADR in 2012, yet the government eventually did not enact it amid Moroccan threats of boycotting Swedish companies and products (Stitou 2015). Overall, the mainstream Western official position on the conflict is one of twofold non-recognition equally affecting both SADR and Moroccan sovereignty claims over Western Sahara.

As regards international organisations, where membership may provide contested states with ‘indirect collective recognition’ (Ker-Lindsay 2015: 274), the UN has never admitted the SADR to membership as a state in keeping with Western Sahara’s official status as a non-self-governing territory. The most relevant supporting actor and platform for the

SADR has been the AU, along with its predecessor, the OAU. The OUA's receptivity was grounded in its foundational normative commitment to the eradication of colonialism in Africa and to the *uti possidetis* principle – two norms that favour Sahrawi statehood. The SADR accessed the OAU as a full member in 1982 and would act as a founding member of the AU 20 years later. This substantially reinforced its titular recognition, or the acknowledgement of its right statehood (Geldenhuis 2014: 361), in Africa and beyond – for instance, by enabling it to enter into international legal agreements as an AU member. In response, outrage over the SADR's seating pushed Morocco to withdraw from the OAU in 1984 and to remain absent from this and the AU for over three decades, until 2017. At the same time, the AU's indirect collective recognition of the SADR has never been matched by an overwhelming intergovernmental consensus among its member states. This is one of the many 'instances of states being admitted into organisations even though some members may not recognise them' (Ker-Lindsay 2015: 274).

In recent years, Moroccan foreign policy has striven to turn such ambiguity in its favour, working to persuade AU member states to disengage or rescind recognition from the SADR while paving the way for the kingdom's much-publicised 'return' to the pan-African organisation in 2017. In this respect, Morocco's diplomatic success has been only mixed as, in the end, its representatives to the AU have begrudgingly accepted to coexist with the Sahrawi ones instead of getting them expelled from this forum (Hernando de Larramendi and Tomé-Alonso 2017). Moreover, in legal terms, while it would be far-fetched to claim that Morocco's accession to the AU entails implied recognition of the SADR, given the 'clear intent of non-recognition' displayed during the process, AU membership has created new obligations for the kingdom under the AU Constitutive Act, which enshrines fundamental principles such as sovereign equality, respect for the borders of AU members, peaceful settlement of disputes between members, prohibition of the use of force, and so on (Banerjee 2017: 35–6). Aside from the AU, the SADR has remained consistently excluded from other relevant regional organisations such as the Arab League and the Arab Maghreb Union. It has only been invited to occasionally participate as a guest in summits of the Non-Aligned Movement and the New Asian–African Strategic Partnership.

Conclusion

The SADR shares some common features but remains an outlier within the categories of *de facto* states, quasi-states, unrecognised states and even contested states for three interrelated reasons. First, the contestation of its statehood does not originate from secessionism but from foreign occupation in the context of a deviant, unfulfilled decolonisation process. Second, its existence is less contentious for the international community than that of secessionist contested states because, unlike in the latter's case, its foundation was not in contravention of international law. Third, the SADR lacks substantial control over most of the territory it claims, i.e. the non-self-governing territory of Western Sahara as defined by the former colonial borders, which is largely occupied and annexed by Morocco, while the SADR operates on an essentially extraterritorial basis from the Tindouf refugee camps in Algeria. The combination of these three circumstances confers the SADR a hybrid identity between a state-in-exile and a *de facto* state, and has the mixed effect of reinforcing the SADR's statehood in constitutive terms (external recognition) while undermining it from a declaratory perspective (functional/effectiveness features). The small print of statehood and recognition in the case of Western Sahara and the SADR can only be understood in relation to their multiple territorialities, including the Western Sahara territory under Moroccan

occupation, the Algerian headquarters and primary area of governance of the SADR, and the Liberated Zone controlled by the Polisario Front/SADR in Western Sahara proper. These territorialities are correlated with three partially overlapping sources of international (non-)recognition, i.e. the non-recognition of Morocco's sovereignty claims over the territory of Western Sahara, the recognition of the Polisario Front as a national liberation movement and a conflict party, and the partial recognition of the SADR as a sovereign state.

Notes

- 1 See 'The United Nations and Decolonization: Non-Self-Governing Territories', Online. Available: www.un.org/en/decolonization/nonselgovterritories.shtml.
- 2 See 'Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War', 18 October 1907, Online. Available: <https://ihl-databases.icrc.org/ihl/INTRO/195>, art. 42.
- 3 See 'Convention on Rights and Duties of States', 26 December 1933, Online. Available: www.oas.org/juridico/english/treaties/a-40.html.
- 4 See 'Recognitions of the SADR', Online. Available: www.arso.org/03-2.htm. 'Reconocimientos de la RASD', Online. Available: www.umdraiga.com/documentos/RASD/RECONOCIMIENTOS_DE_LA_RASD.html.

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SOUTH SUDAN

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Introduction

South Sudan became independent on 9 July 2011, with heads of state and the UN secretary-general attending the celebrations that day in the capital, Juba. Within hours, governments of other countries announced their recognition of the newly established state. It was accepted as a member of the United Nations and the African Union in a matter of weeks. But this was the end of a long and bloody struggle for self-determination, including decades of war with the rest of Sudan, from which it was fighting to secede. Eventually a ceasefire and series of peace agreements setting out a six-year interim period, along with broad international support, paved the way for what was ultimately South Sudan's rapid acceptance as independent state. Even more importantly, it was the acquiescence of Sudan itself – which was not something to be taken for granted – which made the process straightforward and uncontested. Sadly, state failure and a collapse into civil war within South Sudan just over two years after independence have marred what could have been a success story of negotiated secession, with more than a third of the population displaced by fighting and half of its people facing food shortages in due course. The story of how the new state came about is however interesting in itself, and sheds light on how a process can move from war to an agreed outcome, at least up to the point of independence.

This chapter charts the course of South Sudan's journey from being a distinct and neglected part of a colonial-era state, through to being a marginalised part of the newly independent Sudan, which like so many newly decolonised states retained the borders drawn for it by the colonial powers. The history and geography – which determine so much – are described, as well as its troubled relationship with northern Sudan. This relationship, in which Khartoum often took an extractive approach a region whose people were sometimes regarded as inferior, drove the various demands for a better deal by Southerners. These aspirations ranged from a more pluralistic and democratic federal republic with greater respect and autonomy for the South, all the way through to outright independence. In the end, two long wars, and a protracted peace process, put in place an agreement for greater autonomy for the South, with the promise of a referendum at the end of a six-year transition period. The people of South Sudan seized the opportunity to vote for independence in overwhelming numbers in 2011, leading to the birth of the new state later that year. But,

despite a great deal of international goodwill and practical support, divisions and mistrust among the leaders of various factions soon saw a return to war – this time a bitter power struggle within South Sudan – with appalling consequences for its politics and its people.

South Sudan is worth studying for a number of reasons: it shows how the early South Sudanese movements during the first civil war did not receive much international support, but in due course much more sympathy was apparent in the later struggle for self-determination of whatever form. It also reveals the choices to be made by a movement which can seek a federal state which would accommodate them, or pursue the goal of fully independent statehood. Finally, there was an interesting transition over time in Khartoum's approach to the fight for Southern self-determination, from violent resistance to acquiescence in the end. The result was a secession with the consent of the original state. The path from statehood towards state failure in such a short time also highlights the enormous challenges in transforming an armed independence movement into a state which serves the interests and needs of its citizens, and building accountable institutions before state capture takes place.

History, geography, and identity

Before South Sudan broke away, Sudan was the largest country in Africa at 2.4 million square kilometres (about a million square miles) and a population of roughly 40 million people. It ranged from fertile lands with regular rainy seasons in the south near its border with Kenya and Uganda, to desert on its border with Egypt in the north. Through all these lands, the Niles flowed northwards: the White Nile snaking through the south from Uganda, and the Blue Nile coming in from Ethiopia in the east. They joined in the capital, Khartoum, and journeyed onward to Egypt. The importance of these waters to all the countries involved helped shape not only the geopolitics of the region but also the colonial policy, as Britain sought to ensure that Egypt's share of the waters was not compromised (Woodward 2011).

The north and south of what became Sudan have long been distinct in many ways, especially in terms of peoples, languages, and religions.¹ The ruling elite based in Khartoum are mainly Arabic-speaking and Muslim, and for many years have dominated the other regions of the country in a centre-periphery relationship (Willis 2011). The peoples of the South are often represented as Christian and animist (following traditional religions), African, and subjugated by the Arabic North. While there are indeed real distinctions, and these differences have become an integral part of the difficult relationships and the conflict dynamic, it is too easy to over-simplify the description and therefore misunderstand complex relationships. For a start, the “Muslim North versus the Christian South” portrait obscures the diversity of peoples and their relationships within each part of Sudan. The differences include a wide range of mutual unintelligible languages in the South, very real distinctions in ethnic or tribal identity and loyalty, and the fact that armed conflict between groups in the South has cost many lives and shaped the politics of the country as a whole (see Rolandsen and Daly 2016). There are complex relationships between pastoralists, whose cattle may move through the lands used by settled farmers (where each of them also has a distinct religion, language, and identity). Khartoum has also frequently armed and backed Southern groups, and even provided government posts for their leaders, as part of its divide-and-rule strategy in the long war with the South over autonomy. The city of Khartoum has itself been home to millions of displaced Southerners during the war, who set up informal settlements on the outskirts, raised families, and found livelihoods in the North while all the

time maintaining Southern identities and networks. So, while the distinctions between North and South are real, the appeal of a simplistic narrative should be resisted if we are to understand the real conflict dynamics.

The differences between (and within) North and South did not of course make a drive for greater autonomy or indeed self-determination inevitable. Besides the concentration of power and ideas of superiority with the Khartoum elites, the state in Sudan has been largely authoritarian in nature, with little tolerance of dissent. Omar el Bashir was still president three decades after coming to power through a coup in 1989, having understood and used effectively the machinery of the state and its networks of loyalty and patronage. Over a much longer timeframe, the North has traditionally taken an extractive approach to the South, whether that was for slavery, army recruits, or, more recently, oil. A significant source of tension with the South were moves to impose Sharia law across the country, despite assurances in earlier agreements that non-Muslims would not be subject to them (Johnson 2011).

The differences between the two parts of what became Sudan were also underlined by the experience of colonialism, which had two distinct phases. It fell under the Turko-Egyptian empire in the nineteenth century, until an uprising led to the creation of a locally governed Mahdist state in 1885. This was overthrown in a reconquest by Anglo-Egyptian forces, which brought the country under joint British and Egyptian rule known as the Condominium period, lasting from 1899 until Sudanese independence on 1 January 1956. Colonial policy generally saw the South being treated differently, or even isolated from the rest of the country. It was also ignored by comparison with the rest of Sudan in terms of traditional development, such as education, health services, and infrastructure. This was not helped by the fact that it is landlocked, and its borders were with parts of neighbouring countries which were already peripheral, while the North had ports on the Red Sea.

Outbreak of the first civil war for independence

Some disturbances were seen in the South as early as 1955, even before the Sudanese independence on 1 January 1956. But the outbreak of what came to be known as the first civil war is more properly set as 1962. Again, the move can be seen as a response to how the Northern establishment dealt with the South: instead of the planned federalism, which would have taken account of Southern concerns, a more centralised form of governance emerged. It included a policy of Arabisation and Islamicisation as part of the nation-building process, which raised concerns among Southerners, who wanted a more pluralistic society (Johnson 2011, 2016a). The armed movement which emerged, soon known as “Anyanya” (meaning venom or poison) sought self-determination for the South, using the language and ideals of decolonisation which were so potent at the time. However, there was little or no support from the Organisation of African Unity (OAU) or its members, who had agreed to respect the colonial borders and shared an interest in not encouraging secessionist movements which existed across the continent. This is in sharp contrast to the successor to the OAU, the African Union, which ultimately gave its support to the peace process leading to South Sudan’s independence and quickly recognised the new state, in the same way that it supported Eritrea’s agreed secession from Ethiopia following a referendum in the 1990s. Even within the Anyanya movement, there were splits and differences over whether outright independence was the goal, or a federal and more pluralist Sudan.

However, this phase of the long struggle for a better deal for the South was important in that it saw the establishment of both an effective armed group and a political movement,

which set out a variety of demands, and grew in self-confidence and collective identity. Some of the key players in the Ananya movement went on to be significant leaders of the Sudan People's Liberation Movement/Army in its later manifestation. The fact that there was not much international support was to change in due course.

The war was ended with negotiation of the Addis Ababa Agreement in 1972. It offered limited autonomy for the South, including the establishment of a Southern Regional Government (Thomas 2015). But underlying questions remained about how Southern interests, identities, and religious affiliation would be accommodated in reality. Key players in Northern politics still sought to bring national laws into line with their Islamic vision. Even more importantly, the confirmation of large oil reserves – mainly in the South – in 1979 added a new dimension to the question of Sudanese governance. This not only underlined the extractive nature of the North–South relations; it also created important interests for Khartoum, in accessing the oil fields and suppressing civil or armed resistance in the South. The oil pipelines were built through the North to Port Sudan on the Red Sea, further linking the fate of both parts of the country, since even after independence South Sudan would rely on this route for oil exports, which account for almost all government income. It also internationalised the conflict, especially in terms of relations with China, which jointly owned and operated much of the oil infrastructure and was Sudan's largest customer.

The second civil war

Khartoum showed increasing reluctance to adhere to the spirit of the deal, which was supposed to keep the South within a reformed Sudan. The North eventually abrogated the Addis Ababa Agreement, and the second civil war started in 1983. The dominant force was the Sudan People's Liberation Movement/Army (SPLM/A), which was led by John Garang throughout the war and through negotiation of the peace treaty which ended it. The SPLM/A at times held large parts of the country, with the Sudanese national army often holding key towns. This phase was a defining period in terms of the emergence of an effective independence movement and collective identity. But it went further, as the SPLM/A acted like a proto-state which had parallel structures such as international representation, issued travel documents and other authorisations, and operated *de facto* government structures which regulated some of the territory it held. International support also grew in this period.

Estimates of casualties in armed conflict such as this are notoriously difficult to verify, especially since many died during the famine and displacement caused by the war. Life expectancy was low and child mortality high in a region with real development problems, so estimates of “excess mortality” have to be based on a notional baseline. But suffice to say that millions died, and many more were displaced. Some four million Southerners settled in Khartoum. It's also important to recognise that a good deal of the fighting was between militias and ethnic groups in the South. The history of violence between Dinka and Nuer in particular resulted in a legacy which brought further tragedy in post-independence South Sudan: it foreshadowed rivalry and eventual breakdown of the power-sharing government in 2013. Khartoum often backed armed groups in the South, in a successful policy of disruption and divide-and-rule. They were not only armed by the national government, but some of their leaders turned up in Khartoum for a spell as *protégés* of the regime, as allegiances shifted and armed groups fragmented and reunited. The ability of leaders to actually control their militias was also a key factor.

International support for the South Sudanese was much stronger than during the first civil war, when Khartoum was seen by Washington as being friendly to the West. This

time, the Sudanese war was for many years accorded an unusually high priority in US foreign policy. There was in fact a powerful lobby in the United States in favour of the Southern cause. It was a strange combination of conservatives, whose oversimplified analysis saw the South as Christians being oppressed by the Muslim North; a diaspora; and human rights and development groups, later joined by those highlighting the killings and mass displacement in Darfur from 2004 onwards.

They helped to keep the war on Washington's agenda, and their efforts were not harmed by US concerns about Khartoum's support for Osama bin Laden (who lived in Sudan for a time) and its backing for Sharia law, especially after the 1989 coup brought the National Islamic Front to power with its confessional agenda. Economic sanctions were imposed on Sudan by the US, and remained in place throughout the war and subsequent peace process. Western involvement meanwhile in developing the oil fields ran into security problems and pressure from advocacy groups, so the industry was developed primarily by Chinese companies, along with others from India and Malaysia. The first exports flowed in 1999, and became significant to the Sudanese economy as well as shaping its relations with China in particular.

The peace process

Early efforts at some kind of peace talks were hosted by Nigeria, but were undermined by a split in the SPLM/A. The faction led by John Garang sought a democratic, secular Sudan, while others wanted outright independence. The following year, the Inter-Governmental Authority on Development (IGAD) facilitated further talks, and continued in this role throughout the peace process. This regional grouping brought together countries in the Horn of Africa, with membership at that time of Kenya, Uganda, Ethiopia, and Eritrea, and many of the key sessions took place in neighbouring Kenya. The process involved a series of incremental agreements on specific issues, before the final peace agreement dealing with question of possible independence. Sudan agreed to a Declaration of Principles in 1997 after initial objections. This recognised both the right to self-determination and the need for a secular, democratic state in order to achieve unity (Johnson 2016a). It provided a basis for the rest of the negotiations, and a key element was the right to hold a referendum in the South on its future status. This in fact paralleled the process by which Eritrea voted peacefully to become an independent state in 1993, with the consent of Ethiopia, from which it was seceding after a long and bitter war. The model for South Sudan in fact owes something to the Ethiopian leader at the time (Woodward 2011).

Respect for the leadership of John Garang grew in the region, and the SPLM and the diaspora were effective in mobilising Western support for the Southern cause. Human rights, modern-day slavery, and the narrative of an oppressed Christian people were powerful ideas for generating support in the US and in Europe. This support grew as the SPLM/A was seen as capable of engaging in peace talks, and, by the time these had become serious in 2001, the SPLM/A had become "the government of southern Sudan in waiting" (de Waal 2014: 352). Reports of how civilians had suffered under Khartoum's military campaign – whether directly or indirectly – helped to increase sympathy for the South.

As the negotiations picked up momentum, further agreements, which were eventually incorporated in the final treaty, included the Machakos Protocol, signed in Kenya, which set out broad principles for governance (2002), followed by a number of agreements signed in Naivasha, Kenya. These included security arrangements (2003), and in 2004 wealth-sharing, power-sharing, and how to deal with the three separate disputed border regions of Abyei, Blue

Nile, and South Kordofan. International donor countries, who had contributed over the years to the massive relief operation to tackle war-induced famine and other humanitarian crises, made clear they would support the statebuilding project to come. The task was enormous, and not just because South Sudan was one of the poorest countries in the world with few state services for its people. It would also require the difficult transformation of the SPLM/A from a rebel group into a government, in a region where patronage and corruption could upend any hope of governance in the interests of the people (de Waal 2014).

In November 2004, the UN Security Council held a symbolic meeting in Nairobi, in order to show its support for the peace process and encourage the parties to reach a final agreement. The united front shown by the international community – including the support of the African Union – helped to pave the way not only for a final peace agreement but ultimately also for its implementation and recognition of the new state. A complicating factor at this time was that a brutal conflict had erupted in the region of Darfur in western Sudan a year before, leading to a humanitarian crisis and widespread abuses reminiscent of what South Sudan had previously experienced. The conflict dynamic was different but some of the tactics sounded familiar. Darfur is another of Sudan's peripheral regions, where there was resentment at having been ignored by the centre. Its many population groups included those who could be described as largely African and largely Arabic, and the differences between them were significant in terms of what was happening. A military attack in 2003 by a newly established group seeking more autonomy for Darfur was met with a formidable response by the government, which went on to arm, support, and operate alongside Arabic militias drawn from the local population. The ethnic cleansing resulted in three million people (more than half the population of the region) being displaced, along with killings and gender-based violence. An under-resourced peacekeeping mission was sent by the African Union (AU) in 2004 – one of the first such AU operations – but could not stem the violence against civilians. At the United Nations Security Council, Khartoum was protected from any real sanctions by China, which bought most of Sudan's oil while selling arms to the regime. In the end, the AU mission was “re-hatted” to become a joint UN–AU mission in 2007, despite much resistance from Khartoum along with denial that there was a humanitarian crisis. The International Criminal Court later indicted leading figures from a number of armed actors in Darfur, including Sudan's president Omar al Bashir, for serious crimes there under international humanitarian law (International Criminal Court no date).

Besides being a disruption and a concern for the North–South peace process, the crisis underlined a number of important things. While a ceasefire existed in South Sudan, it showed that the North retained its capacity for a military response to whatever it perceived as a threat in its peripheral regions, including the targeting of civilians. It also exposed the complex network of relationships between the various groups in Sudan, which goes far beyond the “Arabic North” versus the “Christian South”. In many cases, the relationships *within* these regions was fundamental to the dynamic as much as *between* regions. Groups may have coexisted, competed, inter-married, fought, shared resources, and managed conflict locally for generations, while also being vulnerable to outside actors and the injection of arms. It also showed the limits of international intervention at the humanitarian level (which faced obstruction and logistical problems), as peacekeepers (coming up against jealously guarded state sovereignty), and at the military level (for which there was absolutely no appetite from the international community).

A final agreement with two options

In the end, despite what might be termed the distraction of Darfur, a Comprehensive Peace Agreement (CPA) was drawn up by the parties and signed at a public ceremony at

a football stadium in Nairobi in January 2005. It was ambitious, and involved a long and complex implementation process, during which South Sudan would rely on international support to prepare itself for possible statehood. An interim period of six years was specified, during which there would be elections throughout Sudan and in the South. The final question of its status would be decided by a referendum, as had already been set out in the earlier Machakos Protocol. This declared that the people of South Sudan had the right to self-determination through (among other things) a referendum on its future status. This was to be internationally monitored, and jointly organised by Khartoum and the SPLM/A. The choice was to be between unity (with the North) or secession (Young 2012). For many observers, it was a foregone conclusion that the SPLM/A and the people would overwhelmingly choose complete independence in any referendum, if only they were allowed to. This was a key aspect: that South Sudan's sovereignty would be recognised if the process were allowed to unfold as set out in the agreement.

The agreement however retained the previous ideas which had been committed to before but not delivered: to change the nature of Sudan as a whole to make it a more pluralistic state where the rights and voices of Southerners had at least some recognition. The CPA stated that Sudan would have to be just and fair for all its citizens, that the grievances of the South should be redressed, and that both parties should work to make the unity of Sudan attractive to all its people (Comprehensive Peace Agreement 2005; Johnson 2013, 2016b). This vision of a "New Sudan" put forward by SPLM/A leader John Garang was the only real alternative to separation, but did not come about. One difficult subject deferred for future consideration was the status of three border areas and which side they belonged to: people in Abyei, Blue Nile, and the Nuba Mountains were to have a say in whether they would join the North or South, and a rough outline for this was set out. It is perhaps unusual that secession and recognition of the new state could in the end be practically uncontested, when the borders were still not agreed and oil resources were at stake. But it also shows how finally there was a momentum and real support for self-determination, even if some of the details were to be worked out later.

Six months after the agreement was signed, John Garang made the highly symbolic and triumphal journey to Khartoum in July 2005, where he was greeted by enormous crowds. He was sworn in as first vice president of Sudan, a post provided for under the CPA, in what could have helped to pave the way to a New Sudan. However, three weeks later he died in a helicopter crash in South Sudan. His sudden death removed a leader who had provided both vision and tactical skills. It also confirmed that the SPLM/A's ultimate goal would now be full independence, with little interest in taking the risk that Khartoum was serious about a New Sudan. There had always been the suspicion that, given the authoritarian nature of the ruling party (in power since 1989), Khartoum would somehow undermine the CPA and prevent a referendum on independence going ahead at the end of the transition period. Their long track record, the harshness of the crackdown in Darfur, and the fact that the North would lose a substantial part of the oil revenues if South Sudan broke away, convinced many that Khartoum should still not be trusted and that independence was the only option. While John Garang was still revered, his successor, Salva Kiir, has not shown the same vision – as evidenced by the post-independence violence and breakdown of government.

In the end, the support of the international community in building the proto-state of South Sudan helped to create an atmosphere in which its self-determination would be allowed to become a reality, as envisaged in the CPA (see Rolandsen 2011). Key supporters of the process included the troika of the US, the UK, and Norway, and individual donors

as well as multilateral agencies provided resources and technical assistance. The question of whether South Sudan could absorb the funds effectively and without blatant corruption and neo-patrimonialism was another question. China – which had backed Khartoum throughout the conflict in Darfur – was not an obstacle. Just as important was the regional support, mainly expressed through IGAD, and the AU itself. Some neighbouring countries had a long record of supporting rebel movements in each other's territory, and many of them had reason not to encourage secessionist movements in their own territories. But this did not prevent them from backing the process. The one player whose intentions were still unknown was Khartoum, which at one point tried to hold up the referendum, and had a track record of failing to honour deals on Southern autonomy (such as the Addis Ababa Agreement). Its ability to disrupt internal Southern politics and tactics of divide-and-rule had so often been effective, and the ongoing disregard for human rights was clear in the continuing war in Darfur. There were still doubts that Khartoum would allow the process to go ahead, but in the end it did. Despite these fears, President Omar al Bashir announced shortly before the referendum on independence that he would respect the result, saying in a speech in Juba that, whatever the choice of Southerners, Khartoum would accept it and be the first to come and celebrate with them (Young 2012). The vote was held in January 2011 with the endorsement of the AU and the rest of the international community, and returned a massive 99% in favour of full independence (Woodward 2011).

Independence at last

So it was six months later that South Sudan marked its independence on 9 July 2011, at a ceremony in the capital, Juba, where joy, hope, and relief were clearly expressed. Self-determination was now manifested as statehood, with broad support from the international community and even the acquiescence of its former adversary. The celebrations were attended by many international figures, including UN secretary-general Ban Ki-moon, and President Bashir of what was now the neighbouring country of Sudan. Having been through decades of bloody and uncertain struggle for at least some kind of autonomy, followed by a slow peace process and a six-year interim period which allowed for the possibility independence, international recognition started to come in immediately. Formal statements of recognition were made on the day South Sudan became independent by dozens of countries, including all five members of the UN Security Council, and its former adversary, Sudan. Among those immediately announcing recognition of the new state on 9 July were US president Barack Obama, who recalled the support which civil rights leader Martin Luther King had expressed for Ghana when it achieved independence, as part of that great wave of decolonisation. Framing it in terms of national liberation resonated with how the SPLM/A had made its case internationally. Obama said, “We know that southern Sudanese have claimed their sovereignty, and shown that neither their dignity nor their dream of self-determination can be denied” (Obama 2011). The norms of national liberation and self-determination were celebrated in statements from the international community, although the very real challenges of statebuilding remained a concern. In general, support was not conditional, but there was due recognition of just how difficult the enormous task of creating a functioning and accountable state out of the war-ravaged region affected by poverty and under-development. The unspoken fears were that corruption, factional rivalry, and ethnic tensions would derail this difficult process.

A few days after the independence ceremony, the UN Security Council referred South Sudan's membership application to its Committee on the Admission of New Members, which reported back and resulted in the Security Council recommending (without the need

for a vote) to the General Assembly that the newly independent country be admitted. In a statement to mark the decision by the Security Council, its president said:

On behalf of the members of the Security Council, I wish to extend my congratulations to the Republic of South Sudan on this historic occasion. The Council notes with great satisfaction the Republic of South Sudan's solemn commitment to uphold the purposes and principles of the Charter of the United Nations and to fulfil all the obligations contained therein.

(UN Security Council 2011)

The General Assembly duly accepted South Sudan as the UN's 193rd member the following day (14 July) in a resolution adopted by acclamation, less than a week after its independence (UN General Assembly 2011). UN secretary-general Ban Ki-moon, who had attended the independence ceremony just a few days before in Juba, spoke immediately after the resolution was adopted. He said that "the world gathers to say in one voice: Welcome, South Sudan. Welcome to the community of nations. ... Together, let us say to the citizens of our newest Member State: You now sit with us. We stand with you" (UN News 2011).

South Sudan became a full member of the AU later in the same month (July 2011). Several countries, such as the US and France, already had diplomatic missions or even full consulates in Juba during the transition period, and these were then upgraded to embassies. South Sudan immediately started the process of opening embassies, and later joined IGAD, which had hosted the negotiations for the peace process.

The challenges facing the new but desperately poor country were enormous, despite the international goodwill and practical support in terms of aid and other assistance (Copnall 2014; Johnson 2014a, 2014b; de Vries and Schomerus 2017a, 2017b; Martell 2018). Oil production accounted for almost all government income, but the following year exports were halted in a dispute with Sudan over paying the transit costs through the pipelines to the Red Sea – the only way to get the oil to the outside world. This affected both countries badly, as their economies were highly dependent on oil revenue. Tensions over the three disputed border areas continued without any immediate resolution. And the networks of patronage and corruption already in place continued to undermine governance of the new state. Just over two years after the jubilation of independence, serious fighting broke out in Juba in December 2013 between factions of the ruling government when a tense power-sharing agreement broke down. Personal rivalry between President Salva Kiir (who had become SPLM/A leader after the death of John Garang in 2005) and Riek Machar (who had led his own armed group during the war) resulted in attacks on civilians based on their ethnicity, leading to massive displacement as people read the signs of what was to come. These two leaders came from the largest ethnic groups in South Sudan, the Dinka and Nuer, respectively, and politics and conflict in South Sudan became increasingly polarised along tribal lines. Food production was disrupted by insecurity and displacement (Concern Worldwide 2018), and, despite a massive international relief effort, famine was declared in February 2017 (exactly as predicted) in parts of Unity State. It was the first time in several years that famine had been recorded in the world.

The problems seen in the long North–South war reappeared, with humanitarian access and relief supplies being blocked as a tactic of war. By 2018, more than four million people (a third of the population) had fled their homes, with half of these becoming refugees in neighbouring countries – including Sudan. Oil production practically ceased due to insecurity, and the economy collapsed. In terms of long-term conflict resolution, the most worrying aspect is how quickly the power struggle between two men and their armed factions turned into one where ethnicity was

a factor. The use of rape as a weapon of war, killings, displacement, and other human rights atrocities have been well documented (Center for Civilians in Conflict 2016; Office of the High Commissioner for Human Rights and UNMISS 2018; United Nations 2018), and show that identity politics are a driving force. There is a bitter irony in how the SPLM/A, which was supposed to be a liberation movement, became Dinka-dominated and responsible for some of the worst attacks on civilians from other groups.

Conclusions

As South Sudan continued on a path towards a failed state, the civil war saw Western powers wearying in their support for the new nation, while at the same time providing considerable humanitarian resources and backing regional dialogue initiatives, which were primarily led by IGAD. An arms embargo was suggested for a number of years but failed to get enough votes at the UN Security Council in December 2016. The initiative was eventually passed in February 2018. But South Sudan's problems do not arise from lack of state recognition, and in fact come despite considerable goodwill and practical support from most of South Sudan's neighbours and the wider international community. The massive aid operation to deal with war-induced famine during the conflict with the North has been replaced by one dealing with the crisis created by civil war within South Sudan. More than half the population was food insecure in 2018 (World Food Programme 2018). IGAD, which helped to broker the peace agreement which created South Sudan, has been the lead mediator in repeated attempts to negotiate an end to the fighting. Further ironies appeared as South Sudanese people fled northwards into Sudan, and even Darfur, in an attempt to escape the fighting, while a shaky power-sharing agreement between the warring elites of South Sudan was brokered by Khartoum and signed there in September 2018. The kind of inclusive, tolerant, and democratic state which a New Sudan was supposed to be – but which turned out to be impossible and made secession the only other option – is in fact a model which South Sudan desperately needs. There are of course courageous voices in civil society with a vision for an inclusive South Sudan, but the space for civil society is limited and uncomfortable (Jok 2017; Christian Aid 2018). Ultimately, peace, coexistence, and the creation of a polity or social contract after years of war will be a long process, requiring real leadership and vision, rather than one rooted in the zero-sum ethnopolitics of rivalry and competition.

Note

- 1 While the idea of what South Sudan amounts to as a distinct entity has long been accepted, the terminology for the rest of Sudan is less clear. There is no equivalent “North Sudan”, and following Southern independence the remaining part is simply called “Sudan”. To avoid confusion, the terms “the North” (or “Khartoum”) and “the South” are used here to distinguish the two parts, up to the point of independence.

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31

KOSOVO

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Introduction

On 17 February 2008, Kosovo declared its independent statehood in close coordination with the United States of America (US) and European partner states. Kosovo was the last remaining entity to declare independence after the violent dissolution of the former Yugoslavia, having endured a decade of state violence and ethnic conflict by the Serbian regime and another subsequent decade of international administration and supervision. Between 2006 and 2008, the UN led talks for defining Kosovo's future political status, which concluded that supervised independence was the most viable solution for peace, democracy, and prosperity in Kosovo and the wider region (Visoka 2017). However, this recommended settlement faced objections from Serbia as the former host state, backed by Russia and supported by China, who threatened to veto the UN's plan for supervised independence for Kosovo. The failure of the UN Security Council to endorse Kosovo's independence set the country on a complex path of becoming a sovereign state.

Kosovo's declaration of independence in 2008 and its subsequent efforts to achieve diplomatic recognition have generated a range of reactions and uncertainties. A group of scholars claims that Kosovo's independence can be supported by international law as an exceptional case taking into account the unique pathways to independent statehood (Weller 2009). However, another group of scholars argues that Kosovo has breached the vital norms of state sovereignty and territorial integrity, the necessity of securing consent from the host state before declaring independence, and the dangerous implications for international order and other secessionist conflicts (Milanović and Wood 2015). The Kosovo case has also divided the international community on the issue of secession and recognition. While the US and most European states strongly support Kosovo's statehood, Serbia – backed by Russia, China and other non-Western regional powers continue to oppose Kosovo's independence and its international recognition. Despite these challenges, during its first decade as an independent state Kosovo has secured recognition from 116 states (as of 2018), established diplomatic relations with over 80 states, opened 25 embassies, and became a member of over 60 international and regional organisations. What explains Kosovo's success to date in becoming a recognised state? What role did great powers and their own proactive diplomacy play in strengthening Kosovo's international subjectivity?

This chapter explores the everyday micro-politics of constructing independent statehood and obtaining international recognition in a case involving a non-consensual declaration of independence from the former host state (Visoka 2018a). The chapter argues that Kosovo's diplomatic success in obtaining bilateral recognition has been the situational assemblage of multiple discourses, practised through a broad variety of performative actions and shaped by a complex entanglement within global assemblages of norms, actors, relations, and events. Although powerful states played an important role in strengthening Kosovo's international standing, Kosovo's own diplomatic efforts have shaped the dynamics and outcomes of its campaign for international legitimisation. Kosovo's own diplomatic agency was crucial not only in shaping and transforming its own international status through discursive and performative actions, but also by mobilising support from global and regional powers. As a result of this prudent diplomatic approach, Kosovo as an emerging state developed its own legitimating narratives, generated support from different states, challenged the international exclusionary norms, and found loopholes in the global legal and political system to fight for its place among the sovereign nations. Accordingly, the analysis in this chapter departs from conventional and legal debates on statehood, secession, and recognition to demonstrate that the recognition of states is not only a matter of law or a single act but is first and foremost a matter related to the performative diplomacy of fledgling states and a process which involves complex entanglement with external forces.

The analysis in this chapter proceeds as follows. A brief history of Kosovo's quest for independent statehood is offered to demonstrate the non-linear process of state-becoming. The discussion then explores Kosovo's struggle for international recognition by focusing on the diplomatic discourse, performances, and entanglements with external actors as three segments that have underpinned country's campaign for consolidating independent statehood. The chapter concludes with a brief diagnosis of three potential futures for Kosovo in its quest for becoming a full member of the international community.

Kosovo's path to independent statehood

Kosovo's campaign for independence was not entirely a planned endeavour. It was rather an open-ended and multidirectional pursuit undertaken by different actors through different methods, shifting between non-violent and violent methods for realising independent statehood. Kosovo's contemporary struggle for independent statehood can be comprehended in three distinct phases: the campaign for internationalisation of Kosovo's struggle for freedom and independence (1990–1998); the period of UN transitional administration and statebuilding (1999–2008); and, finally, the transition from supervised to full independence (since 2008).

The first phase of crafting Kosovo's statehood occurred between 1990 to 1999 and involved a gradual detachment from the fractured remains of Serbian-dominated Yugoslavia, which in Kosovo began with peaceful resistance, continued as a quest for democratic separation through a referendum and ended with a violent conflict and international intervention. Kosovo's distinctly identifiable ethnic community with a clearly demarked geographical space and the perseverance of serious discontents expressed through political confrontation as well as indiscriminate use of violence by central government provided strong grounds for the mobilisation of political leadership with wide popular legitimacy in support of independence (Bartkus 1999: 10). During this phase, Serbia's violent reaction to the claims for independence solidified Kosovo's case for independence, including: the substantive abolition of Kosovo's autonomy; subjecting Kosovo-Albanians to a systematic denial of their basic human rights, including general discrimination and the mass dismissal of ethnic Albanians

from public office and commercial enterprises; interference with the judiciary, arbitrary arrests and imprisonment; use of torture and the disproportionate use of force (Weller 2009). While the 1974 Constitution of Yugoslavia granted Kosovo most features of statehood, during the 1990s struggle to become a sovereign state, Kosovo ultimately formed the necessary social, political, and institutional awareness for becoming and acting like a sovereign state. During this phase, every act of seeking independence on the grounds that Kosovo satisfies the core criteria of statehood performed the function of consolidating the further the very criteria that it claimed to possess.

During the first phase, Kosovo's struggle for self-determination was initially undertaken through peaceful methods, which involved boycotting Serbia's harsh regime through the creation of parallel state institutions and the establishment of a government-in-exile (see Weller 1999). Although the quest for Kosovo's independence was inevitably an elite-driven process, its legitimacy was underscored by the overwhelming political will and commitment among Albanians in Kosovo for realising independent statehood: this served as the foundation for Kosovo's independence. The rationale for seeking statehood was not embedded in the calculation of potential risks and uncertain futures. Rather, it was driven by values, hope, and the belief that independence is indispensable as the only path for Kosovo-Albanians to realise their historical aspiration for collective freedom and self-determination. Under the conditions of denied statehood, the focus of the campaign for independence was to continue local resistance and ensure the survival of the Kosovo-Albanian population while proactively seeking external support for independence by internationalising the self-determination crisis, drawing international attention to Serbia's systematic and state-sponsored human rights abuses and political prosecution, and ultimately triggering international intervention to achieve liberation. The initial process of state-becoming involved created a cohesive social and political structure which was enabled by peaceful resistance and state-alike parallel institutions. Yet, as Serbian regime did not respect the majoritarian quest for independence in Kosovo, the pro-independence political leadership engaged in a complex campaign for internationalisation of the problem of Kosovo through a government-in-exile and broad network of diaspora community (Pula 2004). However, the struggle for independence through domestic boycotts and attempts to internationalisation Kosovo's case for independence produced only limited results, largely since the international community was unwilling to address Kosovo issue at the same time as the Dayton peace process, which aimed to end the conflict in Bosnia and Herzegovina and Croatia.

The initial failure of preventive diplomacy to address the situation in Kosovo led to the escalation of the conflict, which then demanded the urgent attention of the international community. This political stalemate coupled with the state's violence transformed the resistance from peaceful protest to an armed struggle between the Kosovo Liberation Army (KLA) and Serbian police and armed forces. This in turn exacerbated a dynamic of violence that created a humanitarian emergency by 1998 as Serbian state-sponsored violence took on the form of ethnic cleansing. The armed resistance and the escalation of the crisis finally caught the attention of the international community, which tried to resolve the dispute through diplomatic means. The response of the international diplomacy only after the crisis reached its tipping point reflects the frequent failure of the international community to prioritise conflict prevention and the subsequent phase of crisis management. Ultimately, the fully fledged violent conflict lasted over two years and cost over 13,000 people their lives, including the occurrence of widespread war crimes and crimes against humanity with genocidal intents (Humanitarian Law Center 2011). Subsequently, NATO's military intervention tried to stop Serbia's state-sponsored violence against Kosovo-Albanians, which consisted of ethnic policing to maintain control over the territory, ethnic cleansing in regions where

local insurgence was challenging the judicial authority, and then full-scale depopulation of Kosovo by driving Kosovo-Albanians out of the territory in response to NATO's humanitarian intervention (Ron 2003: 89–108).

The second phase of crafting Kosovo's independent statehood took place between 1999 and 2008, beginning with NATO's military intervention and the subsequent UN transitional administration. This critical phase involved consolidating internal sovereignty, strengthening state capacities, earning the support of major powers and democracies, and preparing the ground for independent statehood (see Phillips 2012). It was NATO's intervention and the decision, articulated in UN Security Council Resolution 1244 (1999), to place Kosovo under international administration, which effectively removed Serbia's sovereignty over Kosovo. This period reveals how Serbia's actions and efforts to prevent state formation unintentionally enhanced Kosovo's international support along with its chances for independent statehood. The main impetus for utilising the UN administration as a pathway to independence came from the Kosovo-Albanian political elite, who were relentless in shaping the political, legal, and institutional processes to create for Kosovo the attributes of an independent state. The quest for statehood provides almost unquestionable legitimacy to political and military leaders, which raises questions about the true motivations and hidden intentions behind the campaigns for independence. During this phase, everyday diplomacy focused on steering the statebuilding process in the direction of state formation, thereby generating support within the UN civilian presence and among the diplomatic representatives of foreign countries that were committed to resolving Kosovo's status.

Although the UN and NATO never formally supported Kosovo's independence, the peacebuilding and statebuilding processes they facilitated ultimately created the conditions that led to full independence in 2008. Nonetheless, the UN administration of Kosovo between 1999 and 2008 tried to counterbalance the Kosovo-Albanians' focus on independence with normative conditions related to minority protection, good governance, and democratisation. In many regards, the UN has channelled statebuilding efforts to respond to the Kosovo-Albanians' desire for independent statehood while directing peacebuilding activities to accommodate and appease the Serb minority in Kosovo and their objection to independent statehood (Visoka 2017). At least in retrospect, the period of UN administration played a significant role in resolving the "recognition dilemma" experienced in the aftermath of the Kosovo's declaration of independence. The UN transitional administration of Kosovo provided an externally designed pathway to full sovereign statehood by creating the political, economic, and social infrastructure whereby the entity consolidates its statehood capacities with functioning democratic institutions, a self-reliant market economy, and the capacity to make and implement law and contribute to regional stability. The UN mediated talks on the final status represented the final attempt to resolve the dispute through peaceful negotiations and compromise. After two years of unsuccessful talks, the UN mediator Martti Ahtisaari concluded that "independence is the only option for a politically stable and economically viable Kosovo" (UN Security Council 2007: 4). Serbia rejected the independence proposal, which mobilised Russia to oppose the UN Security Council endorsement plan for supervised independence. As this crucial development narrowed down the prospects for a mutually consensual settlement, Kosovo and the Western powers endorsed the pathway for a declaration of independence without Serbia's and UN affirmative endorsement.

The third phase of crafting Kosovo's statehood began with Kosovo's declaration of independence in February 2008, which represented a remedial solution and a historical change in Kosovo's struggle for becoming a sovereign state. Although Kosovo proclaimed independence in close coordination with the international democratic community, it lacked the

blessing of the former host state and did not receive endorsement by the UN Security Council. This set the country into a complex trajectory pursuing bilateral recognition and membership of second-order international organisations in the hope that it would eventually achieve a critical point and gain full international acceptance. Other issues which preoccupied Kosovo after independence was the struggle to reduce international missions and expand its own domestic sovereignty, a process which was intimately linked with the international support for international recognition. While UNMIK, the EU Rule of Law Mission in Kosovo (EULEX), the NATO peacekeepers, and the OSCE were status-neutral, only the International Civilian Office (ICO) actively supported Kosovo's independence (Visoka and Bolton 2011). Kosovo was obliged to endure another period of international supervision in exchange for diplomatic recognition while gradually expanding domestic authority in exchange for providing strong safeguards for minorities, and demonstrating capabilities of a functioning a normal state. Most importantly, this period was marked with the most complex task of obtaining international recognition and membership of international bodies under the conditions of partial external contestation and inhospitable global environment for new states. Parallel to consolidating domestic sovereignty, after independence Kosovo prioritised foreign policy consolidation (UN Security Council 2008: 5). To facilitate this, Kosovo began establishing the legal and institutional infrastructure to govern and execute its foreign policy and external relations.

The three phases underpinning Kosovo's struggle for statehood performed three different legitimisation functions (see Seymour 2017). The first phase added moral legitimacy to the case for statehood, whereby independence became the remedial choice after the abolishment of Kosovo's autonomy, political violence and systematic human rights abuses, and international involvement. Subsequently, the 1990s events formed the historical, normative, and political justificatory discourse for international recognition, and bonded Kosovo's special relationship with the US and the majority of European powers. The second phase of state-becoming added procedural and deliberative legitimacy to Kosovo's struggle for independence by demonstrating that the territory prior to the proclamation of independence satisfied core attributes of modern statehood and was ready to function as sovereign and self-sufficient state. After almost a decade of international administration and *de facto* abrogation of Serbia's sovereignty and authority over Kosovo, it was practically and politically impossible for Kosovo to return to the pre-war political status or another autonomous arrangement within Serbia. This marked the phase which for many was significant for Kosovo to earn its sovereignty. Finally, the third phase of state-becoming added functional and political legitimacy to the case of independence, whereby Kosovo demonstrated that it was ready to act like a state, to take international obligations, to implement the UN's proposal which led to supervised independence, and to integrate into the regional and international political and socio-economic organisations. The remainder of this chapter explores in detail the third stage of Kosovo's struggle for consolidating statehood by examining its diplomatic discourses, performances, and entanglements as part of efforts for securing recognition and obtaining membership of international bodies.

Diplomatic strategy for international recognition

Since the declaration of independence, the core goal of Kosovo's foreign policy has remained completing international recognition, which is seen as a crucial step towards consolidating statehood and advancing the country's foreign policy. The absence of universal recognition has become a threat to Kosovo's political existence and an encounter that undermined its domestic sovereignty could affect its territorial integrity and vice versa. A diplomatic memo of the MFA of Kosovo (2014) stated that:

Recognition is a priority of Kosovo's foreign policy as it determines the external dimension of Kosovo's political existence. Recognition of Kosovo is important as it would strengthen our international position, it would bring stability internally and in the region of Balkans, it would bring economic investments, as well as help Kosovo integrate in the international organizations.

However, when Kosovo declared independence, it was caught unprepared as it had neither a foreign policy apparatus in place nor a strategy how to achieve international recognition. Only through practising its prudent diplomacy could it gradually develop both a discursive and institutional repertoire to guide its campaign for international legitimization.

Diplomatic discourse

Acting like a sovereign state requires recognition by other states and sovereign representation on the world stage, both of which are mediated by and embedded in specific narratives, discourses, and speech-acts. Accordingly, Kosovo's campaign for consolidating statehood was guided by a framework of discourses, which served to orient the everyday performances of Kosovo's new diplomatic corps, and ensure that decisions and actions feed into the long-term goals and values, as well as avoid mistakes and reduce uncertainties. Kosovo assembled multiple discourses which historicised and actualised arguments why the country deserves independence and admission to the club of sovereign states through recognition and membership of international organisations. Kosovo used three sets of arguments. The first set of arguments tried to portray Kosovo as a special case for remedial recognition grounded on historical and normative grounds, such as: the violent dissolution of Yugoslavia; a case for self-determination as a "remedy of last resort" after the violent removal of Kosovo's autonomy by the Milošević regime; the endurance of a decade of state-sponsored violence and human rights abuses against the Albanian majority population in Kosovo; the failure of preventive diplomacy; the humanitarian intervention that paved the way for a UN transitional administration of Kosovo; and Serbia's failure to accept the outcome of UN-sponsored negotiations for defining Kosovo's final status (MFA of Kosovo 2011; see also Buchanan 2003).

Kosovo's diplomatic discourse did not portray the case of recognition on the grounds of being a case of secession, but a specific case emerging from the violent dissolution of former Yugoslav federation (see Wilson 2009). Kosovo argued that its right to statehood derived from the fact Kosovo was granted, under the 1974 Constitution of Yugoslavia, autonomous rights almost equivalent to other federal unit in the former Yugoslavia, which ceased to exist following the violent and non-consensual dissolution of its constitutive units (republics). The argument that "Kosovo's independence was the last chapter of the final dissolution of Yugoslavia" (MFA of Kosovo 2016: 6) aimed at ensuring that first and foremost Kosovo's independence would not be labelled as breach of international law. The diplomatic discourse also aimed to distance Kosovo from comparisons with other frozen conflict and unrecognised states by arguing that Kosovo is *sui generis* – a unique and incomparable case that does not set any precedent in international relations. Kosovo's written submission to the International Court of Justice (ICJ) proceedings reaffirmed that "the people of Kosovo constitute a self-determination unit and were entitled to declare independence through their democratically elected representatives given the massive human rights' violations perpetrated and the systematic denial of the right of self-determination by the FRY/Serbia" (MFA of Kosovo 2009: 76). Kosovo invoked the case for statehood on the grounds of the collective right to self-determination. Self-determination of peoples "implies a unilateral right to initiate

a change in the status of a territory through an act of will of the population of that entire territory” (Weller 2008: 26). Invoking the discourse of self-determination intended to relate Kosovo’s case to global norms but also to generate international sympathy and support. Furthermore, Kosovo argued that its path to independence followed a process implemented through multilateral involvement in negotiating Kosovo’s political status. This added processual and procedural legitimacy to Kosovo’s willingness to resolve the status question via peaceful, multilateral, and diplomatic means.

Parallel to the uniqueness arguments, Kosovo has to demonstrate that it would become a normal state and match the expectations of the international community. The invocation of a particular language, concepts, and legal references mimicking existing states has a significant role to play in supporting international recognition and the legitimization of independent statehood. Accordingly, the second set of arguments highlighted the satisfaction of core criteria and requirements of statehood, as outlined within the Montevideo Convention of 1933 and inscribed in general international law. Kosovo emphasised that it has a permanent population, a defined territory, effective government, and the competence and powers to enter into external relations. A widely used argument to support Kosovo’s recognition involves highlighting it as a successful example of UN-led statebuilding, emphasising aspects including: the prevailing political stability in the country; the establishment of a secure environment; the successful conduct of democratic elections; and constitutionally enshrined protection for minorities (MFA of Kosovo 2013). This discourse corresponded broadly with global political trends according higher consideration to human rights conditions, the treatment of minorities, promoting regional peace and stability, as well as internal democratic governance and effectiveness.

The third and final set of arguments involved the discursification of specific domestic and global events, which provided significant grounds for strengthening Kosovo’s statehood, including: the ICJ’s ruling on the legality of Kosovo’s declaration of independence in 2010; the end of supervised independence for Kosovo in 2012; the first EU-facilitated agreement for normalisation of relations with Serbia in 2013; the advancement of EU integration in 2015 with the conclusion of the Stabilisation and Association Agreement (SAA); and membership of regional and international organisations (see Hoxhaj 2016). A major milestone in this regard is the 2010 Advisory Opinion issued by the ICJ on Kosovo’s unilateral declaration of independence. The ICJ announced its Advisory Opinion on 22 July 2010, concluding that:

the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law.

(ICJ 2010: 53)

Increasingly, the practice of state recognition is blurring classical arguments about the criteria and threshold for statehood, to give greater consideration to human rights records, commitments to regional peace and security, and internal capacity for resiliency, normalcy, and self-sufficiency. Although Kosovo’s trajectory to independent statehood emphasised that it is a unique and unprecedented case, the campaign for recognition required reverting this argumentative technique and making the case using globally acceptable narratives. With the increase of global insecurity and hybrid threats, Kosovo made the case for recognition and UN admission to enforce international law and contribute to international security, thereby moving from being a receiver to a provider of external security.

Performative diplomacy

Kosovo's process of state-becoming involved performing a wide range of diplomatic practices for securing diplomatic recognition. During its campaign for recognition, Kosovo devised a processual approach to diplomatic recognition, which consisted in reaching out to other states individually and engaging with them for as long as necessary, using both diplomatic and undiplomatic means to encourage the state to confer recognition on Kosovo (see Hoxhaj 2016). The process of securing diplomatic recognition involved four major stages. The first stage of recognition involved submitting the request for recognition, where Kosovo sent continuously requests for recognition and establishment of diplomatic relations. In certain occasions the request was made indirectly via another powerful and influential state, regional organisation, or influential personality. The essence of making sovereignty is to perform again and again speech-acts and gestures, which enhances the chances for acquiring external recognition, acceptance, and legitimacy (see Jeffrey 2013). At this point, the diplomatic strategy was to reach out to as many countries as possible to understand their position on Kosovo and, if receptive signs were given, to take the necessary steps to secure recognition. Sending requests for establishing diplomatic relations was a regular and everyday diplomatic activity. The request for recognition was always phrased as an invitation for the establishment of diplomatic relations, which often synonymises diplomatic recognition. This approach incurred minimal costs and provided Kosovo with the opportunity to test which countries would respond and signal their willingness to recognise Kosovo, but it also created diplomatic space to organise visits or meetings at multilateral events. The request for recognition performed the function of shaping knowledge and changing external perceptions of Kosovo, and intended to ease the willingness of other states to meet Kosovar diplomats and discuss prospects for bilateral recognition.

The second stage in the recognition process was direct encountering and communication, whereby Kosovar diplomats met formally or informally with representatives of states that were seeking recognition in bilateral or multilateral settings, or exchange letters for a conventional or non-conventional event. These initial contacts intended to reduce estrangement and build interpersonal relations, which were later nurtured through different modes of follow-up communication. For Kosovo, conventional diplomatic habits and communication channels were insufficient: hybrid approaches combining convention and unconventional diplomatic practices were required. To ease and sustain the process of widening diplomatic recognition, Kosovo established 40 diplomatic missions. The quest for recognition has forced Kosovo to attend multilateral events around the globe, which has had little political or economic significance other than providing an opportunity to establish contacts with foreign governments, to seek the establishment of diplomatic relations and recognition, and to secure affirmative votes for membership in international organisations. Attending regional events was useful for Kosovar diplomats to establish initial contacts with other states and initiate the lobbying campaign for recognition.

The campaign for diplomatic recognition also involved paying visits to the countries from whom Kosovo was seeking recognition, which required respecting their local diplomatic codes and institutional procedures for signing diplomatic relations. Kosovo's lobbying tactics involved assigning its officials to cultivate warm relationships with political leaders and diplomats from certain regions. Building personal relationships played an important role in securing recognition and establishing diplomatic relations. Face-to-face encounters provided spaces for performing personal diplomacy, which represents "a form of diplomatic encounters and interactions among individual leaders in which persuasion, personal

‘chemistry’, mutual trust, gestures, and convictions often play an important role” (Vogt 2017: 9). Kosovo’s diplomats did not have a single common narrative explaining why their interlocutors should recognise Kosovo or support its bid to join international organisations. They rather drew on a repertoire consisting of situated narratives that were adjusted to the type of interlocutors and their geographical, cultural, and political background. The narrative sometimes evolved in the course of conversation. The purpose of diplomatic performances is to shape the position of a particular audience. In Kosovo’s case the audience were the diplomatic interlocutors from whom it was seeking recognition and the establishment of diplomatic relations.

These efforts often led to the third stage, which involved official communication, where there is bilateral discussion on the recognition and establishment of diplomatic relations and the modalities and deals were made in exchange of recognition. Following this, if diplomatic recognition did not follow immediately, intermediary measures and signs of mutual acceptance were made evident, for example through waiving of visa regimes, official visits, invitation to important events, regular meetings, affirmative voting in international organisations, and opening of liaison offices. The purpose of this institutional engagement was to keep the channels of communication open, establishing institutional cooperation in order to eventually create the momentum and suitable conditions for recognition and the establishment of diplomatic relations.

Finally, when the internal and external conditions were fulfilled and were at their tipping point, the formal recognition took place, which had a textual and performative dimension, through sending the official recognition letter or signing diplomatic relations. While Kosovo was often satisfied with obtaining diplomatic recognition, in the long run it also worked to establish diplomatic relations with countries that had recognised Kosovo as an independent and sovereign state. Establishing diplomatic relations was seen as the next stage to “strengthen the position as a full member of the international community” as well as to open up opportunities for “other important benefits, such as foreign investment [and] trade exchanges” (Government of Kosovo 2015: 43).

For most of the time, the process of securing recognition wasn’t smooth for Kosovo and there were many failed attempts. In contemporary politics, state recognition is not driven by normative and legal principles but it is a process shaped by domestic and global political interests. Notwithstanding Kosovo’s achievements, the struggle for recognition has shown that in unusual instances, countries can revert their decision and derecognise Kosovo and break diplomatic relations. In general, Kosovo couldn’t afford chequebook diplomacy or provide foreign aid in exchange of recognition owing to its own poor economic condition. Most of the recognitions are credited to Kosovo’s proactive diplomacy coupled with extensive support from powerful and prestigious states. However, Kosovo’s weak economy and the lack of trade with many regions meant that the recognition was granted on intangible prospects for future political and economic cooperation. Kosovo received recognition by these countries but failed to continue establishing diplomatic relations and deepening bilateral relations. Kosovo’s lack of resources to deepen bilateral relations with many countries represented a constant threat that with the growing economic incentives of Russia and Serbia they could reverse the decision and derecognise Kosovo’s independence. Serbian and Russian diplomats have constantly tried to use their political and economic leverages to prevent, delay, or reverse the decisions for recognising Kosovo. Consequently, during only 2017 and 2018, Serbia managed to persuaded 11 countries to withdraw recognition of Kosovo, while two countries have reinstated their previous decision after Kosovo and its allies intervened. The withdrawal of recognition signifies that bilateral recognition without

universal acceptance and dispute resolution is unsustainable and prone to creation of protracted self-determination disputes.

As these four stages show, the performative diplomacy entailed creativity and mimicry of existing diplomatic practices where sovereignty is exercised through diplomatic visits, performing as a sovereign equal in bilateral and multilateral events, and promoting rituals of statehood. Kosovo's international diplomatic success was inherently reliant on the agency of empowered individuals – and not strictly embedded within a solid institutional structure, diplomatic capacity, and resources. The performative aspect of Kosovo's state-becoming struggle required constantly repeating, improvising, and readjusting multiple diplomatic discourses and actions to each individual country from which recognition was sought.

International entanglements

Kosovo's quest to strengthen independent statehood was shaped not only by discursive and performative diplomacy but also by entanglement with related and unrelated assemblages of events, relations, political processes, and material changes elsewhere in world politics. The major entanglement which positively enabled Kosovo to strengthen its international sovereignty was recognition by and lobbying through Western powers, which had a multiplying and leveraging effect by expanding the coverage of recognitions. Kosovo could only perform its diplomacy for recognition by entangling with global assemblages of power, norms, relations, and institutions. As of December 2018, Kosovo has been recognised by 116 sovereign states, 114 of whom are members of the UN. There is evidence that 11 states have withdrawn recognition of Kosovo, while two have reinstated their recognition of Kosovo's independence. Kosovo is recognised by the majority of European countries, 23 out of 28 member states of the EU, 25 out of 29 NATO member states, and all seven member states of the G7. Out of 114 UN member states that have recognised Kosovo, 62 countries were categorised as democracies by Freedom House in 2017, while 30 countries are semi-authoritarian regimes and 20 are undemocratic nations (see Visoka 2018a).

Notably, recognition by the US or other major global and regional powers gives the recipient state stronger international and domestic legitimacy (see Coggins 2014). In the foreign policies of Western countries, recognition of Kosovo's independence became a crucial hallmark for making international intervention and post-conflict statebuilding in Kosovo a success story as well as ensuring regional stability. Kosovo's foreign affairs leadership has openly admitted that "American support in our external and internal affairs has been one of the basic preconditions for a successful statebuilding process" (Hoxhaj 2016: 266). Kosovo's diplomatic approach has fundamentally benefited from strategic dependency and entanglement with the US and major European powers, which have played a crucial role in securing Kosovo's recognition and membership of international bodies. In particular, Kosovo's relations with the United States were essential for advancing the country's international standing. The US's support for Kosovo's recognition was partially driven by its stability-seeking foreign policy but also the political priority given by successive US administrations to handling crises within the Balkans. Defending Kosovo's independence and strengthening its international standing also protected the legacy of NATO's military intervention in 1999 and its subsequent peacekeeping presence. Moreover, the US openly admits that, by supporting Kosovo's independence, they defended European and American unity against Russian pressure, and "gave Europe and America a chance to redefine our common purpose and put it to work" (Wisner 2008: 195–196).

When Kosovo was recognised by influential leaders high up the pecking order of multi-lateral organisations, geographical regions, and alliances, this contributed to influencing the decision of other states to extend diplomatic recognition to Kosovo. Every act of recognition had an entangling function; other countries were encouraged to follow the trajectory for recognising Kosovo set by leaders of pecking orders within multilateral organisations, geographical regions, and alliances. In turn, these recognitions played an important role in influencing the decision of states for extending diplomatic recognition to Kosovo. Aware of these entanglements, Kosovo's diplomats prioritised qualitative recognitions, which entailed seeking recognition from states with international power and prestige who would influence other smaller and dependent states to recognise Kosovo as an independent and sovereign state. To disentangle the regional assemblages of relations and influences, Kosovo analysed the role of political and geographical alliances, economic cooperation, aid dependency, and cultural and historical affinity between states, as well as other specific determinants of the foreign affairs priorities of other states.

Notably, Kosovo's foreign policy alignment with the US and major European powers played a positive role in most cases, but it did also antagonise many countries who oppose Western dominance in world politics. Furthermore, external assistance for Kosovo's recognition reduced significantly owing to changing global circumstances, shifts of foreign policy priorities, and the emergence of more urgent global crises, leaving Kosovo's own diplomatic abilities and skills to advance further its recognition campaign (Visoka 2018b). Most importantly, the very same logic of global entanglements often worked against Kosovo's foreign policy interests. Major disempowering entanglements such as counter-recognition campaigns by the former host state and their great power allies and association with harmful precedents and other secessionist conflicts and regions have significantly undermined Kosovo's pace to full integration in the international system. While state recognition is primarily contingent upon the contextual circumstances under which a case requests and receives recognition, the act and practice itself can have legacies and implications for other cases. The sequence of domestic and global events, luck and chance have played a profound role in enabling or obstructing Kosovo's foreign policy goal of consolidating statehood (Newman and Visoka 2018b). Moreover, the process of diplomatic recognition is entangled with broader global analogies and dissimilar cases of state-like entities seeking international recognition. While many states are sympathetic towards the Kosovo issue, they are unable to recognise its independence owing to problems with their own domestic secessionist groups or problems with minority groups. In certain cases, the recognition process was delayed or reversed by sudden international changes, such as the outburst of violent conflicts, governmental and regime change, the emergence of new contested and unrecognised states, and the reshuffling of regional and global power relations.

Parallel to enabling entanglements, Kosovo's independent statehood was also influenced by other actors, analogies, and remote events, which had a disempowering function on Kosovo. Backed by Russia's bilateral and multilateral diplomatic network, Serbia focused its counter-recognition campaign preventing and when possible reversing the recognition of Kosovo (see Ker-Lindsay 2012). Russia's objection to Kosovo's recognition and membership of international bodies is part of their policy to disrupt the enlargement of NATO and the EU to the Balkans. Moreover, for Russia Kosovo represents a suitable confrontation point with the West to justify its interventions in Georgia (Abkhazia and South Ossetia) and Ukraine (Crimea) and the exploitation of frozen conflicts to protect Russia from the further enlargement of NATO and the EU into Eastern Europe. Other states that withhold recognition refer to Serbia's sovereignty and territorial integrity, arguing that international law does not

allow secession outside the colonial context and that “unilateral secession” – secession in the absence of host state consent – sets a negative precedent and should not be recognised.

Among the UN member states that withhold recognition of Kosovo, 29 are undemocratic nations, whereas 49 other countries are evenly divided into democratic and semi-authoritarian nations. Almost half of the countries that have withheld bilateral recognition of Kosovo have either domestic secessionist movements or are entangled into close alliances with Kosovo’s main opponents and their international allies (Visoka 2018a). Many others have strategic partnerships with Kosovo’s main diplomatic opponents such as Russia. Five EU member states, namely Cyprus, Greece, Romania, Slovakia and Spain, have withheld the recognition of Kosovo’s independence, fearing it will set a precedent for their own internal domestic problems with minorities and breakaway regions (Newman and Visoka 2018a). In the Eurasian region, Kosovo has been recognised by 34 countries, whereas 15 countries continue to withhold recognition of the fledgling state. For example, the presence of multiple frozen conflicts and *de facto* states explain why Georgia, Moldova, Azerbaijan, and Armenia have not recognised Kosovo yet. Other Central Asian states that were once part of the Soviet Union have refused to recognise Kosovo owing to close foreign policy coordination with Russia. In South East Asia, non-recognition of Kosovo’s independence by India, which had its own internal issues with Kashmir, also managed to influence the decision of Nepal, Bhutan, and Sri Lanka. In the Americas, so far Kosovo has been recognised by 20 countries, whereas 15 continue to withhold the recognition of the fledgling state. This trend of withholding the recognition of Kosovo’s independence due to internal problems with indigenous secessionist movements is also prevalent among 11 countries in the African continent. Kosovo so far has been recognised by 27 African countries, whereas another 27 countries in this world region continue to withhold recognition of Kosovo. In the Middle East, Israel has not recognised Kosovo, fearing that such an act could legitimate the Palestinian claim for statehood. Similarly, Iraq, Iran, and Syria have not recognised Kosovo’s independence.

In a globally connected world, the task of Kosovo’s diplomacy was to mobilise support from regional and global powers and entangle Kosovo’s interests with other countries’ foreign policy interests. The strength of Kosovo’s diplomacy lay in its ability to figure out how to work with great powers and utilise their global influence and diplomatic network. The early recognition of Kosovo by the US and most European powers set it on a positive trajectory, which influenced the decision of other states to also recognise Kosovo. The more recognitions Kosovo secured, the more it created the conditions and momentum for further recognition because other countries were under pressure not to be excluded from the international movement in support of Kosovo’s independence. However, over the years it became clear that Kosovo was caught between great power rivalries, which significantly undermined the prospects for universal recognition. Recognition of Kosovo’s independence by one political bloc of states has significantly politicised and complicated the recognition process in a broader perspective. Kosovo has received wide recognition from most states belonging to the Euro-Atlantic community, while no recognition has been received from other emerging powers and those who are positioned behind Russia on the question of Kosovo’s independence. This entrapment remains impassable for the foreseeable future, unless Kosovo joins the UN, which would be equivalent to collective recognition and ultimately mark the end of the saga for bilateral recognition.

Conclusion

Sovereign statehood and self-determination of peoples remain among the most problematic, yet important aspects of global politics. The hostile response to claims for independent statehood has led to the creation of new states attracting different degrees of international recognition, which are often excluded from global politics, institutions, norms and laws, and are exposed to external interference and various forms of dependency (Fabry 2010). This chapter examined Kosovo's struggle for diplomatic recognition in a hostile international environment which does not support creation of new states without the consent of the base state and wider normative, institutional, and political consensus. Within a decade, Kosovo successfully secured recognition from almost two-thirds of the UN member states and joined a significant number of international and regional organisations. These achievements cannot be solely attributed to Kosovo's powerful friends without acknowledging the pivotal role that Kosovo's own discourse-based performative diplomacy has played in the struggle to secure international affirmation of its sovereign statehood. The chapter argued that Kosovo's success in consolidating its sovereign statehood has been the assemblage and situational connectivity of multiple integrated discourses, practised through a broad variety of performative actions, which was enabled by the complex entanglement of different actors, events, and relations.

Despite the success of its initial diplomatic efforts, Kosovo is now entering its second decade of independent statehood facing domestic and external challenges that may affect its international standing. Extensive diplomatic recognition is an important indicator of wider international legitimacy, but as long as Kosovo remains outside the UN its political existence remains under threat. The path for international legitimation through individual recognition is lengthy and requires interacting with each state individually, which consumes extensive time and resources (see Geldenhuys 2009). Increasingly, Kosovo's international partners have laterally tried to encourage Kosovo's leadership to take a more proactive role in the process of obtaining new diplomatic recognition and securing membership of international organisations. This discourse conferring diplomatic ownership on Kosovo is not a symptom of Kosovo's diplomatic maturity but rather reflects the strategic withdrawal of Kosovo's international partners from their commitment and promise to integrate Kosovo fully in the international community of sovereign and independent states. Kosovo's prospects for joining the European Union and NATO are grim owing to the extensive reforms required and the fact that some of the members of these organisations have not yet recognised Kosovo. Admission to the UN is unlikely without the consent of Serbia, Russia, and China, who are increasingly becoming hostile towards the waning international power of the US and European states. A potential way out for Kosovo's contested statehood would be to reach an agreement with Serbia as part of the journey undertaken by both countries to join the EU, which could require granting Kosovo's Serbian minority wider autonomy within the context of a complex arrangement whereby Serbia would implicitly accept Kosovo's independence and consent to its membership of the UN without formally conferring recognition. This would end Kosovo's decade-long quest for bilateral recognition, but could expose the country to the potential recursive secession of the Serbian community. If this scenario does not work, Kosovo would be obliged either to continue its current approach of seeking incremental integration into the international system or seek a radical change to its status by seeking functional unification with the kin-state of Albania. Such an unlikely move could result in redrawing political borders and recurrence of conflict in the Balkans. Therefore, the question of Kosovo's sovereign status is not yet entirely closed, and the next stage will be definitive in either making or breaking the country's desire for becoming a sovereign state.

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SOMALILAND

Scott Pegg

Introduction

A former British protectorate, Somaliland reasserted its sovereignty and declared independence from Somalia in 1991. Somaliland arguably has *the* best case for recognition of any contemporary secessionist movement. It certainly has a better case than either Kosovo or South Sudan had before they were widely (Kosovo) or almost universally (South Sudan) recognized. Yet, to date, Somaliland remains entirely unrecognized. Although largely peaceful in its central regions and with impressive accomplishments in democratization, security and economic recovery, Somaliland remains a *de facto* state: an entity that controls territory, endures over time, secures popular support, provides governance and yet remains unrecognized by other sovereign states (Pegg 1998). This chapter first sets out Somaliland's case for recognition and its diplomacy. It then investigates various possible explanations for why Somaliland has (so far) remained entirely unrecognized. A fourth substantive section suggests that Somaliland's extended experience as a *de facto* state raises interesting questions about the costs and benefits of non-recognition. The chapter concludes by considering various alternative futures for Somaliland, both with and without recognition.

Somaliland's case for recognition

Somaliland's case for international recognition is multifaceted. Some aspects of its case have remained constant since 1991, while others have been elevated to more prominent positions as its *de facto* state became more peaceful in its core areas (Walls 2009) and made impressive progress (albeit with recurrent setbacks) toward electoral democracy (Pegg and Walls 2018). Our discussion separates the various components of Somaliland's case for recognition into legal/normative arguments and empirical or performance-based arguments.

The legal and normative case

Given the narrow interpretation of self-determination prevalent since 1945 (Jackson 1990; Pegg 1998), Somaliland's most important asset in terms of its search for recognition is its separate colonial status. This is prominently displayed in the office of its foreign minister in

the form of a map of Italian East Africa which shows the British protectorate of Somaliland and the French colony of Djibouti surrounded by the Italian colonies of Eritrea and Somalia and Italian-occupied Ethiopia. Somaliland's former status as a separate colony is also highlighted in its claim to the territorial borders of the former British Somaliland (noted in Article II of its constitution). Government publications sometimes include the texts of the Anglo-French Treaty of 1888, the Anglo-Italian Protocol of 1894 and the Anglo-Ethiopian Treaty of 1897, which defined Somaliland's colonial borders (Republic of Somaliland 2002), as well as Queen Elizabeth's Royal Proclamation Awarding Independence to Somaliland (Republic of Somaliland 2002: 12; Republic of Somaliland 2017b: 32–33). Somaliland believes itself well-suited for the post-1945 international system where, in Jackson's (1990: 17) expression, 'to be a sovereign state today one needs only to have been a formal colony yesterday'.

Beyond its separate colonial status, Somaliland emphasizes its brief five-day period of widely recognized sovereign statehood in 1960. Somaliland received its independence from the UK on 26 June 1960. The British knew that Somaliland planned to unite with the former Italian colony of Somalia and did not object to this but felt that Somaliland should receive its independence first. The United Nations registered notification of Somaliland's independence and 35 UN member states, including all five permanent members of the Security Council, recognized Somaliland (Geldenhuys 2009: 129). Although Somaliland joined a union with Somalia on 1 July 1960, its five previous days of sovereign statehood allow it to present its case as a resumption of its former sovereignty rather than as secession.

Importantly, beyond limiting any precedent set by its recognition, the combination of its separate colonial status and its five days of independent statehood makes Somaliland's case for recognition entirely compatible with Article 4(b) of the Constitutive Act of the African Union (2000), which emphasizes 'respect of borders existing on achievement of independence'. Indeed, a 2005 African Union (AU) fact-finding mission to Somaliland emphasized that Somaliland's statebuilding project 'was anchored, and remains so, on the recognition by the Somalilanders of the inherited colonial borders at the time of independence from Britain in June 1960' (African Union 2005, para. 6).

Another plank of Somaliland's legal case for recognition is that it represents the dissolution of a failed union rather than secession. The more expansive version of this argument questions whether the union between Somalia and Somaliland was ever properly consummated. The original plan was for delegates from Somaliland and Somalia to sign an international treaty forming their union. This never happened. Ultimately, the legislatures of Somaliland and Somalia passed separate Acts of Union that were substantively different. Somaliland voters showed their displeasure with the proposed union both by boycotting a June 1961 referendum on Somalia's constitution and by voting against it by wide majorities. Somaliland's claim to its union with Somalia never being legally ratified is buttressed by a 1963 court ruling by a British judge in Mogadishu acquitting northern military officers of treason on the basis that, in the absence of a legally binding Act of Union, the court lacked jurisdiction over events in Somaliland (Adam 1994: 23–26; Bryden 2004: 170–171; Carroll and Rajagopal 1992–1993: 660–661; Republic of Somaliland 2002: 4–5; Republic of Somaliland 2017b: 8–14).

The less expansive version of this argument acknowledges that after 1961 'the union was not seriously challenged again' and that after Somaliland's Mohamed Ibrahim Egal became prime minister of Somalia in 1967 'integration appeared to be an accepted fact' (Bradbury 2008: 33–34). Yet, it still emphasizes the distinction between the dissolution of a failed union and unilateral secession. Failed unions that dissolve, including those between Egypt

and Syria, Senegal and Mali, Senegal and Gambia and Cape Verde and Guinea Bissau are much more commonly accepted than secession and they are also consistent with post-Cold War state practice, which allowed for the recognition of successor states to the former Yugoslavia only after those cases were treated as the dissolution of failed unions, as had been the case with Czechoslovakia and the Soviet Union (Fabry 2008: 62). Referencing such cases, the Republic of Somaliland (2017b: 30) argues that historically ‘the African Union permitted states to reclaim and retrieve their sovereignty following the dissolution of an unsuccessful union’. It goes on to maintain that ‘In a similar fashion, following the end of the Cold War, successor state claims were a key factor in reestablishing the independence of former Yugoslav Republics and Soviet Socialist Republics’ (Republic of Somaliland 2017b: 30–31). As with Somaliland’s separate colonial status, dissolving a union also limits any precedent set by its recognition. The AU fact-finding mission specifically highlighted legal and empirical problems with Somaliland’s union with Somalia and noted that those problems make ‘Somaliland’s search for recognition historically unique and self-justified in African political history. Objectively viewed, the case should not be linked to the notion of “opening a Pandora’s box”’ (African Union 2005, para. 8).

A final part of Somaliland’s legal or normative case is that it has a ‘remedial right’ to secession based on the brutal human rights violations suffered at the hands of the Siad Barre regime in the late 1980s. Hargeisa and Burao were largely destroyed by artillery fire and repeated indiscriminate aerial bombing campaigns that did ‘not seem to correspond to any rational political or military objectives’ (Adam 1994: 29). Omer (2010) explained that ‘Six people in my own family were killed by aerial bombing. Everyone in Somaliland is like me.’ Johnson and Smaker (2014: 8) estimate that 50,000 to 100,000 people were killed in Somaliland, while Africa Watch (1990: 10), writing at a time when the violence was still ongoing, estimated 50,000–60,000 killed, with more than 400,000 people fleeing as refugees and another nearly 400,000 people fleeing as internally displaced persons. The Republic of Somaliland (2017a: 129–130) has identified 243 mass grave sites across its territory and claims the death toll to ‘be around 100,000’, with ‘up to 50,000 people’ killed in Hargeisa alone, ‘as a result of summary executions, aerial bombardments and ground attacks carried out by government troops’ (2017a: 147–148). This violence is commemorated today by Hargeisa’s central monument, which is one of the MiG fighter planes that Siad Barre’s air force used to bomb the city. While international law does not recognize a ‘remedial right’ to secession (Pegg and Kolsto 2015: 197), the massive civilian suffering in Somaliland adds weight to the normative case for recognition. As Klich (2018: 200) explains, ‘Somaliland’s evidenced claim that its people have been subjected to gross human rights violations provides a moral argument that complements its claims to have strong legal grounding’.

Empirical or performance-based arguments

While Somaliland continues to emphasize the legal and normative aspects of its case, it increasingly posits an empirical or performance-based case that it has ‘earned sovereignty’ through its relative peace, stability, democratization and economic recovery. As explained by Richards (2014: 117–118), ‘the argument being made is that the territory has *earned* sovereignty through exhibiting preferable and acceptable empirical statehood’.

What Somaliland means by ‘earned sovereignty’ is different from how ‘earned sovereignty’ was conceptually developed by Paul Williams and his colleagues. In its original formulation (Williams and Heymann 2004: 439–441; Williams and Pecci 2004: 355–356), earned sovereignty comprises three core elements (shared sovereignty, institution building,

final status determination) and three optional elements (phased sovereignty, conditional sovereignty, constrained sovereignty). Earned sovereignty in this conceptualization has not been tried between Somalia and Somaliland. Instead, Somaliland has pursued a strategy of proclaiming its sovereignty and final status, building institutions and conducting itself in ways that demonstrate that it has ‘earned sovereignty’ based ‘on the achievement of a satisfactory level of good governance and legal guarantees. This includes protection of human and minority rights, disarmament and demobilization, development of democratic institutions, institution of the rule of law, and promotion of regional stability’ (Williams and Pecci 2004: 367).

One component of Somaliland’s earned sovereignty strategy for recognition is demonstrating widespread popular support for independence. Somaliland has not conducted a referendum on independence *per se*, but its 2001 constitutional referendum is widely perceived as serving that purpose since Article 1 of the constitution references Somaliland restoring its independence and refers to it as ‘an independent country’. Although several observers have noted problems with this poll and question both the reported turnout and results (97.9% yes vote), they concur that it still demonstrated significant popular support for independence (Anonymous 2002: 263–264; Bradbury 2008: 133; Bryden 2004: 172). A few years later, an AU fact-finding mission noted that ‘The message was the same at every place: “the irreversible independence of Somaliland; the irreversible sovereignty of Somaliland; no return to the Union with Somalia; the quest for recognition from the AU and the international community”’ (African Union 2005, para. 3). The Republic of Somaliland (2017b: 23–24) also emphasizes a petition appealing for Somaliland’s formal recognition that was signed by 1,021,000 Somaliland citizens to mark the 25th anniversary of the restoration of Somaliland’s sovereignty in 2016. Popular support can be demonstrated by many other self-determination movements and it is certainly not sufficient to secure recognition, but there is no doubt that the vast majority of Somaliland citizens clearly favour sovereign recognition.

A second component of Somaliland’s earned sovereignty argument is the relative peace and security enjoyed in most of the country since 1997 (Walls 2009). Somaliland’s central core, formed by the triangle between Hargeisa, Berbera and Burao, is remarkably safe. Its disputed eastern regions, which Puntland also claims, have seen recurrent bouts of fighting but the areas under Somaliland’s control have gradually expanded. Even allowing for some conflicts between Somaliland and Puntland in the eastern regions of Sool and Sanaag, including a worrying escalation of fighting in and around Tukaraq in the first half of 2018 (International Crisis Group 2018), Somaliland’s peace and security is dramatically better than Mogadishu’s and compares favourably to many other sub-Saharan African countries. The United Nations Development Program Somalia (2012: 209), for example, found that the percentage of youth experiencing five different kinds of violence in the past year was lower in all categories in Somaliland than it was in south-central Somalia. Somaliland’s security rests on a decentralized system where clans are largely responsible for actions taking place in their territories (Walls 2009). Most fundamentally, it is based on the high priority that Somaliland citizens place on maintaining peace. As explained by Abdi ‘Bobo’ Yusuf Duale (2010), ‘The people are our police’.

The core component of Somaliland’s performance-based argument for recognition, though, remains its democracy, which ‘juxtaposes striking successes with recurrent and persistent problems’ (Pegg and Walls 2018: 327). Some of the problems include repeated delays to elections, a failure to elect lower house of parliament members since 2005 and a failure to elect or select upper house of parliament members since 1997. Impressive successes include its first four presidents all leaving office voluntarily or regularly, the peaceful and constitutional succession of the vice-president following the surprise death of President Egal

in 2002, the loser of an extremely close 2003 presidential election accepting defeat graciously and the incumbent president peacefully handing over power to the opposition after losing the 2010 presidential election (Pegg and Walls 2018). Somaliland's democracy faces many challenges but again compares favourably not just to Mogadishu but to other sub-Saharan African states. Freedom House (2018), for example, ranks Somaliland as 'partly free' while its neighbours Djibouti, Ethiopia and Somalia are all ranked 'not free'. For Somaliland,

the proclamation of democratic values is not a break with other legitimizing strategies; rather, it is portrayed as a natural extension. National self-determination, past grievances and democratization are constructed as creating a coherent narrative; as an even stronger argument for independence.

(Caspersen 2011: 346).

Somaliland's diplomacy

Somaliland's foreign policy has been criticized as being 'not ... that strategic' (Klich 2018: 191). In an echo of early European diplomatic practice, Somaliland's 'initial paradiplomacy relied on individuals within the diaspora who were well connected, independently wealthy, and motivated to further Somaliland's recognition seeking cause' (Klich 2018: 191). Elements of this reliance on wealthy individuals still remain today as Somaliland has ten staffed offices abroad and 18 honorary consuls functioning in an individual capacity without any support (Shire 2018). In recent years, though, Somaliland's foreign policy has become more strategic (Klich 2018: 191). Specifically, Somaliland's main diplomatic focus is now on seven countries in sub-Saharan Africa – the Gambia, Kenya, Nigeria, Rwanda, Senegal, South Africa and Uganda – that are seen as friendly or sympathetic. Related to this, lobbying the AU is another key priority (Shire 2018).

Although recognition remains its clear priority, the focus of Somaliland's diplomacy 'away from the public eye in recent years has been on building and using diplomatic relations to develop a stronger economic future' (Klich 2018: 190). Outside of its political activities, Somaliland's Ministry of Foreign Affairs and International Cooperation currently pursues efforts in four main areas: (i) economic – most specifically seeking to attract foreign direct investment; (ii) cooperation, including such things as lobbying the UK and other EU countries for increased foreign assistance and promoting international cooperation in health and education; (iii) diaspora relations; and (iv) providing consular services (Shire 2018).

Somaliland has been engaged with extensively without recognition. There are daily flights from Addis Ababa, Djibouti and Dubai to Hargeisa. Djibouti, Ethiopia and Turkey have established consulates in Hargeisa, the UK Foreign and Commonwealth Office has a staffed office in Hargeisa and the UN, the European Union, Denmark and Germany also have offices there to manage their aid programmes (Shire 2018). Djibouti, Ethiopia and Kenya all sent large delegations to attend the inauguration of Somaliland's president in 2010. The British government provided significant funding for the international election observer mission that monitored Somaliland's 2017 presidential elections and Bradbury (2008: 218) estimates that foreign donors covered 70% of the costs of the 2005 parliamentary elections. The World Bank (2016: 62) estimates that foreign aid to Somaliland 'exceeded US\$100 million in 2012' and notes that 'This is still a relatively small percentage of GDP but very high in relation to total government expenditure by international standards'. An

analysis of WikiLeaks US diplomatic cables reveals significant US engagement with Somaliland on security cooperation, counterterrorism and its democratic electoral process. The WikiLeaks cables also demonstrate substantive coordination between the US and various European allies in terms of supporting democratization in Somaliland (Pegg and Berg 2016).

Somaliland has arguably pushed or tested the limits of such an engagement without recognition strategy furthest in its recent interactions with the United Arab Emirates (UAE). In 2016, the Dubai-based DP World signed an agreement with Somaliland to invest up to US\$442 million to upgrade and expand Berbera's port. Ethiopia subsequently joined the deal with a 19% stake (Somaliland has a 30% stake and DP World has 51%). In separate deals, the UAE also agreed to establish a military base in Berbera, which would train Somaliland soldiers and police and to accept Somaliland passports for travel and work visas to the UAE. The extremely limited impact of Somalia's repeated objections to the Berbera port deal has only served to highlight its complete lack of control over Somaliland (Ali 2018).

What explains Somaliland's failure to secure recognition?

Somaliland obviously suffers from the same constraints facing other secessionist movements. The international normative environment continues to prioritize respect for sovereignty and territorial integrity above all else. There is a broad consensus that post-Cold War state practice has strengthened the normative consensus against unilateral secession and in favour of the territorial integrity of existing states (Crawford 2007: 415; Fabry 2012). Given the strength of its case, though, one must ask if there are other specific factors at work denying Somaliland its membership in the international society of sovereign states.

One possible explanation is the territorial dispute between Somaliland and Puntland that covers approximately one-third of Somaliland's claimed territory in its eastern Sool and Sanaag regions. Somaliland's territorial claim is based on its former colonial boundaries. Puntland, in contrast, advances a descent-based argument that its territory comprises all areas inhabited by members of the Harti clan family. There is no doubt that Somaliland secures less loyalty or has a weaker remit in its eastern regions than it does in its central and western core (Hoehne 2009). Yet, Somaliland has made steady progress in extending its actual territorial control closer to the borders it claims. Paquin (2010) finds no evidence that the disputed territories claimed by both Puntland and Somaliland have adversely affected Somaliland's quest for recognition. He observes (2010: 162) that 'None of the U.S. government officials interviewed ... raised the Puntland issue as an obstacle to Somaliland's recognition'.

Coggins (2014) powerfully argues that recognition fundamentally remains a political decision of the recognizing state. In her view, 'Nascent states are either elevated to state membership or excluded from it by powerful, existing members guided significantly by their own parochial interests' (Coggins 2014: 10). Extrapolating from this view, one can easily identify specific obstacles in Somaliland's path. Egypt ostensibly favours a united Somalia because it believes this will help it in its fight with Ethiopia over the use of Nile River basin water. Turkey and Qatar have emerged as powerful supporters of a united Somalia in recent years. Djibouti cooperates with Somaliland in several ways but arguably benefits from its lack of recognition limiting Berbera's ability to compete more effectively against it as a port, airport and/or military base host. Ethiopia generally has friendly relations with Somaliland but is conscious of Addis Ababa's role as the home of the AU and hesitates to push an issue that might divide AU membership. The US and the UK have both expressed a willingness to recognize Somaliland after its African neighbours do so but appear unwilling

to spend any political capital on spearheading Somaliland's recognition as they did with Kosovo.

Somaliland's former foreign minister Edna Adan Ismail argues passionately that one of Somaliland's biggest problems is its name. In her view, as soon as Western audiences hear the prefix 'Somali', they immediately start thinking about *Black Hawk Down* and US soldiers being dragged through the streets of Mogadishu in 1993, which then renders them incapable of making distinctions between Somaliland and Somalia. Faisal Ali 'Warabe', one of the three presidential candidates in the 2017 elections, pledged that, if elected, he would change Somaliland's name to 'Shankaroon-land' to distinguish it more clearly from Somalia (*The National* 2017). Paquin (2010) at least partially accepts this argument when trying to explain why the US has not recognized Somalia, as his 'stability-seeking argument' suggests it would, at least after 1997. In his view, 'Since the failed military operation of 1993, a "Somalia aversion" has affected the conduct of the U.S. policy toward Somalia and Somaliland', with the result that 'the U.S. casualties in Mogadishu are causally relevant in the explanation of the U.S. attitude toward Somaliland' (Paquin 2010: 152–153).

Another argument that would seemingly suggest recognition for Somaliland is Griffiths's (2015) emphasis on the importance of administrative lines. Griffiths (2015: 732) argues that sovereign states 'use administrative lines and categories when determining which groups can secede without fear of setting a precedent, and who they must deny (potentially fight) to maintain a credible reputation'. His empirical results from a dataset comprising 403 secessionist movements from 1816 to 2011 suggest that 'Proto-states that are unique in type or members of a higher-level administrative category are far more likely to be recognized' (Griffiths 2015: 748). Somaliland's status as a separate colony and previously independent state seemingly make it both unique and the highest-level administrative category possible. When asked to explain how his model would account for Somaliland's non-recognition, Griffiths (2018) argued that his model is based on administrative lines at the time secession was declared. Somaliland was thus not seen by Somalia in 1991 as a separate colony but rather as comprising six of the country's 24 regions. Allowing it to secede would therefore set a much larger precedent for the rest of Somalia than its former colonial status would imply.

A final factor that might explain Somaliland's non-recognition is state collapse in Mogadishu. The lack of a viable state in Mogadishu that controls territory and provides governance has caused massive human suffering in south-central Somalia. It has not, however, prevented Somalia from being widely accepted into a variety of regional and international organizations (Anonymous 2002). As Geldenhuys (2009: 146) explains,

Although devoid of empirical statehood, Somalia has retained its juridical statehood – a feature that has allowed it to effectively veto Somaliland's progress to confirmed statehood. African countries have allowed this absurdity by their dogmatic commitment to the phantom state of Somalia over the factual state of Somaliland.

The collapse of the state in Somalia, though, has also had another more specific effect in undermining Somaliland's case for recognition. Berlin (2009: 584–585) puts forward a sanction theory of recognition which 'recommends recognition when it would serve as an effective sanction for the bad behavior of a secessionist entity's parent state'. The problem for Somaliland here is that 'it is difficult, given Somalia's complete collapse, even to talk about Somalia as a state at all. ... Somalia is incapable of ... being deterred (or punished,

for that matter)’ (Berlin 2009: 584–585). In his view, ‘[t]he international community’s non-recognition of Somaliland is completely consistent with the sanction theory of recognition because recognizing Somaliland would not serve as an *effective* sanction’ (Berlin 2009: 584–585). In short, Somaliland’s argument for remedial secession based on the human rights violations it suffered is undermined because the government that committed those violations no longer exists.

Somaliland and the costs and benefits of non-recognition

The *de facto* state literature frequently highlights the costs of non-recognition. Unrecognized entities are unable to join regional and international organizations. They cannot access funding from the World Bank. They find it extremely difficult to secure the commercial financing and insurance that would enable foreign direct investment. Their citizens often find it impossible to travel abroad using their ‘passports’. Most importantly, recognition brings important security benefits including international prohibitions against external intervention. The ‘most serious consequence’ of non-recognition, in Fabry’s (2012: 662) phrasing, ‘is that those who find themselves in this position are legally exposed to being forcibly displaced from the territory they claim and control by the state actually recognized as sovereign in that territory’. The forcible eradications of Serbian Krajina (1995), Chechnya (1999) and Tamil Eelam (2009) and the extremely muted complaints about the human rights violations they generated vividly demonstrate the potential ultimate cost of non-recognition to secessionist leaders.

Somaliland is by no means immune to the various costs of non-recognition. The lack of commercial banks and insurance hinders foreign direct investment (Bradbury 2008: 154; Bryden 2004: 169; Omar 2010) and its uncertain legal status makes it difficult to sign long-term contracts with oil companies (Dualeh 2012). Livestock is Somaliland’s single largest export earner and livestock production accounts for almost 30% of its entire GDP (World Bank 2016: 12). Yet, Somaliland’s lack of international recognition greatly hinders its ability to protest or fight against Saudi export bans which have been imposed in 1998, 2000 and 2016 (Bryden 2004: 180–181; Omar 2010). Non-recognition also greatly limits Somaliland’s access to international development assistance and often means that aid priorities are set in Nairobi or Geneva and not in Hargeisa (Bryden 2004: 179; Omar 2010; Omer 2010). As Bradbury (2008: 93) points out, to the extent that ‘limited international assistance to Somaliland did delay the physical, economic and political recovery of the country, then it had human costs’. Finally, non-recognition also has very negative psychological effects, breeding insecurity and a feeling that war could return at any time (Omer 2010). Ultimately, in this sense, ‘recognition is not development or investment or bilateral agreements. It is security. We need recognition to defend ourselves’ (Duale 2010).

For many *de facto* states, the costs of non-recognition are muted by the support offered by an external patron state that provides diplomatic, economic, financial and military assistance. The Turkish army, for example, secures the borders of Northern Cyprus, while many citizens of Abkhazia travel on Russian passports and Nagorno-Karabakh uses Armenia’s currency. The fact that it lacks such an external patron state means that Somaliland has been more fully exposed to the costs of non-recognition than any other *de facto* state. Paradoxically, though, that has led an increasing number of observers to argue that Somaliland has also benefitted significantly from non-recognition, particularly in terms of the extensive freedom it afforded Somaliland in terms of its statebuilding choices (Bradbury 2008; Eubank 2012; Phillips 2016; Richards 2014; Richards and Smith 2015).

Eubank (2012) argues that the lack of foreign aid provided to Somaliland forced its leaders to prioritize locally generated revenues. In his view, ‘revenue bargaining forced

Somaliland's central government to accept institutional arrangements that provided safeguards against the possible rise of a predatory state' (Eubank 2012: 477). Importantly, persistent dependence on local revenues in the context of a lack of international recognition 'provided Somaliland citizens with an ongoing mechanism for enforcing these arrangements', thus minimizing the possibility that the government would deviate significantly from the constitutional order established in 2001 (Eubank 2012: 477).

Phillips (2016: 639) maintains that, in contrast to many post-conflict countries 'targeted by international state-building initiatives, the political settlement that limited large-scale violence in Somaliland evolved without explicit externally driven expectations, schedules or technical indicators of success'. The relative flexibility Phillips highlights is, as Richards and Smith (2015: 1722) put it, only 'possible because of, not in spite of, non-recognition'. Richards (2014) specifically highlights the creation of the *Guurti* (Somaliland's upper house of parliament, whose members are clan elders) as something that would not have happened if international outsiders had played a more prominent role in directing Somaliland's statebuilding project. In her view (2014: 150), 'For Somaliland, the institutionalized traditional authority is not a sacrifice of acceptable statehood, but rather a necessity for acceptable statehood to be achieved in the emerging state'.

Having greater flexibility in the absence of significant external pressures has allowed Somaliland the freedom to craft institutions that fit its society and culture. The freedom to create such institutions (like the clan-based *Guurti*) does not, however, guarantee that they will work well. As Richards and Smith (2015: 1724) emphasize, non-recognition 'provides flexibility in state building but ... does not preclude errors and mistakes being made'. Indeed, Hoehne (2013: 200) argues forcefully that Somaliland's often praised hybrid mix of traditional and modern institutions has now become 'a "crippled hybrid" in which neither state nor traditional institutions function really well'. Somaliland's experience does not suggest that the benefits of non-recognition exceed the costs. Indeed, the entrenched belief that recognition would bring significant benefits to Somaliland underlines its continued pursuit of recognition (Caspersen 2015: 400–401). Somaliland's experience does, however, suggest that in addition to generating costs, non-recognition can also produce substantial benefits that might, under certain conditions, facilitate the construction of peaceful and democratic states.

Conclusion: alternative futures

Pegg (1998: 204–228) originally identified four different potential scenarios for the future evolution of *de facto* states: military defeat or forcible eradication; reaching some sort of negotiated settlement; successful graduation to sovereign statehood; and continued existence as a *de facto* state. The first two outcomes, eradication and peaceful reunification, seem highly unlikely for Somaliland (Pegg and Kolstø 2015: 198–199). Although Caspersen (2012: 125–126) finds that forcible eradication 'remains the preferred option' for many parent states and 'is statistically the most likely outcome' for *de facto* states, military strength is always relative. A government in Mogadishu that struggles to control more than a few neighbourhoods of its own capital city is not yet in any position to threaten Somaliland militarily. An internally stable Somalia could one day threaten Somaliland but that has not happened for the past 27+ years and it shows no signs of happening any time soon. Somaliland and Somalia did engage in a series of direct talks between 2012 and 2014, many of which were hosted by Turkey. These talks, however, achieved little and broke down in acrimony. From the perspective of Somaliland, Turkey is now an entirely discredited mediator and it is difficult to see the talks restarting in the absence of a new mediator. More fundamentally, Somalia has little to offer Somaliland to entice its leaders or citizens to want

to return. Independence without recognition remains preferable to reunification with Somalia. Somaliland thus has two main alternatives: graduation to sovereign statehood and a future with recognition or continued existence as a *de facto* state without recognition.

A future with recognition?

Recognition could potentially come to Somaliland in several ways. A fundamental change in international norms and a return to what Fabry (2008) characterizes as the 1815–1950 practice of self-determination as a negative right would clearly favour recognition for Somaliland. Recognition, in his view, was granted to former Spanish colonies in Latin America because:

A collectivity that had attained statehood in demonstrable fact was entitled to acknowledgment of that statehood in law due to the decisive normative meaning of the achievement: the formation of a stable, effective entity in which the population habitually obeyed the new rulers was taken as an authoritative expression of the will of the people to constitute an independent state.

(Fabry 2008: 55).

A normative shift embracing a more expansive interpretation of UN Security Council Resolution 1674 (2006), which set out the ‘responsibility to protect’ (R2P) doctrine, could also facilitate Somaliland’s recognition. Under such an expanded interpretation of R2P, when a recognized state like Somalia ‘fails to protect, it forfeits its claim to territorial integrity’ (Berlin 2009: 571).

Somaliland’s former foreign minister Mohammed Omar advanced the hopeful argument that Somaliland’s potential oil reserves could provide a route to recognition. Omar (2012) argued that Somaliland is hopeful that, if sufficient quantities of oil are found, extractive industry companies would pressure their governments to recognize so they can participate fully in the resource boom. His logic seems more hopeful than realistic but a fundamental problem with this scenario is that Somaliland still has not demonstrated that it has commercially viable oil reserves (Dualeh 2012).

While an unlimited number of potential scenarios for recognition can be identified, ultimately Somaliland has what might be termed ‘good’ and ‘bad’ routes to recognition. The ‘good’ route to recognition is basically that Somalia establishes some sort of minimally viable state that then consents to Somaliland’s independence. International practice is quite consistent that secessions blessed by the parent state are quickly accepted by other members of the international community. Recent African practice with Eritrea (1993), whose case bears some similarities to Somaliland (Adam 1994), and South Sudan (2011), which had a much weaker case for recognition, also supports this. Mogadishu’s consent, perhaps in the context of a negotiated agreement and an additional referendum in Somaliland, seems unlikely at this time but remains Somaliland’s best hope for successful graduation to widely recognized sovereign statehood. The ‘bad’ route to recognition is basically that Somaliland’s existence is existentially threatened by Al Shabab or some future radical jihadist group and its stability is called into question. In this scenario, neighbours like Djibouti and Ethiopia that appear quite happy with Somaliland’s current *de facto* statehood might find themselves faced with the prospect that Somaliland, which buffers them from the instability and violence seen in south-central Somalia, might not survive. If presented with the stark choice of recognizing Somaliland to help save it versus allowing Al Shabab or some similar group to extend its influence to their borders, they might choose to recognize Somaliland. Friendly outside powers like the UAE, the UK and the US might also be more willing to

spend the political capital necessary to spearhead recognition for Somaliland if presented with such a stark choice. Yet, the experience of Iraqi Kurdistan when existentially threatened by ISIS suggests caution here. The US and other allies did intervene militarily to help preserve the Kurdistan Regional Government. They were, however, sharp critics of its 2017 referendum on independence (Klich 2018: 254–255). The clear implication is that the ‘bad’ route to recognition might lead to preserving Somaliland as a *de facto* state and not to recognizing it as a sovereign state.

In the popular imagination in Somaliland, recognition is accorded almost mythical status, where it is seen as the solution to all problems facing Somaliland. If it does ultimately come, it is important to note that recognition will not be a panacea for Somaliland or magically cure all that ails it. With or without recognition, Somaliland remains heavily dependent upon livestock production in a drought-prone region. Recognition will not solve the problem that much of the male population is addicted to chewing *qat* and it will not automatically improve the status of women in a traditional society. Recognition will also bring new challenges. As Johnson and Smaker (2014: 12) emphasize,

If Somaliland secures recognition, the people may no longer be mobilized by a shared goal, allowing internal divisions to reemerge. International recognition would no longer serve as a carrot encouraging politicians to moderate their behavior, and it would give the government greater access to foreign loans – which could weaken the long-standing relationship between the government and business community.

A future without recognition?

Somaliland has now existed for more than 25 years without any external recognition of its sovereignty and there is little reason to suspect it cannot continue to do so. Non-recognition would result in continued uncertainty which would lead to continued low levels of foreign direct investment and foreign aid. That would hinder Somaliland’s ability to develop and lift larger numbers of its citizens out of abject poverty. Yet, Somaliland compares favourably to Somalia on several different indicators (Pegg and Kolsto 2015: 199) and its democracy compares favourably to all its neighbours and many of its regional peers. Somaliland receives far more refugees than it produces, and its citizens greatly value the peace and stability provided in most areas of its claimed territory.

Until recently, Somaliland’s search for recognition has led to some concomitant neglect of its possibilities for what is frequently termed ‘engagement without recognition’ (Ker-Lindsay 2015). There are two reasons to suspect that more actively pursuing engagement without recognition might benefit Somaliland. First, as Caspersen (2015: 400) notes, in Somaliland’s case the pursuit of recognition and the pursuit of engagement without recognition are ‘clearly complimentary’ strategies. In her explanation, pursuing a strategy of engagement without recognition ‘appears to reinforce, rather than contradict, the appeal for recognition since it would enable the creation of an even more effective entity and allows Somaliland to emphasize the possible strategic benefits of recognizing its independence’ (Caspersen 2015: 401). Second, Ker-Lindsay (2015) demonstrates that sovereign states have almost unlimited latitude in implementing engagement without recognition strategies should they so desire. In his view, sovereign states:

can choose to set the threshold for engagement without recognition extremely high. Indeed ... evidence suggests that, as long as it keeps insisting that it has not

in fact recognized it, a state can even go so far as to interact with a contested state as though it were recognized in all but name.

(Ker-Lindsay 2015: 285).

Somaliland will continue to push its case for international recognition. It should also expand and take advantage of whatever opportunities it has for engagement without recognition. Recognition would bring many benefits to Somaliland, but it would also present new challenges that could put at risk some of what makes it such a special place today. Recognition will not solve all of Somaliland's problems, nor will its absence necessarily threaten all its progress.

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ABKHAZIA AND SOUTH OSSETIA

Donnacha Ó Beacháin

Introduction

The Kremlin does not subscribe to the narrative that what happens in Kosovo stays in Kosovo. Just months after the Balkan republic acquired recognition from the US and most of the EU, the Russian Federation endowed Abkhazia and South Ossetia with a similar diplomatic status, although military hostilities involving Georgian, South Ossetian and Russian forces in August 2008 provided the official pretext. Within four years Abkhazia had secured recognition from six UN member states, one more than South Ossetia, before momentum stalled and went into reverse, declining to four recognitions each before a dual recognition from Syria in 2018 revived interest but has failed to arrest the impression that a new wave of diplomatic breakthroughs for the two Caucasian republics is unlikely in the near future.

Like other post-Soviet states, both recognised and unrecognised, Abkhazia and South Ossetia have based their administrative bureaucracies largely on pre-existing communist-era structures. However, given the lack of a corresponding institution during Soviet times, the Ministry of Foreign Affairs (MFA) had to be built from scratch. While this did not distinguish them from post-Soviet recognised countries or, indeed, newly independent decolonised states, lack of recognition created additional challenges, as did building a state in the immediate aftermath of wars that aroused little international interest, much less active aid and sympathy.

The two main priorities of the MFAs in Abkhazia and South Ossetia are strengthening the strategic partnership with their patron, Russia, and enhancing international legitimacy.¹ Abkhazia takes the latter role far more seriously than South Ossetia and consequently a substantially larger part of this chapter will be devoted to the former. South Ossetia has few of the features or opportunities for independent economic development, let alone statehood (Ó Beacháin et al. 2016; Ó Beacháin 2017). Unlike the Abkhazians – the majority of whom yearn for independence and international recognition (Toal et al. 2011; Toal and O’Loughlin 2013) – the optimal outcome for most South Ossetians is a unified state with North Ossetia, either independent or (much more likely) as part of the Russian Federation.² Allied to the tepid desire for international recognition, South Ossetia enjoys minuscule resources to project itself internationally. It therefore relies heavily on Russia to promote its cause and, also, on the Abkhazians, who have lobbied on behalf of the Ossetians.³

This chapter examines the vital role of Russia, unquestionably Abkhazia's and South Ossetia's most important partner, and how the extreme asymmetry of these relations has fostered a very high level of dependence on Moscow's goodwill, which extends to efforts to secure international recognition. While Abkhazia's MFA ardently pushed its case for recognition, it was Moscow's clout that secured several breakthroughs. Latin American countries provided the early advances with Nicaragua and Venezuela, through the personal interventions of Presidents Daniel Ortega and Hugo Chávez, respectively, affording speedy recognition, but expected breakthroughs in Bolivia, Ecuador and the Dominican Republic failed to materialise. Remarkably, none of the recognitions came from within the post-Soviet space, where the Kremlin arguably enjoys the most clout. Belarus proved to be a vital weathervane for determining the prevailing diplomatic winds. By recoiling from recognising Abkhazia and South Ossetia at a critical juncture it made it much less likely that the Kremlin would secure support from other post-Soviet allies.

Punching significantly above their minuscule diplomatic weight, the island nations of the South Pacific proved to be a key battleground. Having been willingly dragged into the diplomatic war between Russia and the West, the foreign policy of these microstates is essentially one of selling recognition in return for aid. The undeveloped nature of their economies combined with the enormous distance between the Caucasian republics and their fickle partners minimises the chances of meaningful engagement and greatly limits trading opportunities. Before concluding, we will also briefly examine other forms of recognition, secured, for example, through engagement with subnational polities, membership of international sporting organisation and cooperation with other *de facto* states.

As this chapter highlights, Abkhazia and South Ossetia's status as partially recognised states is less the result of pursuing a particular foreign policy and much more the product of international events, such as the recognition of Kosovo, that the Abkhazians or Ossetians were unable to control or direct. The number of recognitions would have been significantly greater had it not been for the US and EU's exertions on Tbilisi's behalf. Ultimately, recognition depends less on a state's relations with Georgia or Abkhazia/South Ossetia than on with Russia and the West.

Russia: the patron

After the West recognised Kosovo, the Abkhazians expected Russia to confer a similar status on their country, and were disappointed when it did not. According to Abkhazia's then foreign minister, Sergei Shamba, Russia had decided not to recognise Abkhazia after Kosovo's independence because the Abkhazians would not concede to the Kremlin's demand of absorption into Russia (Wikileaks 2008f). The decision to recognise in August 2008 was, according to Shamba's deputy, communicated at short notice: "We weren't sure right up until the very last moment" (Gvinjia 2019).

After supporting a crippling international embargo of Abkhazia during the 1990s, Kremlin policy shifted to open and direct support under Vladimir Putin's presidency, which has provided pensions and passports for most residents of Abkhazia and South Ossetia (Gagulia 2009). The decision by Western powers to push for the recognition of Kosovo as an independent state prompted the Kremlin to question why the right to self-determination should not be extended to what it maintained were similar cases in the post-Soviet space. "Why can Albanians in Kosovo have independence but South Ossetia and Abkhazia can't?" Putin asked in 2006, before adding rhetorically, "What's the difference?" (Geldenhuys 2009: 74). The brief but intense

conflagration during August 2008, which primarily involved Russian and Georgian forces, provided the Kremlin with the excuse it needed to recognise, on 26 August, Abkhazia and South Ossetia as independent states. It borrowed heavily from the vocabulary and rationale employed by Western powers when intervening in the Balkans to support Kosovar claims against Serbia. Thus, the Georgian government was accused of attempting genocide in South Ossetia, prompting humanitarian intervention by Russian forces (Medvedev 2008).

Formal recognition has facilitated an unprecedented level of support. Russia is responsible for most of Abkhazia and South Ossetia's trade. Moreover, it subsidises about half of Abkhazia's annual budget and 90% of South Ossetia's (Comai 2018: 188). In common with other very small states, in particular post-colonial ones, Abkhazia sends students and personnel for training in the structures of their patron state. Maintaining cooperation with Russia is therefore a vital priority. But, while South Ossetia is happy with this Russian embrace, many in Abkhazia are wary for fear the grip could become suffocating. It was a dilemma captured in an aphorism that did the rounds in Abkhazia following the 2008 war: "we used to be independent but now we have recognition".⁴ Once Russia established formal diplomatic relations with Abkhazia and South Ossetia, the Kremlin embarked on a campaign to secure other recognitions for the two regions. Initially at least, Abkhazia enthusiastically threw itself into the fight for recognition, utilising Russian resources when available. Given that independence is not the objective of the South Ossetian political elite, the MFA's campaign, such as it was, seemed dutiful rather than determined and completely dependent on Moscow.

In the immediate aftermath of the 2008 conflagration, the US tried unsuccessfully to mobilise the United Nations to censure Russia. For example, attempts to urge Vietnam and Burkina Faso, as recently elected non-permanent members of the Security Council, to "publicly and forcefully condemn" Russia's recognition of Abkhazia and South Ossetia, were rebuffed. Vietnam blamed Georgian President Saakashvili's decision to invade South Ossetia for the crisis and, further, maintained that the Kremlin's decision was "a direct consequence of the US-led movement to recognise Kosovo, which Vietnam had opposed" (Wikileaks 2008a). Burkina Faso refused to get involved in "a new Cold War" between the US and Russia, and claimed that a public condemnation from its representatives would "not change anything on the ground" (Wikileaks 2008b).

If the US was not having much success awakening indignation from a largely indifferent international community, Russia encountered difficulties in mustering support from its closest allies. Two days after Russia recognised Abkhazia and South Ossetia, a meeting of the Shanghai Cooperation Organisation (SCO) in Dushanbe provided the perfect platform for Russia to garner support for its new diplomatic departure. As an alliance of regional autocrats, composed of four post-Soviet Central Asian States (Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan), China and Russia itself, the Kremlin might have expected to get a good hearing for its case to recognise Abkhazia and South Ossetia. These Russian allies were, however, unlikely to be instinctive supporters of independence for the two breakaway states. With their own real (or potential) secessionist ethnic minorities, SCO members had little incentive to recognise separatists in post-Soviet states. China, in particular, was obsessed with secessionism, with Taiwan, Tibet and Xinjiang to contend with. Within Central Asia too, Stalinist cartography had left a legacy of ethnic minorities on the "wrong" side of borders.

Locking horns in Latin America

To the surprise of many it was not the post-Soviet space but, rather, Latin America that emerged as the key region in the struggle for early recognitions for Abkhazia and South

Ossetia. On closer inspection, however, there were many reasons why this continent emerged as a battleground. Soviet and US interests had clashed here during the Cold War. Latin America provided fertile soil for Soviet-backed communism, which successive US administrations tried to counter through support for right-wing dictatorships and/or guerrilla movements. A diluted form of geopolitical competition continued after the Cold War subsided. The region contained several left-wing regimes that frequently combined populism, anti-US rhetoric, and warm relations with the Kremlin. Between 1999 and 2008, left-wing candidates won presidential elections in Venezuela, Brazil, Argentina, Uruguay, Bolivia, Honduras, Ecuador, Nicaragua and Paraguay. From the Abkhazian and Ossetian perspective, opportunities for diplomatic breakthroughs were enhanced by the fact that, as a faraway region that knew little of inter-ethnic squabbles in the South Caucasus and cared less, it had few preconceived ideas about the conflicts and might be more open to persuasion. The Georgian government had virtually no diplomatic presence in the region.

On 5 September 2008, the Nicaraguan president Daniel Ortega and acting foreign minister Manuel Coronel Kautz signed Decrees 46 and 47, extending full diplomatic recognition to its “sister” republics of South Ossetia and Abkhazia, welcoming them into the “community of independent nations of the world”. According to senior diplomatic figures in Abkhazia, Nicaragua’s speedy recognition stemmed primarily from solidarity with Russia, though they also stressed Nicaragua’s general interest in issues of self-determination and combating imperialism (Chirikba 2011a; Gvinjia 2019). According to the US embassy in Managua’s internal records, Nicaragua’s recognition of Abkhazia and South Ossetia had “everything to do with strengthening Ortega’s relationship with Russia”. It noted that Ortega regularly gave speeches that “fondly recall the Cold War Era and Moscow’s support of the Nicaraguan Revolution” and that he was “again actively courting the Kremlin”. The US government speculated that Ortega believed the recognitions to be a “low-cost” way of generating increased Russian military and economic assistance, offsetting the US and European Union aid withdrawn following criticism of Nicaragua’s local elections in November 2008. It believed Ortega sought to “recreate the bipolar conflict and clientelism that once existed between Russia and the West in Central America” and was therefore happy to rekindle Cold War enmities (Wikileaks 2009b).

The US informed Nicaragua that its decision to recognise Abkhazia and South Ossetia “would cause all aspects of our relationship to be reviewed” as “the territorial integrity of another nation allied to the U.S. and regional security were at stake” (Wikileaks 2008d). Maintaining that their decision had been motivated by a desire to encourage peace and in response to pleas from Abkhazia and South Ossetia following Georgian aggression, the Nicaraguan government noted that it had “warned the US when it recognized Kosovo that it had ‘opened Pandora’s Box’ and was now paying the consequences”. When the US countered by highlighting Nicaragua’s refusal to recognise Kosovo, Nicaragua’s representative replied that Kosovo should have remained part of Yugoslavia but South Ossetia and Abkhazia were different “for ethnic, historical and geographic reasons” (Wikileaks 2008d). The US ambassador communicated with peers representing other Western states in Nicaragua to better coordinate a response and to determine how other embassies would raise the matter with Managua.

A second recognition for Abkhazia and South Ossetia was secured on 10 September 2009, when Venezuela announced the opening of diplomatic relations with the two Caucasian republics. The timing and context – announced by President Hugo Chávez without prior fanfare following a meeting with his Russian counterpart – illustrated the core dynamics of

this diplomatic initiative. Having made the recognitions announcement in Moscow, rather than in Sukhum/i or Tskhinval/i, Chávez didn't bother to travel south to converse with his new allies in the Caucasus. Rather, he returned to Venezuela, where he revealed he had secured from the Kremlin a \$2.2 billion loan to buy Russian arms. It appeared to most observers that the recognitions had been included as part of a larger package deal. While officially gracious, the recognition recipients were underwhelmed and there was little sense of popular celebration at what should have been a momentous occasion.⁵

Nicaragua and Venezuela's recognitions resulted in several inter-state agreements and have endured for a decade but are increasingly fragile. At the inauguration of President Nicolas Maduro in January 2019, his invited Abkhazian and South Ossetian counterparts, Raul Khajimba and Anatoly Bibilov, were seated in the front row. In contrast, Georgia seized the opportunity to emulate the US stance of withdrawing recognition from Maduro and endorsing his main rival. If matters were not complicated enough, the inauguration also provided the venue for the first official meeting between presidents of Abkhazia and El Salvador. The South American leader, Sánchez Seren, proclaimed his sympathy with the Abkhazian cause and hinted at enhanced relations when he told Khajimba: "We also, like you, fought for our freedom and achieved it. I am pleased to welcome the delegation of the Republic of Abkhazia. This is our first introductory meeting. We hope that our relations will continue" (President of The Republic of Abkhazia 2019).

Following the early breakthroughs in Nicaragua and Venezuela, the Abkhazians and South Ossetians entertained hopes of further recognitions in Latin America. During spring 2009, an Abkhazian delegation led by Maxim Gvinjia toured Latin America, visiting Venezuela, Argentina, Chile, Bolivia and Ecuador. The US embassy in Tbilisi reported that Georgia's political leaders were "visibly upset" by Venezuela's establishment of diplomatic ties with Abkhazia and South Ossetia and warned that Russia's campaign could lead to multiple recognitions by the end of the year (Wikileaks 2009a). Senior Georgian officials visited Latin American capitals in November 2009 to gauge the likelihood of additional recognitions. Though Russia had been lobbying in the region, the Georgians encountered more support than they had expected, which they attributed to the assistance of US officials (Wikileaks 2009c, 2009d). At the UN and around the globe Georgian diplomats embarked on a sustained campaign – aided by the EU and US – to discourage countries from recognising Abkhazia and South Ossetia. Spain proved a particularly useful ally in applying pressure on Latin American states not to follow Nicaragua's lead.

The Abkhazians and South Ossetians placed the highest hopes for recognition on Ecuador and Bolivia, both of which had left-wing presidents (Rafael Correa and Evo Morales, respectively) and adversarial relations with the US. At the beginning of April 2010 several international outlets reported Gvinjia's statement that his government was "waiting for Bolivia and Ecuador to recognize the independence of Abkhazia soon". Unlike previous recognitions, which were announced without prior warning and to general surprise, the prospect of imminent but as yet unannounced recognitions provided the US with enough time to apply maximum pressure to secure a reversal. As Gvinjia's successor, Viacheslav Chirikba, reflected, "The recognitions of the republic were thwarted several times, because they [Abkhazian MFA] declared it too early" (Chirikba 2011a).

The Abkhazians persisted and seemed on the verge of a major diplomatic breakthrough with the Dominican Republic. In response to Georgian demarches, on at least three occasions in April and May 2011 the US government warned its counterpart in Santo Domingo against recognising Abkhazia and South Ossetia (Wikileaks 2011; Chirikba 2011a).

Recognition appeared imminent as an official government delegation headed by the Dominican Republic's deputy prime minister paid an official visit to Abkhazia on 12–13 May. According to Abkhazia's foreign minister, the US government summoned President Fernández to New York, ostensibly for a conference, and sent a private plane for that purpose.⁶ Gvinjia considered the conference to be a pretext for a dressing-down. It certainly resulted in a sudden and decisive move away from recognising Abkhazia. "I do not know what they did to him, but after that he was even afraid to answer my e-mails" (Gvinjia 2017, 2019).

While the Abkhazians embarked on several intensive campaigns to solicit recognitions, they acknowledged that these efforts were stymied by the US and EU diplomatic counter-offensives. Regarding one prospective recognition, the Abkhazian foreign minister (Gvinjia 2017) recalled:

The foreign minister – the prime minister later came – sat in the office. [We settled that] tomorrow we sign an agreement on the establishment of diplomatic relations and recognition, in general. I am only leaving from this palace when the US ambassador calls in. And there are shouts, yelling. I come the next day, I already know what has happened. Sorry, they say, the ambassador was here, and Hillary Clinton called, screamed, and shouted expletives. And they said that if we recognize Abkhazia, the United States will close all its programmes: [they said] "We will leave your country, we will stop financing you, we will break off all relations with you altogether."

Ultimately, governments such as Ecuador, Bolivia and the Dominican Republic had to prioritise on which grounds to confront the US and, despite much cajoling, not least by Russia, decided that recognising Abkhazia and South Ossetia was not worth the risk of rupturing relations with the West. Without the prospect of additional recognitions in Latin America the diplomatic offensive turned to other regions.

Belarus – the game changer

When it came to the Kremlin's campaign to secure recognitions for Abkhazia and South Ossetia and Georgian fears of a "cascade of recognitions", Belarus was considered the key battleground state (Wikileaks 2009a). If left simply to decide between competing entreaties from Tbilisi and Moscow, Belarus would obviously defer to the latter. Countervailing pressure from the US and, more importantly, the EU would provide decisive leverage to shape President Lukashenko's judgement on how best his interests could be served. During a face-to-face meeting on 2 September 2008, Lithuanian prime minister Gediminas Kirkilas asked his Belarusian counterpart, Sergei Sidorsky, to "think twice" before recognising Abkhazia and South Ossetia. Sidorsky responded that Russia was exerting "huge pressure" on the Belarusian government to do so, threatening to treble the price of natural gas in 2009 from approximately \$140 per 1,000 cubic metres to over \$400. By linking the price of natural gas to recognition of Abkhazia and South Ossetia, the Kremlin sought to apply pressure where it could be most effective. Even a decision by Gazprom to postpone a scheduled price increase to \$200 in January would save Belarus billions of euros in 2009 alone. A similar conversation took place that day between the Lithuanian and Belarusian foreign ministers, with the later communicating that Russia had given Minsk until 9 September to make a decision (Wikileaks 2008c).

Throughout these vital months the government in Tbilisi fretted of imminent Belarusian recognition. The Georgian ambassador to Belarus maintained that "no combination of US

and EU enticements ... can compare with potential carrots (or sticks) from Moscow” (Wikileaks 2008e). He noted too with concern that not a single Belarusian official had signed the Georgian book of condolences produced in the immediate aftermath of the 2008 war. While the US stressed to Minsk that recognising Abkhazia and South Ossetia would have a “direct, negative effect” on interactions with the US, it was tempered by the realisation that years of mutual hostility had reduced that bilateral relationship to very little.

Certainly, Lukashenko’s public statements gave Tbilisi every reason to worry. The Belarusian leader ardently defended Russia’s recognition of Abkhazia and South Ossetia, maintaining the Kremlin had “no other moral choice” except to support their “appeal to recognize their rights to self-determination” (Voice of America 2009). Lukashenko publicly called on the Collective Security Treaty Organization (CSTO), which, along with Russia and Belarus, included Armenia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan, to devise a joint position on the conflict. However, as was the case with the SCO summit, at the critical CSTO meeting on 5 September 2008 in Moscow, the Kremlin received “understanding” and “support” for its actions in the Caucasus but no additional recognitions for Abkhazia and South Ossetia.

In its private assessment the US government noted the Belarusian regime’s “talents for claiming action but not actually carrying through” were being tested to the full and that “despite ridiculously elaborate praise of Russian aggression” Minsk had managed to avoid Moscow’s calls to recognise Abkhazia and South Ossetia (Wikileaks 2008e). The Belarusian president obfuscated and played for time. After loyally pushing discussion on recognition of Abkhazia and South Ossetia at the inconclusive CSTO summit, Lukashenko kicked for touch by declaring that the new Belarusian parliament due to be elected on 28 September could take up the issue. This was despite the fact that senior government sources in Minsk readily conceded privately that a simple instruction from Lukashenko was all that was required to effect recognition (Wikileaks 2008e). At this time observers believed recognition from Belarus to be “only a question of time, with the regime seeing what it can get in return” (Wikileaks 2008e).

Georgian president Mikheil Saakashvili harboured similar anxieties and told US officials that the Belarusian leader was under huge economic pressure from Russia to recognise Abkhazia and South Ossetia and could not hold out much longer (Wikileaks 2009c). Should Minsk acquiesce, Saakashvili warned, Georgia would be unable to work with Belarus within the framework of the EU’s new Eastern Partnership Initiative, in which Tbilisi had invested much hope and energy (Wikileaks 2009c).⁷ The Georgians lamented that the Eastern Partnership’s founding documents had failed to include a specific reference to the importance of territorial integrity (Wikileaks 2008e).

The much-anticipated Belarusian recognition of Abkhazia and South Ossetia never transpired, leading to recriminations between Moscow and Minsk. In August 2010, President Medvedev recalled that in the presence of CIS leaders the Belarusian president had “solemnly pledged” to recognise the two breakaway states “in the shortest period of time” (Civil Georgia 2010a). Lukashenko later attributed this volte-face to threats from the US and EU (Belarus had slightly more trade with the latter than with Russia) and the fact that Moscow had failed to offer any mitigating guarantee. In a frank admission of a meeting with the Russian president, Lukashenko recalled:

So, with the long list of possible disasters, which could have embraced Belarus [if it recognised Abkhazia and South Ossetia], I met with [President Medvedev]

in Sochi and we discussed this problem, during which he was citing my solemn pledge [to recognise Abkhazia and South Ossetia]. I am not rejecting [making such pledge]. But I told him: “There will be consequences [for Belarus]; are you ready Mr. President, dear friend, to share these consequences together with us? Are you ready to put your shoulder [to ours]?” I quote [Medvedev’s response]: “Let’s stop this horsetrading. This is one issue and that’s another”. So, I told him: “Thanks, the issue is now closed, there is no continuation to this conversation”

(Civil Georgia 2010b)

Lukashenko consistently made clear that for him the recognition issue was a matter first and foremost of Belarus’s national interest and had little to do with the merits of the individual cases of Abkhazia and South Ossetia. At a press conference on 2 October 2010, he told Russian journalists that, considering Russian–Belarusian relations, “of course we should have recognised [South] Ossetia and Abkhazia; no matter what [Russia] is our ally. From this point of view, we should have done that. Frankly speaking, we were ready to do it” (Civil Georgia 2010b). Ultimately, it was the prospect of reduced trade with the EU that weighed most decisively on Lukashenko’s calculations (Civil Georgia 2009). Indeed, the Abkhazians go so far as to claim that the Belarusian leader “earned a lot” by exploiting the recognition tug-of-war between Russia and the West (Gvinjia 2019).

Since 2010, there has been little evidence that recognition of Abkhazia and South Ossetia has been under active consideration by the Belarusian government. Dissuading Belarus proved a turning point at this critical juncture. Although there would be subsequent recognitions, as catalogued below, none had the clout of the early troika, some were reversed, and only Russia’s seems secure. Having reached dead ends in Latin America and the post-Soviet space, the Kremlin now turned its attention to the South Pacific, where multiple microstates struggling to survive were open to doing deals that might include recognition of faraway lands of which they knew little.

Chequebook diplomacy in the South Pacific

The South Pacific microstates are old hands at the recognition game. Taiwan maintains six valuable recognitions in the region – from the Solomon Islands, Palau, the Marshall Islands, Kiribati, Nauru and Tuvalu – all of which were ripe for inducements to recognise Abkhazia and South Ossetia.⁸ In these cases, recognition is bought rather than earned. It is not a question of states weighing up the merits of conflicting national state-building projects or territorial claims but rather a question of each alliance trying to outbid the other. Many states, particularly the small, vulnerable and developing, are open to financial stimuli, which are material and quantifiable, in return for the largely intangible exercise of recognising a small distant state with which it enjoys no contact. Propositions are attractive if the costs do not outweigh the benefits and this is where interventions by the EU, the US, Australia and the (British) Commonwealth have been vital. In chequebook diplomacy it is not simply a matter of who offers the most largesse, but also who can threaten the greatest repercussions. In the South Pacific seas, as with the largely disinterested states of Latin America and Africa, this battle has not been primarily fought between Georgia and Abkhazia but rather between their respective allies.

When the tiny South Pacific island of Nauru established diplomatic relations with Abkhazia and South Ossetia on 15 December 2009, the logic might not have been

immediately obvious to casual observers of international politics. With a territory of just 21 square kilometres and a population of 10,084, according to the island's 2011 census, Nauru is, after the unique outlier of the Vatican, the least populous state in the world. Separated from its nearest neighbour (Kiribati, another micro-state) by over 300 kilometres of empty ocean, Nauru is a country without a capital, a military or a national currency. Bereft of political parties, alliances in the 18-member parliament are usually built around friends and family, from whom they elect a president (Reilly and Gratschew 2001: 698). Nauru only joined the United Nations in 1999 having achieved independence three decades earlier.

The timing of the Russian approach to Nauru was also important, as it coincided with a period of unprecedented economic vulnerability. For decades, a phosphate boom had delivered one of the highest per capita GDPs in the world but, as reserves of this valuable commodity vanished, Nauru's long-term survival was in doubt and the island's leaders looked for other sources of revenue. Bereft of national resources, the island's elite fell back on the one thing they could sell – its sovereignty. Nauru promptly re-recognised Taiwan and, reportedly as a reward, Taipei helped Air Nauru purchase a second-hand Boeing 737. Clearly, this was a state suitable for Russian overtures and, in return for a purported \$50 million, Nauru became the fourth UN member state to recognise Abkhazia and South Ossetia.

The US embassy in Tbilisi privately noted that, while Georgia's response to the Venezuelan and Nicaraguan recognitions had been “manic”, they adopted, outwardly at least, a more “relaxed approach” to Nauru's declaration, a stance the US encouraged (Wikileaks 2009d). Despite the pecuniary and conditional character of the diplomatic relationship, Abkhazia and Nauru have kept up appearances.⁹ In 2013, Nauru's foreign minister travelled to Abkhazia, followed four years later, in November 2017, by President Baron Waqa, the first non-Russian head of state to visit. Such relationships are, however, entirely superficial in character. Emblematic of these diplomatic stunts have been the negotiation of visa-free treaties. Despite the attendant pomp and publicity that accompanied the signings, the likelihood that one of Nauru's 4,000 adults would seek to visit South Ossetia for business or pleasure is improbable.

Next to enter the diplomatic fray was Vanuatu, a cluster of islands in the south-west Pacific, over 2,000 kilometres east of Australia. Vanuatu's multiple recognitions and ultimate derecognition of Abkhazia (notably, no recognition of South Ossetia was proffered¹⁰) reflects how a severely fragmented domestic political scene has influenced this inconsistent foreign agenda (Hassall 2007). Vanuatu first recognised Abkhazia on 23 May 2011 and a week later the first fruits of diplomatic relations were evident when its prime minister issued a formal statement offering condolences on the passing of Abkhazian president Sergei Bagapsh. The first signs of the schizophrenia that was to define Vanuatu's relationship with Abkhazia manifested itself just four days later when, in an interview with the *New York Times*, Vanuatu's UN ambassador denied that his country had recognised Abkhazia, saying, “as far as we are concerned, we are dealing with Georgia, not Abkhazia. It is defamation for our country [to suggest otherwise]” (Transparency International Vanuatu 2011). This in turn triggered a response from Vanuatu's foreign minister, Alfred Carlot, the very next day reaffirming Vanuatu's commitment to recognising Abkhazia. On 10 June, Carlot apologised for the “miscommunication” between the Ministry of Foreign Affairs and Vanuatu's UN representative in New York, but the matter did not rest there. Five days after this clarification, the prime minister's senior political advisor declared that no diplomatic relations with Abkhazia had been established. A change of prime minister on 17 June resulted in Vanuatu officially withdrawing recognition of Abkhazia, ostensibly to keep in line with the majority of the

UN. When, however, Vanuatu's Supreme Court declared the election unconstitutional ten days later and reinstated Prime Minister Sato and Foreign Affairs Minister Carlot, Abkhazia was re-recognised on 7 October 2011.

In May 2013 Vanuatu withdrew its recognition of Abkhazia for the final time and signed an agreement with Georgia two months later. What might seem to the casual observer as regular diplomatic mood swings can in part be explained by the deep divisions within Vanuatu's politics. Some also saw these events as a rerun of Vanuatu's earlier tango with China and Taiwan. In November 2004, Vanuatu had recognised Taiwan in return for \$30 million in aid only to re-establish relations with China one month later after Vanuatu's prime minister lost power (Atkinson 2010).

The Abkhazians attribute the Vanuatu and Tuvalu reversals to a combination of Georgian intrigues, Western pressure and financial inducements. According to Abkhazia's foreign minister of the time, there have been several very friendly meetings with high-level officials from Vanuatu and Tuvalu since these states recognised Georgia. Not only did the Abkhazians not receive any formal communications announcing an end to diplomatic relations; it was relayed to them that no such note would be issued. Accordingly, Abkhazia's official position is that these states still recognise each other (Chirikba 2011a).

The next recognition of Abkhazia and South Ossetia also emanated from the South Pacific region, from the tiny Polynesian state of Tuvalu (Civil Georgia 2011). A collection of eight atoll-islands totalling a mere 26 square kilometres and inhabited by a population of 10,640 (2012 census), Tuvalu became a member of the United Nations in the year 2000. It is governed by a 12-seat parliament that selects a prime minister (the British monarch is head of state). A government delegation headed by Prime Minister Willy Telavi visited Sukhum/i on 18 September 2011 and Tskhinval/i the following day, signing documents establishing diplomatic relations with the leaders of both republics.¹¹

The Georgian government belatedly stirred and began to provide humanitarian assistance to Tuvalu, sending a shipment of medical equipment shortly before the recognitions of Abkhazia and South Ossetia, a futile gesture that failed to reverse the course of events. A source at the Georgian foreign ministry responded to the new recognition by saying that, "with all due respect to UN member states, I would like to point out that according to experts' predictions Tuvalu will soon be underwater", before adding with diplomatic understatement that the decision was "most likely ... influenced by considerations of a quite pragmatic and mercantile nature" (Kommersant 2011).

In September 2011, Georgian foreign minister Grigol Vashadze conducted the first tour of the South Pacific countries in the history of Georgian diplomacy. Ostensibly about strengthening bilateral relations, the trip was very much an expedition to prevent a new wave of recognitions by regional microstates. Vital to this effort would be the help of Australia and New Zealand. These countries were patrons to many small Oceanic states and Vashadze lobbied both regional powers as part of his tour. As had been the case with Vanuatu, a change of government, combined with external pressure and inducements, prompted Tuvalu to rescind its recognition of Abkhazia and South Ossetia (Civil Georgia 2014). Telavi's administration was replaced in 2013 by one led by Enele Sopoaga, who had previously criticised the decision to recognise the Caucasian republics without consulting Tuvalu's parliament.

"It might be unfair to call Nauru and Tuvalu diplomatic prostitutes," Oliver Bullough has noted, "but they have tended to hook up with anyone who'll pay them" (Bullough 2014). While it's easy to dismiss such political promiscuity, for these tiny South Pacific states, investments in lieu of favours rendered are a matter of national survival. The battle for the votes and bank accounts of South Pacific nations continued

apace throughout the 2010s with countries like Samoa, Kiribati, Palau and Fiji prime targets. Not only had Abkhazia and South Ossetia not established diplomatic relations with these South Pacific nations before 2008 but neither had Georgia, and Tbilisi embarked on a frenzied scramble to prevent further Kremlin-inspired recognitions. During the four years following the 2008 war, Georgia established diplomatic relations with no fewer than 50 UN member states (Civil Georgia 2012). Fiji is a case in point. Georgia only established diplomatic relations with Fiji in March 2010 and on October 2011 the tiny nation was honoured by a visit from Georgian foreign minister Grigol Vashadze. Suspended from the Pacific Islands Forum and from the Commonwealth because of the 2006 coup, Fiji's diplomatic isolation also made it a potential target for new friends, particularly those bearing gifts. The Georgians were understandably jittery in advance of Russian foreign minister Sergei Lavrov's visit to Fiji on 1 February 2012, as part of a five-stop tour of the Asia-Pacific region, and publicly pleaded with Fiji to (in the words of their deputy foreign minister) "resist the temptation" to recognise Abkhazia and South Ossetia. In an effort to fight temptation with temptation, by the end of the year Georgia had gifted the schools of Fiji with hundreds of computer netbooks along with numerous scholarships for Fijian students (Fijian Government 2012).

While Georgia's chequebook is not as large nor its pockets as deep as Russia's, Tbilisi's powerful allies provided vital inducements and deterrents, which determined the stances of many uncommitted UN member states. In particular, fear of losing US, EU and/or Australian aid influenced many a potential waverer. Through its Consolidation Appropriations Acts, the annual budgetary legislation sanctioning spending by various federal agencies, the US prohibits the provision of aid to those governments that have recognised the independence of, or established relations with, Abkhazia and South Ossetia.¹² There are a few potential loopholes, however. The Act stipulates that no funds can be made to assist the central governments of errant states but this leaves open the possibility to fund other agencies and institutions. Moreover, the Secretary of State can waive this restriction on assistance if s/he determines that "to do so is in the national interest of the United States" (United States Congress 2018a).

The Act also directs the Secretary of the Treasury to instruct the US executive directors of each international financial institution to vote against any assistance, including by loan, credit, or guarantee, for any programme deemed to violate Georgia's sovereignty and territorial integrity (Section 7070 (c) 3) The Countering America's Adversaries Through Sanctions Act, signed into law in August 2017, also makes several references to Abkhazia and South Ossetia. In addition to imposing sanctions against Russia it authorised the expenditure of \$250 million for the Countering Russian Influence Fund during the 2018–19 fiscal year. In acting thus, the US declares its adherence to the principle of *ex injuria jus non oritur*, and supports the "Stimson Doctrine", named after the former US Secretary of State, both of which eschew recognition of territorial changes effected by force, which include "the illegal invasions and occupations of Abkhazia, South Ossetia, Crimea, Eastern Ukraine, and Transnistria" (United States Congress 2018b). Officially at least, the Abkhazians reject the chequebook diplomacy narrative as "fake news disseminated by Georgia". They maintain that, "unlike the Americans in the case of Kosovo", the Kremlin does not pay for recognitions and that "if it did we would probably have had many more recognitions" (Chirikba 2011a).

Other forms of recognition

For many years Abkhazia and South Ossetia have maintained diplomatic relations with other post-Soviet separatist entities, namely with each other, with Transnistria and with

Nagorno-Karabakh. Indeed, these constitute their oldest inter-state relationships, dating back to the early 1990s, and since then Transnistria, Abkhazia and South Ossetia have established representative offices in each other's capitals. In 2006, the post-Soviet unrecognised quartet established the Community for Democracy and Rights of Nations, which provides a platform for cooperation. More recently, the "peoples' republics" of Donetsk and Luhansk have sought recognition from Abkhazia and South Ossetia, but only the latter has obliged.¹³ No significant attempts have been made to reach out to unrecognised states beyond the post-Soviet space, such as Somaliland, though logistics are an obvious barrier.

Sport has proved a platform for Abkhazia to advertise its statehood. Although excluded from the Olympic Games (an Abkhazian bronze medallist in 2012 had to compete for Russia), the Abkhazians have proved enterprising in advertising their state through competing in and hosting international sporting events. Abkhazia's hosting of the 8th World Domino Championship in 2011 was considered a major achievement, with over 200 participants from two dozen countries attending the tournament despite being blocked entry via Georgia. The Confederation of Independent Football Associations (CONIFA), established in 2013 and with 47 members, provided unprecedented exposure. Despite being billed by many in the international media as a tournament for unrecognised states, it is more accurately one composed of non-FIFA members. In 2016, Abkhazia hosted 12 teams, including Northern Cyprus and Somaliland, for the CONIFA World Football Cup, garnering significant media attention in the process. The choice of Abkhazia was a direct response to the Hungarian government's decision to refuse visas to the Abkhazia and South Ossetia teams selected to participate in CONIFA's European Cup the previous year.

Another avenue for state interaction has been with territorial sub-units of recognised UN member states, what might be described as a form of paradiplomacy. With its strong regional autonomies, Italy, for example, has provided many opportunities for cooperation for the authorities in Sukhum/i and Tskhinval/i. Although the Italian authorities in Rome have consistently denied recognition to both breakaway states, Abkhazia (and, to a much lesser extent, South Ossetia) has made formal agreements with municipalities, associations and business organisations in different Italian regions, as well as in San Marino.

Conclusion

Russian recognition is vital for the Abkhazian and South Ossetian administrations and provides numerous economic and security benefits. The advantages accrued from the other recognitions are less tangible but nonetheless appreciated. As one Abkhazian foreign minister stressed, "they are very useful politically. Any new recognition strengthens our international positions. In the UN, we have their voices in our favour. They have friends and allies, which is also useful for us" (Chirikba 2011a). After an initial burst of recognitions in the three years following the Kremlin's endorsement in 2008, there has been a clear slowing of impetus, in large part because of pressure applied by Western powers on Georgia's behalf.

On 29 May 2018, the Syrian government recognised Abkhazia and South Ossetia and announced that it would be opening embassies in both states. Soon afterwards Presidents Khajimba and Bibilov conducted separate official visits to Syria and met with Bashar al-Assad in Damascus. Though ostensibly "in gratitude for their assistance against terrorist aggression" in Syria, it was more accurately a token of appreciation for Russian help in keeping the Assad regime in power. Certainly, the carefully choreographed recognition bore all the hallmarks of Kremlin influence. Diplomatic relations with Abkhazia and South Ossetia were

established at exactly the same time and both Caucasian republics published almost identical statements announcing the new departure. Abkhazia's links with Syria have been significant (Sukhum/i has encouraged several hundred Syrian refugees of Abkhazian origin to resettle) but are ironically the result of Russia's deportation of the Abkhazians during the nineteenth century. According to Abkhazia's longstanding foreign minister Viacheslav Chirikba (2011a):

The Russian position was like this: we would welcome this recognition, but this should be the initiative of both sides. I met officially with the Syrian ambassador in Moscow in 2015,¹⁴ and he promised that as soon as the war in Syria was over they would raise the level of our relations. Well, of course, Russia was a strong factor, but the Abkhaz side too was very active diplomatically. In general, Russia was readily supporting our efforts when asked by our side, providing logistics and helping diplomatically, in conformity with our mutual agreements.

Unlike the recognitions from very distant countries in Latin America and the South Pacific, with whom it is difficult to maintain any meaningful economic relationship, Syria is much closer, reachable by sea and air connections and, combined with the Caucasian diasporas, more suitable potentially for economic and cultural interaction (Chirikba 2011a). Georgia responded by severing diplomatic relations with Syria. Following years of hiatus, this gesture came at a time when the general view was that the Kremlin had stopped seeking recognitions for Abkhazia and South Ossetia after the practice had proven to be unflattering and expensive. It suggests that while the quest for recognitions has lost momentum it has not been abandoned altogether.

Despite this unexpected addition to their diplomatic network, Abkhazia's and South Ossetia's recognitions are vulnerable. Those provided by Nicaragua and Venezuela, for example, were very much the personal initiative of Daniel Ortega and Hugo Chávez. At the time of writing, Nicaragua and Venezuela teeter on the brink of civil war and/or economic collapse. It's unlikely that recognition of Abkhazia and South Ossetia will long survive the end of these regimes. A tempting aid package for Nauru along with a change of government in Syria and the recognition of Abkhazia and South Ossetia might well be reduced to a solitary endorsement from its reliable patron, Russia.

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Notes

- 1 The MFAs also play a role in providing consular services, issuing visas, coordinating the work of embassies and representative offices and in general promoting the country abroad. It also seeks to play a role in enhancing trade and fostering favourable conditions for foreign investment and socio-economic development.
- 2 In an interview with the author, South Ossetia's foreign minister, Murat Dzhioyev, claimed that a united independent Ossetia – combining North and South – was the most desired outcome but conceded that this was an unlikely prospect, as Russia would not allow North Ossetia to secede from the Federation. Unity with North Ossetia would therefore mean joining the Russian Federation (Dzhioyev 2002).
- 3 “Usually when we lobby, we lobby for them (the South Ossetians) too” (Gvinjia 2019).
- 4 As communicated to the author in Abkhazia.

- 5 Based on author's observations and discussions while in the Abkhazian capital, Sukhum/i, when Venezuela recognised Abkhazia and South Ossetia in September 2009.
- 6 Details of the conference and President Fernández's itinerary can be found at Diariolibre (2011).
- 7 The Eastern Partnership, which targets Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, aims at upgrading engagement, including the prospect of association agreements, integration into the EU economy and easier travel to the EU.
- 8 Indeed, 16 of Taiwan's 18 recognitions are located in Latin American (10) and the South Pacific (6), with the outliers being Swaziland and the Holy See.
- 9 See interviews with the speaker of the Parliament of the Republic of Nauru, Ludwig Scotty, who led the delegation, and Ben Van Der Sadne, adviser to the Ministry of Foreign Affairs and Trade of the Republic of Nauru (Alagala 2011).
- 10 According to Chirikba (2011a), one of the reasons for this divergence is that Abkhazia had benefited from additional lobbying on their behalf from (non-Russian) internationals. Latvian-born and Fiji-based Juris Gulbis, Abkhazia's ambassador to the Asia-Pacific, played a prominent role in the process.
- 11 This author briefly met with Prime Minister Wily Telavi during his visit to Abkhazia as it coincided with early presidential elections called following death of Sergei Bagapsh. Telavi brought with him a solitary observer from Tuvalu to observe the election.
- 12 In 2018, the Act authorised no less than \$105.3 million in aid for Georgia (United States Congress 2018a).
- 13 While the Abkhaz maintain official contacts with Donetsk and Luhansk their position has been that recognition would be premature while the Minsk process is under way. Chirikba (2011a) has stated that "We hope that the sides will come to a mutually acceptable solution, with special status negotiated for Lugansk and Donetsk. If all means of peaceful and mutually acceptable solutions are exhausted, then we can return to this issue. I personally think that the situation in both entities is developing along the Abkhazia/South Ossetia scenario".
- 14 See Ria Novosti (2015).

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TRANSDNIESTRIA AND NORTHERN CYPRUS

Daria Isachenko

Introduction

Berlin's noble district Grunewald not only hosts historical villas and various embassies but is also a place of ambiguities that characterise a contemporary system of sovereign states. Here one can encounter what appears to be a consular office of the Conch Republic, 'a semi-farcical micro-state' that declared its independence from the United States in 1982 in Key West, Florida (Steinberg and Chapman 2009). The flag of the Conch Republic, which claims a territory of 15.4 km², is proudly displayed in front of the building. Oktay Öztürk, the current representative of Northern Cyprus in Germany, explains to the author that the sticker 'CC' on a nearby car stands for consular corps. The Turkish Cypriot representation office is located within a 300-metre walking distance. No flag can be spotted outside the building. The only reference on a car outside is a specially ordered licence plate 'NZ', meaning Nordzypren (Northern Cyprus in German). The plate number, 2012, refers to the year when the Turkish Cypriot representation office was opened in Berlin. Asked by the author 'Why not 1983?', the year when the Turkish Republic of Northern Cyprus (TRNC) was established and which is engraved on its state emblem, Öztürk clarifies: 'It was the choice of my predecessor. I would have put 21.12.1963 instead', referring to the outbreak of violence between Greek and Turkish Cypriots.

The significance of three dates that surfaced in the conversation is well captured by what Richmond (2002) called the 'sovereignty trap' that exposes how sovereignty for contested places such as Northern Cyprus is 'their enemy, their saviour-liberator, and dictator'. In 1963, the state sovereignty of the Republic of Cyprus was perceived as an 'enemy' within the Turkish Cypriot community, as the 1960 power-sharing arrangement collapsed with tensions leading to armed conflict and the eventual withdrawal of Turkish Cypriots from state structures. Separation gradually evolved from the General Committee (1963–67) to the Provisional Cyprus Turkish Administration (1967–74) that, following Turkish intervention, turned into the Autonomous Turkish Cypriot Administration (1974–75). In 1975, the Turkish Federated State of Cyprus was established. In 1983, sovereignty was finally about to become a 'saviour-liberator' for Turkish Cypriots, when the then leader, Rauf Denktaş, proclaimed the TRNC. In the words of Denktaş (1988: 120), the declaration was meant 'to put the facts before the world in a language which it could not fail to understand. That was

to declare our statehood. ... The world had to see that we existed. Recognition was of secondary importance.' This statement is particularly revealing of how statehood is perceived as the only alternative imaginable. Yet the issue of recognition became of primary importance to the Greek Cypriot-controlled Republic of Cyprus as well as to the international community. Referring to the TRNC declaration as 'legally invalid', UN Security Council Resolution 541 (1983) dictated to 'all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus' as well as 'not to recognise any Cypriot State other than the Republic of Cyprus'. Recognised only by Turkey, the TRNC keeps participating in the negotiation process while at the same time assuming the consequences of its pursuit of statehood without any formal international status.

The conflict over Transnistria, which is *de jure* part of Moldova, differs from the Cyprus question in longevity and intensity of armed hostilities as well as in the degree of international involvement.¹ Yet, the emergence of this unrecognised state and its continuing existence follows the same logic of the aforementioned sovereignty trap. Transnistria emerged when the Soviet Union was about to collapse. Concerned with Soviet Moldova's aspiration to join Romania, the solution for Transnistria pertained, like in the case of Northern Cyprus, to the language of statehood. In September 1990, Transnistria declared its independence from Moldova, but remained within the Soviet Union. The ceasefire of the armed conflict was reached in 1992 with the intervention of the Russian army. Since the 1990s, Transnistria has developed all the necessary state institutions and symbols, including its own currency; however, unlike Northern Cyprus, it is not recognised by any UN member state.

Based on the cases of Northern Cyprus and Transnistria, this chapter examines how the sovereignty trap impacts their attempts to acquire some kind of formal status on the international arena. On the one hand, their existence confirms the enduring centrality of the state as they seek to join the world of sovereign states. On the other hand, despite the lack of recognition, they are still embedded in informal as well as formal networks of international politics. It is argued that central to this embeddedness is state recognition viewed as a category of practice. This chapter proceeds as follows. It first explores the question of how the authorities of Northern Cyprus and Transnistria frame their foreign policy priorities. Second, the case studies are examined in turn, outlining their attempts at integration within regional organisations as well as at cultivation of bilateral relations through the establishment of missions abroad and other means at hand. The chapter concludes with a short discussion of areas for further research.

Unrecognised foreign policy objectives: recognition as practice

While participating in the negotiation processes, Northern Cyprus and Transnistria developed functioning state institutions, including ministries of foreign affairs with directorates ranging from research and foreign policy planning, protocol and external coordination to departments dealing with international organisations. Transnistria introduced a distinguished formal uniform for its diplomatic corps, worn during special public occasions. These developments appear to confirm that international recognition is generally assumed to be the goal of those who lack it. The main task of foreign policy is understood to be directed towards this end (Owtram 2011). However, the self-presentation on the websites of the ministries of foreign policy of Transnistria and Turkish Cyprus also include a special section on the ongoing negotiation processes. Importantly, the goal of recognition has been questioned both within Transnistria and Northern Cyprus.

In 2004, the failure of an internationally sponsored peace initiative for a comprehensive settlement of the Cyprus question, known as the Annan Plan, resulted in a change of policy in Northern Cyprus. The referendum results, in particular the pro-solution vote of Turkish Cypriots, made the then Turkish Cypriot leader, Mehmet Ali Talat, reformulate the strategy towards seeking international acknowledgement as opposed to recognition (Isachenko 2008). Even before this readjustment, there was a perception of inconsistency regarding the intentions of the Turkish Cypriot leadership, as the discourse vacillated between supporting a federal solution for Cyprus and international recognition. When asked why Pakistan did not recognise the TRNC, the leader of Pakistan in the early 1990s reportedly commented that ‘even Turkish Cypriots themselves have not made up their mind as to whether they really want independence’ (quoted in Aykan 1995: 67).²

Transnistria’s quest for a proper place has been also marked by a redefinition of its goals as a rule by conducting referendums. The fact that Transnistria was ‘created in accordance with the results of a nationwide referendum’ in the period 1989–90 is one of the central arguments used by Transnistria’s authorities in the promotion of its statehood claims on the international arena (Krasnoselsky 2017).³ In the most recent referendum conducted in 2006, Transnistrians were asked for an opinion on the following questions: (i) whether one supported the course of Transnistrian independence and the republic’s subsequent free accession to Russia, and (ii) whether one was in favour of renouncing Transnistrian independence to join Moldova. The referendum resulted in 97 per cent of votes in favour of the first option, although the Kremlin did not give this any due consideration. Whereas the question may seem ambivalent in relation to the actual goals of Transnistria, according to the current minister of foreign affairs, Vitalii Ignatiev (2018), ‘there is no contradiction here: the priority is wide international recognition. Pridnestrovie can join the Russian Federation only on the basis of a bilateral agreement between two sovereign states’. Whereas for some the question in the referendum was formulated to reconfirm Transnistria’s geopolitical orientation towards Russia with a possible form of cooperation, as in the case of the Union State between Russia and Belarus (Interview 2018d), for others the option implied more the model of Kaliningrad and thus eventually becoming part of the Russian Federation (Interview 2018e).⁴ Importantly, not least due to the ‘mental connection with Russia and the presence of historical memory’ people residing in Transnistria ‘perceive Russia as their own state and do not consider it as abroad’ (Shornikov 2016).

As local authorities have been updating and refining their objectives, for the outside world, it is their declarations of independence that remains crucial. In scholarly debates, this has found an expression in the way ‘*de facto* states’ have been defined. As suggested by Caspersen (2009: 47), among the criteria that distinguish *de facto* states include ‘an aspiration for full, *de jure*, independence through a formal declaration of independence or through the holding of a referendum’. From the perspective of parent states, a declaration of independence and thus the search for recognition means a vigorous advancement of counter-recognition strategies (Ker-Lindsay 2012). This resulted from the logic that emerged from the Westphalian system that as a rule does not allow for any ambiguities regarding a formal state in the inter-state system. By implication, it is assumed that the foreign policy of unrecognised states must differ from those of recognised states. ‘A distinctive feature’, as suggested by Owtram (2011: 134), ‘will be the maintenance and management of the relationship with the parent and patron state and the interaction with the international community and international organisations on the issues of recognition and aid’. It is especially the ‘level of capability’ in relations with patron states, great powers and international organisations that is central (Owtram 2011: 137). In a similar vein, Berg and Vits (2018) analyse the ‘actorness of *de facto* states’ in the foreign policy field in terms

of '(1) the capacity/capability to act; (2) the asymmetric relations moulded into interdependence with their patrons; (3) the external environment which privileges traditional diplomatic connections and the rules of the game against illegal challengers'.

Without denying the importance of these actors in shaping the politics of recognition, these distinctions between recognised and unrecognised foreign policies neither elucidate what the ideal type for measuring the capacity level should be nor, more importantly, does it explain how the relationships are managed in practice. Moreover, such a perspective on patron states and great powers privileges the focus on recognition as an act rather than as a process, and disregards the importance of micro-dynamics of diplomatic activities as well as the significance of performative practices (Newman and Visoka 2018; Visoka 2018). In this regard, the research on unrecognised diplomacy may benefit from a distinction between a category of practice and a category of analysis. As defined by Brubaker and Cooper 2000: 4),

By categories of practice, following Bourdieu, we mean something akin to what others have called 'native' or 'folk' or 'lay' categories. These are categories of everyday social experience, developed and deployed by ordinary social actors, as distinguished from the experience-distant categories used by social analysts.

As further sections illustrate, while international recognition matters with regards to norms and practices that Northern Cyprus and Transdnistria follow, no less significant are self-perceptions of recognition as a practice. It is above all the region-ness, personal connections and informal arrangements that mark their efforts in the search for a formal status and thus provide the basis for performing recognition. Equally importantly, foreign policy conduct is not limited to relations with patron states.

Turkish Cypriot State: diplomatic practice beyond the territorial ideal

In 2004, the TRNC acquired yet another name – the Turkish Cypriot State. It was envisaged as part of a bi-zonal, bi-communal federation of two politically equal entities in the Annan Plan. The new state, however, would remain in international limbo. On 24 April 2004, when the Annan Plan was put to a referendum, 65 per cent of Turkish Cypriots voted in favour, whereas 76 per cent of Greek Cypriots voted against. In May 2004, the Greek Cypriot-controlled Republic of Cyprus joined the European Union. The application of the *aquis communautaire* 'in the areas falling outside the effective control of the Cypriot Government' was suspended. In May 2015, the EU opened an 'Infopoint office' in Northern Cyprus to 'help Turkish Cypriots satisfy their need for information on issues of the European Union through activities and a dynamic presence on social media' (Christou 2015).

Other organisations reacted more promptly to the pro-solution stance expressed in the voting results on the Annan Plan. Following the 2004 referendum, the name of Northern Cyprus was changed to the 'Turkish Cypriot State' in the Economic Cooperation Organization (ECO) and the Organisation of Islamic Cooperation (OIC, formerly known as the Organization of the Islamic Conference), where Northern Cyprus was previously represented as the 'Turkish Muslim Community of Cyprus'. Of significance is not only the discursive act of renaming, as members of the OIC were also urged to foster bilateral relations with Northern Cyprus and report on progress on an annual basis (Isachenko 2012: 164). Since the Annan Plan, while the TRNC did manage to expand the scope of bilateral relations, they still remain constrained, not least due to the concerns of other states with implied recognition in connection with naming.

One of the main instruments aimed at escaping international isolation is representation missions abroad. At present, the TRNC has 26 missions established in 20 different countries, all listed under 'consular info' on the website of its Ministry of Foreign Affairs, which differ with regards to their formal status and functions. Out of 26 missions, seven are located in Turkey. In Ankara, the TRNC currently has a fully fledged diplomatic embassy, as Turkey has officially recognised it as a state since 1983. Its first representation was opened back in 1966 as the Bureau of the Turkish Cypriot Community. In another six cities in Turkey, the TRNC is represented by consuls general. In Pakistan, which almost recognised the TRNC in 1983, the Turkish Cypriot representation in Islamabad is treated practically like any other embassy. It is officially listed in Pakistan's Diplomatic Bluebook and the TRNC flag is displayed not only in front of the representative's residency but also in front of the representation office building (Interview 2018b). The purpose of the TRNC representation offices also varies. In places like New York, Washington, DC, Brussels and Geneva, the mission is mainly political that seeks to advance Turkish Cypriot perspectives on the negotiation process. In Gulf States, on the other hand, Turkish Cypriots foster relations in tourism, trade and education. In some countries, like Azerbaijan and Kyrgyzstan, missions are opened based on shared origins or 'as in Finland and Hungary to some extent on more distant kin ties' (Interview 2018b). Importantly, diplomatic activities abroad long predate the declaration of independence and tellingly reveal the development stages of the Cyprus conflict. The first mission was opened in London between 1963 and 1964 as the Bureau of the Turkish Cypriot Community. Others followed along the negotiation process with further openings in New York (1975), Brussels (1981) and Washington, DC (1984).

Regarding the naming of missions, consistency is observable only on the Turkish Cypriot side. They are officially called 'representations', whereas their location is specified by cities, rather than by states. As pointed out by the Turkish Cypriot representative in Berlin, the name is not important, as the main aim of diplomacy 'is to talk to people and let them know we exist' (Interview 2018a). On the other hand, names of missions vary according to concerns of particular states as to what might constitute state recognition or not. In the US, for instance, there is the 'Representation of the TRNC in Washington' and its presence is regulated by the Foreign Agents Registration Act. In Germany, the TRNC mission was opened as the 'Turkish Cypriot Representation' with reference to the 1960 Constitution of the Republic of Cyprus, which is considered invalid in the TRNC (Interview 2018b). In Rome, the Turkish Cypriot mission was opened as the 'Representation Office of Northern Cyprus', whereas in Kuwait it bears the title of the 'Turkish Republic of Northern Cyprus Governmental Trade Office in Kuwait' (Interview 2018a).

The establishment of contacts and the work of missions abroad depend to a great extent on the personality of ambassadors of foreign countries as well as on the nature of the diplomatic community. A telling example of this is the TRNC mission in Kuwait. Even though the Turkish Cypriot representation is not listed among the official embassies, the head of mission receives invitations to official receptions in embassies of the UK and Switzerland (Interview 2018a). On the other hand, although Kuwait's authorities are wary of seeing its flag next to the TRNC flag on a festive cake, official receptions devoted to the celebration of TRNC independence day organised by its representation office at times attract up to 200 guests from countries ranging from Azerbaijan to Turkey, Russia, Pakistan, Taiwan and Myanmar. This can be explained by the low degree of interaction between foreigners and locals and a high degree of interaction within the diplomatic community working in Kuwait (Interview 2018a).

Despite the possibilities provided by the regional cooperation within the OIC and the diplomatic openness in places like Kuwait, bilateral relations are still limited by the discourse

of non-recognition. An illustrative case in point is the relationship between the TRNC and Azerbaijan. After the collapse of the Soviet Union, there was some hope that countries of Turkic origin such as Azerbaijan, Uzbekistan, Kazakhstan, Kyrgyzstan and Turkmenistan might recognise the TRNC (Bahcheli 2008). Although this expectation did not materialise, the TRNC opened a representation mission in 1997 in Azerbaijan's capital, Baku. After the 2004 referendum, the relations intensified, not least due to the personal friendships between government officials of Azerbaijan and Northern Cyprus (Isachenko 2012: 164). In an attempt to lift international isolation, a delegation of Azerbaijani businessmen visited Northern Cyprus in July 2005, flying directly from Baku to Ercan, an internationally unrecognised airport. This was considered a historical event, since there are usually no direct flights to Ercan from countries other than Turkey.

The flight from Baku to Ercan was preceded by a visit of the then Turkish prime minister, Recep Tayip Erdoğan, to Azerbaijan in June 2005. As stated by Erdoğan, 'Azerbaijan was close to recognising Northern Cyprus', further expecting that 'Azerbaijan's steps in this direction will continue' (quoted in Abbasov 2005). Although there was a promise to introduce direct flights between Azerbaijan and Northern Cyprus on a regular basis, no further flights followed from Baku to Ercan. Despite close relations with Turkey, Azerbaijani sympathy towards the TRNC is restrained by fear that other countries would recognise Nagorno-Karabakh, a territory with sovereignty claims over which Azerbaijan has no effective control. The recognition of TRNC also becomes an issue for Azerbaijan especially during elections and is used in a power struggle to ensure Turkey's support (Abbasov 2005). However, at stake is also the question of Azerbaijani relations with the EU in the context of the Eastern Partnership. The implication of Azerbaijan's balancing between Turkey and the EU is thus reflected in the TRNC diplomatic service abroad. The bilateral relations between Northern Cyprus and Azerbaijan are not based on a clearly defined position of recognition or non-recognition, but on personal relations and the degree of courage of ambassadors amid geopolitical considerations. As a result, whereas in some countries ambassadors from Azerbaijan attend official receptions organised by the representation offices, in others they refrain from doing so and avoid any official contact (Interview 2018a).

Apart from establishing diplomatic missions, Northern Cyprus also seeks to escape international isolation via contacts in the cultural sphere and sports. In promoting Northern Cyprus abroad, the Turkish Cypriot diaspora plays a significant role. For example, a Turkish Cypriot pianist, Rüya Taner, educated in the United Kingdom and having performed in capitals around the world, is currently working in the TRNC presidential office as special advisor on arts. As pointed out by a Turkish Cypriot diplomat, this is significant in that, 'as her performances are appreciated by the audience, and once people know that she is a Turkish Cypriot, this is how they learn about Northern Cyprus' (Interview 2018b). Music diplomacy has also become a tool of the TRNC presidential office as it has established a symphony orchestra and recorded a number of CDs.

To avoid isolation in sports, Northern Cyprus frequently hosts international tournaments, such as non-Olympic forms of martial arts. Another case in point is Taekwon-do, or more specifically Taekwon-do GTF (Global Taekwon-do Federation), which is not a member of the International Olympic Committee, as opposed to Taekwon-do WTF (World Taekwon-do Federation). In 2010, it hosted an international tournament that attracted 200 sportsmen from 12 countries, including Turkey, Kazakhstan, Azerbaijan, Iran, Russia and Moldova. The opening ceremony was attended by the Turkish Cypriot president and the vice prime minister (Syrbov 2010).

Transdnistria: regional cooperation with(out) recognition

In comparison with Northern Cyprus, Transdnistria's diplomatic activities are more limited in scope; however, a similar weight afforded to performative aspects of diplomatic practices and reliance on regional formats of cooperation can be observed. Although Transdnistria is not recognised by any UN member state, it nevertheless passed a law that acknowledges the normative framework of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The main outlet for the conduct of diplomatic practices is provided by ties that bind Transdnistria together with other post-Soviet states with a contested international status, such as Abkhazia, South Ossetia and to some extent Nagorno-Karabakh. As Russia recognises Abkhazia and South Ossetia as sovereign states, rendering them thus partially recognised states to the outside world, according to the logic of one expert, Transdnistria can now also be considered as a partially recognised state, because it is recognised by Abkhazia and South Ossetia (Interview 2018f). Tellingly, as Abkhazia and South Ossetia celebrated the tenth anniversary of Russia's recognition in August 2018, the event was commemorated in Transdnistria's capital, Tiraspol, as well. The flags of Abkhazia and South Ossetia were solemnly raised on Tiraspol's central square. If Transdnistria's cooperation with Abkhazia and South Ossetia is marked by a significant number of agreements, no such solid legal basis is present in Transdnistria's relations with Nagorno-Karabakh. Yet, the flag of Nagorno-Karabakh was raised as well, not only 'for the purpose of quantity' but also 'due to moral and ethical reasons' (Interview 2018d).

Above all, it was the similarity of context, namely the legal limbo that resulted after the collapse of the Soviet Union, which served as a basis of cooperation for Eurasian *de facto* states; in addition, a bond of solidarity among 'brotherly republics' was reinforced by the shared experiences of armed conflicts. As early as January 1993, with the war still ongoing in Abkhazia, the leaders of Transdnistria and Abkhazia signed a treaty on friendship and cooperation. Although the document makes no explicit reference to the act of recognition, it is currently considered the basis of the establishment of diplomatic relations between Transdnistria and Abkhazia.⁵ In 1994, Transdnistria also concluded a similar agreement on friendship and cooperation with South Ossetia. Throughout the 1990s, cooperation largely involved mutual visits of delegations as well as sharing experiences on strategies and tactics in negotiation processes (Interview 2018d). In the early 2000s, however, cooperation took on a different dimension, with the focus of activities placed not only on the internal negotiation process, but also on joint appeals to the international community. This is manifest in the reform of Transdnistria's institutional structure dealing with the outside world, which started as 'a bureau of external relations' in the early 1990s, and in 2000 transformed into a fully fledged Ministry of Foreign Affairs. Furthermore, cooperation among post-Soviet Eurasian *de facto* states intensified with the creation of a consulting committee of foreign affairs ministers in order to 'unite efforts to get recognition from the international community' (Sergeev and Berezintseva 2000).

An increased degree of regional cooperation took place in 2006, which acquired a more formal character when in June the leaders of Transdnistria, South Ossetia and Abkhazia signed a joint declaration to set up the Community for Democracy and Rights of Peoples. The choice of this organisation's name is particularly telling in its reference to the dominant international discourse on democracy and the right to self-determination. As the leader of Abkhazia confirmed in his speech, 'Today we again affirmed before the whole world our intentions to build independent democratic states' (quoted in Allenova 2006). To convince the international community as well as to draw attention to the principle of self-determination, the authorities of South Ossetia and Transdnistria conducted referendums.

What prompted the consolidation of the joint efforts of unrecognised states were various 'anti-Russian processes' taking place in the post-Soviet space, such as the colour revolutions in Georgia and Ukraine as well as the creation of the Organisation for Democracy and Economic Development-GUAM in May 2006 by Georgia, Ukraine, Azerbaijan and Moldova (Interview 2018d). In this context, post-Soviet unrecognised states are often regarded as mere geopolitical instruments created and used by Russia to contain the expansion of NATO and the EU towards its frontiers and thus to counteract Western involvement in what Russia considers its 'sphere of influence'. This is, however, an overly simplistic perception, because it distorts the question of agency. For instance, the role of Russia in the establishment of *de facto* states is often overstated and local perspectives are rarely taken seriously. Transnistria's efforts to lobby Russia for support started before NATO's intention to expand eastwards when the Soviet Union was still in place. The main basis was provided by deputies from Transnistria who took part in the Congress of People's Deputies of the USSR that functioned between 1989 and 1991. According to a former minister of foreign affairs of Transnistria, their offices were 'our first embassy in Moscow' (Litskai 2017a: 11). Sensing the disintegration of the USSR, several deputies formed Soiuz (Union) in February 1990 to prevent its eventual collapse. This group, as a 'non-standard, effective and very active semi-diplomatic system', was crucial in providing the connection to Moscow and assisted in arranging meetings with the top Soviet leadership (Litskai 2017a: 12). Furthermore, cooperation between post-Soviet *de facto* states has largely proceeded without the involvement of Russia. Between 1994 and 1999, Abkhazia was faced with a blockade imposed by Russia and the Commonwealth of Independent States. As a consequence, it was prohibited for male Abkhazians to cross the only border it shared, which was with Russia, and for foreigners to enter Abkhazia via Russia. Nevertheless, despite the impossibility of travel, the local authorities of Transnistria and Abkhazia managed to find creative ways to travel, to exchange delegations and to conduct mutual observations of elections (Interview 2018c, 2018d).

With Vladimir Putin coming to power, Russia's official policy experienced significant changes with the provision of more support to post-Soviet *de facto* states. However, Moscow used the effects of unrecognised statebuilding processes already in place, rather than causing them to appear in its struggle to counter NATO expansion in or around its near abroad. Importantly, whereas the interests of Abkhazia and South Ossetia coincided with Russia's foreign policy in 2008, which culminated in their official recognition, in the case of Transnistria this was not so. Of significance is the contrast between two statements made by Russia's State Duma: one in 2006 and the other in 2008. In the first one, dated 6 October 2006, in reaction to Transnistria's referendum vote on independence and free accession to Russia, the State Duma merely concluded that 'the Russian Federation must build its policy in light of the free expression and will by the people of Pridnestrovie' (State Duma 2006). On 21 March 2008, the State Duma issued another statement, entitled 'On the Policy of the Russian Federation with Respect to Abkhazia, South Ossetia and Pridnestrovie', in which it explicitly identified preconditions for the prospect of recognition. Thus, according to the statement,

in the event of a possible Georgia's armed attack at Abkhazia or South Ossetia or steps to speedily move Georgia into NATO, it is necessary to take all measures to protect the citizens of the Russian Federation residing in Abkhazia and South Ossetia and consider possibility of initiating acceleration of the sovereignization process of Abkhazia and South Ossetia by the Russian Federation.

Although the title explicitly addressed all three *de facto* states, the State Duma 'having studied the appeals of Abkhazia and South Ossetia' proposed to Russia's president and government 'to consider the issue of expediency of recognizing the independence of Abkhazia and South Ossetia' (State Duma 2008).

Russia's policy proved to be crucial in the case of Transdniestria's search for recognition outside the post-Soviet space. In 2007, for example, Transdniestria was almost recognised by Venezuela. The two sides negotiated a basis for cooperation in technical education and trade, with Transdniestria's trade office opened in Venezuela. What sparked the interest of Venezuela were the intentions of its former president Hugo Chávez to help those 'oppressed by the West'. Despite Transdniestria's extensive preliminary work, cooperation did not result in recognition, because of Venezuela's subsequent alignment with Russia, which considered that the negotiation process was not fully exhausted and, unlike the case of Georgia's breakaway republics, recognition thus remained out of the question (Interview 2018d).

While Transdniestria's international relations depend greatly on the constellation of great powers' interests, they are not entirely limited by them. Like in the case of Northern Cyprus, performative aspects of diplomatic practices that do not necessarily correspond to the territorial ideal are also observable in Transdniestria. This is illustrated by the establishment and operation of representation offices of Transdniestria in Abkhazia and South Ossetia. The opening of these missions dates back to 2006, when the leaders of Transdniestria and Abkhazia agreed to open such representations. Initially, Transdniestria's mission in Abkhazia was opened as a 'regional public organisation' under the name of 'Center for Cooperation Abkhazia–Pridnestrovie'. Currently, these missions are called either 'official representations' or, as in the case of Transdniestria's mission in Abkhazia, 'official representation (embassy)'.

A model of honorary consul served as a basis for diplomatic representation, which was then adapted to local circumstances and needs. Transdniestria's representative in Abkhazia is, for example, a citizen of Abkhazia, who holds at the same time citizenship of Transdniestria, although Abkhazia's constitution does not allow for dual citizenship. Abkhazia's and South Ossetia's representatives in Transdniestria also serve citizens of Transdniestria with corresponding citizenships of sending states as well. On the one hand, such a practice is seen locally as both less costly and as a more efficient way of maintaining relations (Interview 2018c). The opening of a fully fledged embassy requires a significant amount of resources to sustain it, whereas reliance on local representatives makes the work more effective, as representatives have the necessary contacts locally. On the other hand, there is still a disparity in relations between Abkhazia and South Ossetia, as between partially recognised states, and between Abkhazia and Transdniestria, as between partially recognised and non-recognised states. In the case of the former, there is an embassy and a practice of presenting letters of credence, while in the case of the latter such a practice is conspicuously absent.

While Transdniestria's unrecognised diplomatic practices may be dismissed as purely symbolic and unimportant, it does attract the attention of its parent state, Moldova, and has been thus subjected to counter-recognition strategies. With the unfolding of the crisis in eastern Ukraine in 2014, the only way for Abkhazia's and South Ossetia's official delegates who travel with Russian passports to get to Transdniestria is via Chisinau, Moldova's capital. Delegations, however, usually do not get beyond passport control in Chisinau's airport and are promptly deported. This not only affects high-profile visits of foreign ministers but also limits cultural contacts (Interview 2018d). The effects of counter-recognition strategies are

tangible in Transnistria. In 2010, for example, it hosted around 100 international guests from Ukraine, Russia, Abkhazia, South Ossetia and Nagorno-Karabakh as well as from the European Parliament, among others. For the celebration of the same occasion in 2018, it could count only on three guests from abroad (Interview 2018d).

Learning from non-recognition

This chapter has examined how Northern Cyprus and Transnistria strive for a formal status in the international arena, demonstrating how they simultaneously conform to but also evade the operational dynamics of the international system by adapting them to their own logic and purposes. While still constrained by the territorial ideal of an inter-state system, we can observe the importance of regional connections and historical and personal ties, as well as performative aspects that matter for the ways in which unrecognised diplomacy is practised. By implication, the key suggestion put forward is that the *de facto* foreign policy conduct of Northern Cyprus and Transnistria is not restricted to the special relationship maintained with patron states. With regard to further avenues for research, it is important to highlight three observations that we can learn from in the cases of Northern Cyprus and Transnistria.

First, statebuilding processes in both cases have been developing along with ongoing negotiation processes. Initial statehood claims were perceived above all as a means to demonstrate actorhood in conflict resolution rather than as an end in itself, as local authorities sought ‘to speak the language the world understands’. Blakkisrud and Kolstø (2011) suggest, for instance, that ‘the time factor will eventually transform the secessionists into state-builders’. In this regard, further research would benefit from such questions as why some statebuilders necessarily seek international recognition while others do not. And, more precisely, how does the negotiation process affect the progress of statehood claims that turn into a quest for international recognition?

Second, irrespective of ultimate objectives, states without any formal international status still seek ways to engage with the outside world. However, it is mostly the shadow of their sponsors that dominates not only the analysis of internal statebuilding efforts, but also their foreign policy conduct. As Berg and Vits (2018) point out, ‘there is no common understanding for whether *de facto* states have their own agency, or if these fledgling states are used as pawns within the context of wider strategic manoeuvring’. The key concern is thus to find out whether they are really able to pursue ‘an independent foreign policy’. This, however, largely follows a single sovereignty perspective of bounded territoriality (Heathershaw and Lambach 2008) that may not be so useful for studying ambiguous spaces like these which, although formally isolated, are becoming increasingly internationalised.

Third, as states without any formal status persevere in their search for a proper place, more are bound to find themselves in the sovereignty trap. The question, then, is how to deal with such states. So far, the focus has often been on how to ‘normalise’ relations with unrecognised states and how to engage with them without granting formal recognition (Berg and Toomla 2009; Cooley and Mitchell 2010; Ker-Lindsay 2015). Three concrete models were proposed by Pegg (1998), based on the experience of Ethiopia, which accepted relations of Eritrea abroad; on the treatment of members by GATT/WTO, which is not tied to sovereignty; and finally on the Taiwan model, whereby Taiwan manages to have extensive relations in economy, trade and other areas despite its lack of recognition. By comparison, as disclosed by a former minister of foreign affairs of Transnistria, around 20 models were scrutinised in Transnistria, until finally Tatarstan was identified as a success story. What was attractive for Transnistria was not

the fact that Tatarstan is officially part of Russia but that it ‘has more than 100 representation missions abroad which conduct 60–70 per cent of diplomatic functions’ (Litskai 2017b: 39). This, by expanding the list of cases not haunted by the spectre of unilateral declarations of independence, may problematise the question of the definition of *de facto*, unrecognised or contested states. Even so, Transdnistria’s research results may point to fresh perspectives on ways of engagement and cooperation that go beyond the territorial ideal.

Notes

- 1 While in the academic literature the term ‘Transnistria’ has become dominant, it has been locally disputed (Isachenko 2012: 184n16). The chapter follows the naming practice of the OSCE Mission in Moldova and uses the term ‘Transdnistria’ instead. When Transdnistria’s sources are cited, the local preference for ‘Pridnestrovie’ is preserved.
- 2 At the time of the declaration of independence in 1983, it was not so much the uncertainty over goals that motivated Pakistan’s decision in its recognition policy towards the TRNC, but rather the threat of the withdrawal of aid by the US (Aykan 1995).
- 3 Democracy-building has also been instrumental in Transdnistria’s quest for recognition (Isachenko 2009).
- 4 In this regard, ties between Russia and Transdnistria are much more complex and multidimensional than traditional inter-state relations would assume. Russia’s support to Transdnistria ranges from stationing peacekeeping troops to supplying history textbooks. At present, from Transdnistria’s total population of 470,600, it is estimated that 220,000 are citizens of the Russian Federation. Russia participates in the negotiation process not only as a mediator but also as a guarantor. Russia’s most direct involvement with Transdnistrian authorities was between 2012 and 2018, when Russia’s president Vladimir Putin appointed a special representative to Transdnistria, Dmitri Rogozin. As opposed to previous Russian officials, Rogozin was not involved in the negotiation process but coordinated humanitarian aid to Transdnistria. However, when asked to assess Russia’s engagement, one of the former government officials of Transdnistria’s highlighted the role of Russia’s former foreign minister, Evgeny Primakov. Of significance was that, during Primakov’s time in the late 1990s, Transdnistria and Moldova were involved in a multilevel dialogue. The memorandum negotiated by Primakov in 1997 was signed not only by Moldova and Transdnistria but also by Russia, Ukraine and the head of the OSCE (Interview 2018d).
- 5 On 22 January 2018, for example, Transdnistria and Abkhazia celebrated the 25th anniversary of diplomatic relations.

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BREXIT AND THE QUESTION OF IRISH UNITY

Eileen Connolly and John Doyle

Introduction

The Good Friday Agreement (1998), which ended a 25-year, low-level, inter-communal conflict in Northern Ireland, put in place a novel solution that changed the nature of how territorial state sovereignty was recognised, both domestically and internationally. It redefined the nature of citizenship in Northern Ireland, recognised that the conflict resolution process must be binational and intergovernmental, and pushed a final decision on the constitutional position of the region into an undefined future. At the same time, the agreement provided a framework for devolved government, which was popular with the public in Northern Ireland, and cross-border cooperation, which was a core issue for Irish nationalists and the Irish government. As a formal agreement between two governments, the agreement had international recognition, including the formal role it gave to the Irish government in Northern Ireland affairs.

Prior to the Good Friday Agreement (GFA) the Northern Ireland conflict was most frequently analysed as a zero-sum territorial dispute along national identity lines. Other cleavages existed in Northern Ireland on economic and social issues and on religious identity, but for the majority of the population these factors re-enforced the political divide rather than creating cross-cutting dimensions. As a result, the main political division was along nationalistic lines where the key cause of conflict was seen as either the result of an incomplete state secession or a question of the failure to grant minority rights. From this perspective of territorial state sovereignty, Northern Ireland could only be Irish, or British, or repartitioned. The GFA moved beyond this zero-sum approach to territorial sovereignty as it created a set of institutions, and a process of reform, that recognised the two conflicting political identities, while leaving open the possibility of change in the constitutional status of the region. It also reduced the immediacy of the demand for a united Ireland, as it expanded the public space available for nationalists, opened up the border, and in doing so enhanced the quality of life and increased the perception that peaceful progress was possible on both sides of the border.

The implementation of the GFA raises issues of relevance for debates on state recognition in the aftermath of peace agreements. It highlights that international recognition of statehood and state sovereignty is not a simple binary option, of recognition or non-recognition, emphasising that in complex peace agreements recognition and sovereignty are also complex

and multilayered. Following the Northern Ireland Agreement of 1998 the British government remains the sovereign government, but as the sovereign government it is also committed by the Agreement to a set of institutional arrangements, including cooperation with the government of Ireland, an open border with cross-border cooperation on the island of Ireland, and a legal framework which guarantees holders of Irish passports equality in law and practice. As a result of this Agreement, in the negotiations that followed the 2016 Brexit referendum, the European Union and the other EU member states have not supported British demands which in the view of the EU would compromise the 1998 agreement and jeopardise peace on the island. The central issue became the refusal by the EU to accept any British proposals which would lead to physical barriers or infrastructure on the Irish land border. In these negotiations the British government underestimated the extent to which the EU regarded the question of Northern Ireland's constitutional status as being guaranteed by the provisions of the GFA. The British government also underestimated the extent to which the EU would support the position of the Irish government as a signatory to the agreement, and as an EU member state. The EU has not acquiesced to the British government's negotiating position, as the *de jure* sovereign power, that would result in abandoning the *de facto* sharing of authority with the Irish government, which is at the core of the peace agreement.

During the Brexit debate it became clear that the existence of the GFA had changed how the relationship between Northern Ireland and Ireland was viewed, both domestically within the island of Ireland, and internationally. It was also clear that this changed perception was not shared by the British government, or the majority of unionist political elites. The international recognition of the GFA limited what the European Union would accept as part of the withdrawal negotiations, and the question of a border on the island of Ireland became a major stumbling block to finding an agreement acceptable to the majority of the British parliament prior to the first Brexit deadline of 29 March 2019. The negotiating stance of the EU demonstrates that British sovereignty in Northern Ireland is no longer recognised as absolute, and that the rights of Irish nationalists in Northern Ireland and of the Irish government had also gained international recognition.

To analyse this shift in the international recognition of the status of Northern Ireland, this chapter begins with a discussion of the historic context to the Northern Ireland conflict, including the Irish state's own search for recognition following the War of Independence in 1918–21. The chapter examines the failure the Irish government to achieve recognition of its territorial claim on Northern Ireland, and the absolute nature of the recognition of British sovereignty in the period prior to 1998. It then looks at the content of the GFA and the way in which it qualified UK sovereignty. The chapter then considers the European Union response to the threat that Brexit poses to the GFA as a *de facto* international treaty on Northern Ireland.

The historic context

The Northern Ireland conflict has its roots in the failure of the British state-building project to consolidate the colonisation of Ireland (O'Leary 2019a). In the early years of the twentieth century a strong political movement in Ireland campaigned for a form of 'home rule'. Following World War I, and a failed armed rebellion in 1916, the demand for 'home rule' became a demand for full independence. A guerrilla war by the Irish Republican Army (IRA) in 1918–21 led to the establishment of an independent Irish state that excluded six counties in the north-east of Ireland. From the seventeenth century the native population of

the north-east of Ireland had been displaced by a policy of 'settler' plantation that was British in its orientation and Protestant in its religious affiliations. This 'unionist' population, through its alliance with elements of the British political establishment, persuaded the British government to adopt a policy of partition, when it became clear that it was not possible to defeat the demand for an independent Irish state. The partition boundary was drawn around an area where unionists made up approximately 66% of the population. Inside this territory the unionist political elites controlled a political party that ruled as a single-party government in a devolved parliament, without any significant internal divisions, for nearly 50 years. This was achieved through the asserting of a privileged position for all the unionist community that overcame strong internal class inequality, as those at the bottom of the unionist class hierarchy still had advantages over their nationalist counterparts in access to employment, education, political representation and cultural rights (McGarry and O'Leary 1995; O'Leary 2019b). The Irish government was not in a position to challenge the internal arrangements in Northern Ireland. The new Irish state had emerged from a damaging civil war, it was economically weak and it had little international recognition or support. From the time of partition, until the search for a solution to the conflict that erupted at the end of the 1960s, there was very little contact between the two governments on the island (Ó Beacháin 2018).

A treaty between the Irish independence movement and the British government in December 1921 that set up the Irish state partitioned Ireland and also placed restrictions on Irish independence. The new Irish state had 'dominion status', which required elected members of the new parliament to swear an oath of allegiance to the British monarchy and to agree to the appointment of a governor general to represent the monarch as the head of state. The treaty also required the surrender of Irish naval bases to the British Royal Navy. Over time the Irish state both unilaterally asserted its sovereignty and looked for international recognition (Ó Beacháin 2018). This unilateral assertion repudiated some of the conditions attached to the 1921 treaty including the abolition of the oath of allegiance in 1933 and the adoption of a new constitution in 1937, which abolished the post of governor general and declared the name of the state to be Ireland (Ó Beacháin 2018). The new constitution also contained a territorial claim to Northern Ireland, but it was not until 1949 that the Irish government declared Ireland to be a republic outside the British Commonwealth of former colonies (Ó Beacháin 2018). These actions did not raise difficulties internationally, as, following the recognition of Ireland as a sovereign state, other states and international organisations did not question the right of Ireland to define its constitutional future according to its own laws, rather than the 1921 Anglo-Irish Treaty. The Irish state, prior to membership of the EU, joined key international organisations such as the League of Nations in 1923, the Council of Europe in 1949 as a founding state, and the United Nations in 1955. All of these organisations fully recognised the Irish state, but also recognised that the sovereignty of Ireland did not extend to Northern Ireland. In these fora, the Irish government made repeated attempts to raise the question of the partition of Ireland and its territorial claim to Northern Ireland. However, attempts to raise partition, either bilaterally or in the League of Nations and the Council of Europe, and later in the United Nations, received almost no international support (Kennedy and O'Halpin 2000: 41–2; O'Kennedy 2001). As Ireland had signed an international treaty that accepted UK sovereignty in Northern Ireland, the Irish state was not able to unilaterally reopen this question diplomatically in the period between independence and the start of the conflict.

At the beginning of the modern conflict at the end of the 1960s, British sovereignty in Northern Ireland was undisputed. From an Irish perspective the conflict began with a violent state response to peaceful demands for equality and as a result the initial reaction of the Irish government was to look for international recognition for the rights of Irish nationalists in Northern Ireland. The main organisation calling for equality for Irish nationalists was the Northern Ireland Civil Rights Association, formed in 1967. Modelled on the US civil rights movement, it adopted the same terminology and tactics of peaceful marches (McCann 1993; Farrell 1976). It was a broad movement, focused on issues of discrimination, not partition, demanding: an end to the provision restricting voting rights in local elections to property owners; an end to the manipulation of electoral district boundaries; an end to discrimination in the provision of public housing and jobs; the repeal of emergency laws; and the disbandment of the B Specials (an ill-disciplined element of the security forces). Civil rights protests gained momentum throughout 1968, and a decision to ban them led to the marches being violently attacked by both police and unionist protestors. At the same time, counter-protests by unionists led to widespread street violence as a result of which thousands of nationalists were forced to leave their homes, in many cases the houses being burnt as they left (Coogan 1980). These events marked the beginning of 25 years of violent inter-communal conflict. In the early stages, the British government left political control in the hands of the regional unionist administration, however it did deploy the British army onto the streets in August 1969, in support of that administration. By 1971, the IRA had reorganised and presented a strong security challenge to the British state, which led in March 1972 to the British government disbanding the Northern Ireland Parliament and imposing direct rule, including the control of security from London (O'Leary and McGarry 2016). Throughout this period of intense violence, the British government was recognised internationally as the sovereign power and the Irish government at the beginning of the conflict failed to gain support from either the UN or the US for international action (Williamson 2017).

By 1973, at the height of the Troubles, the UK and Ireland were able to join the EU on the basis of their existing borders, with Ireland prioritising membership over the issue of partition. The situation in Northern Ireland did not present a barrier to membership as the conflict was considered by the other member states an internal problem for the UK. This view of the conflict allowed the UK to successfully resist any significant international intervention either in the form of UN peacekeepers or in the form of external mediation (Guelke 1988; Ruane and Todd 1996). Despite pressure for action from Irish American lobby groups, the US government also declined to interfere in the Northern conflict, and consistently prioritised its relationship with its closest NATO ally (Cronin 1987). Although the British government did not face serious criticism from other governments, it did face international criticism in other fora. The most significant was a campaign in the USA in the 1980s, in support of the application of the MacBride Principles. This was an attempt to use the financial weight of large pension funds to force companies to adhere to fair employment practices in Northern Ireland, where as a result of systematic discrimination unemployment rates for nationalists were over 2.5 times higher than for unionists. As a result of the campaign to apply the MacBride Principles, 19 US state assemblies, over 40 city councils and a number of charities passed resolutions requiring their pension funds to ensure that they did not invest in any companies operating in Northern Ireland that did not practise 'fair employment'. After five years of the successful implementation of the MacBride Principles, the British government was forced to introduce new legislation monitoring discrimination in employment requiring all companies with more than ten employees to publish the

religious breakdown (as a proxy for national identity) of their workforce annually and setting targets for ‘fair employment’ (Doyle 1994).

The British government also came under pressure from the European Parliament, following representations by Irish nationalists, when the parliament organised a fact-finding study visit to Northern Ireland in 1983. The British government could not exercise a veto on a decision of the European Parliament, as it could in the Council of Ministers, but the UK refused to cooperate and strongly condemned the visit, calling it interference in their internal affairs. The final report from this initiative was mild in its criticisms, calling for the establishment of joint British–Irish responsibilities in a number of fields, ‘politically, legally and otherwise’, as a way of removing the underlying reasons for the conflict (Haagerup 1984). Although this initiative and other European Parliament resolutions on human rights in Northern Ireland in the 1980s did not challenge the sovereignty of the British government, and had no legal impact on the UK, they did have a political impact, increasing Ireland’s international status vis-à-vis the UK and strengthening Ireland’s claim for a formal role in Northern Ireland (Guelke 1989: 161). The MacBride Principles and resolutions of the European Parliament went beyond a resolution based on internal reform alone and began the internationalisation of the search for a resolution to the conflict, involving a role for the Irish government as the representative of Northern Irish nationalists.

In the 1980s, at the time of these initiatives, the idea of an internationally brokered solution did not seem possible. When joining the EU, members of the Irish government had expressed the hope that EEC membership would be a positive force for peace (FitzGerald 1972). However, while relations between the Irish and British governments improved in the context of EEC/EU membership, not even the process of increased European integration in the 1980s and 1990s weakened the negative impact that the Irish border, as a security barrier, had on travel and economic relations between the two parts of the island. It was only with the radical shift in the international environment that followed the fall of communism in 1990 that the conditions were created for a potentially successful peace process, leading to an IRA ceasefire in 1994 as part of a strong confluence of forces that facilitated the pursuit of a negotiated settlement (Connolly and Doyle 2015).

The 1998 Good Friday agreement

Until the peace process of the 1990s, British governments defended their absolute sovereign rights in Northern Ireland and, notwithstanding agreements which included the Irish government in 1973 and 1985, they continued to resist attempted inputs by the Irish government, formal and informal, to manage or resolve the conflict. By the 1990s, it was clear that the British government could contain the conflict, but could not end it, and the cost in terms of human rights and security was high. Offers of improved civil rights within an integrated United Kingdom did not answer the demands of Irish nationalists for greater recognition of their political identity and aspirations. British attempts at peace negotiations in 1972 and the early 1980s had focused on trying to persuade unionists to agree to share power with the moderate Irish nationalists of the SDLP, but their efforts were resisted by unionist political elites, by the rank-and-file membership of unionist political parties and by unionist paramilitary groups (Bruce 1992).

By the early 1990s, significant changes in the political environment indicated the possibility of movement. Between 1989 and 1994, the Irish government was involved in secret talks with Sinn Féin, marking a major change of government policy (Coogan 1995; Mansergh 1995, 1996; Ó Beacháin 2018). The Irish government had come to the conclusion

that the policy of isolating Sinn Féin was not producing political progress in Northern Ireland, weakening Sinn Féin or defeating the IRA. The Irish government also believed that Sinn Féin perceived itself as being in a stalemate situation and was, therefore, at this time open to a new political approach that would provide a way out of the conflict (Connolly and Doyle 2015). Following this initiative from the Irish government, the Conservative Party government in the UK was persuaded to be a reluctant participant in this process, following private but significant pressure from the Clinton administration in the USA (Cox 1998). When running for the US presidency, Bill Clinton had made a commitment on Northern Ireland during the New York Democratic primary election in 1992, to gain the support of the strong Irish American lobby. As US president, in the enabling context of the post-Cold War world, the Clinton administration followed up on this commitment to promote peace in Northern Ireland. In spite of strong opposition from the British government, Clinton, overturning the previous policy to deny visas to militant Irish republicans, gave a US visa to Sinn Féin leader Gerry Adams in 1994, as a gesture of goodwill and as an encouragement to engage in peace negotiations (O'Brien 2013). The British government had so strongly opposed the granting of this visa that the Conservative Party prime minister initially refused to return President Clinton's calls, but eventually gave way to US political pressure.

The reluctance of the British government to engage with Sinn Féin, and their lack of trust in the IRA ceasefire of 1994 led to the temporary collapse of the IRA ceasefire in 1996. This situation changed with the election of a Labour government in May 1997. The Labour Party, which had been in opposition for nearly 20 years, was elected with a significant majority and the motivation to implement a radical political programme. Led by Tony Blair, the new British government's election platform had included a commitment to constitutional reform, which specified the creation of devolved parliaments in Scotland and Wales. A commitment to finding a solution to the Northern Ireland conflict fitted into this wide-ranging programme of constitutional change. Blair also had a positive view of engagement with the Clinton administration, sharing a similar political outlook to the president, and this shift in the UK position allowed talks involving Sinn Féin to begin in September 1997, three years after the initial IRA ceasefire. From this period, Blair personally demonstrated a high level of commitment to the process that led to the agreement of 1998, overcoming resistance from British security interests (De Breadún 2000).

The 1998 GFA created a framework that recognised the *de facto* binational character of Northern Ireland (Doyle 1998). It included a consociational power-sharing executive and assembly; it accorded a special and formal position to the Irish government and it set up a framework for north–south cooperation on the island of Ireland between the two polities. Internally, this was seen in both the requirement for 50:50 nationalist/unionist recruitment to the new police service (Doyle 2010), and in the strong equality protections for citizens, whether they held a British passport or an Irish passport. The open-ended nature of the process was recognised in a legal commitment from the British government to call a referendum on Irish unity should it appear that a majority would vote for unity, and to legislate for Irish unity should concurrent voting majorities exist in Ireland, north and south. The agreement was part of a wider peace process (Doherty 2010; McAuley 2004) and issues that could not be agreed at that time of signing were substantially achieved in the ongoing process that followed. This included the transformation of policing; the destruction of IRA weaponry; the withdrawal of the British army from security operations; and the dismantling of security installations along the border. As part of the referendum endorsing the GFA in the Republic of Ireland, the Irish Constitution was amended to change the assertion of the right to Irish unity from a declaration of a territorial claim to a wording which both

guarantees the entitlement to Irish citizenship for everyone born on the island of Ireland (including within Northern Ireland) and also to assert its desire to ‘unite all the people who share the territory of the island of Ireland’ while accepting that a united Ireland can only come about by the consent of the people in both jurisdictions (Constitution of Ireland: Arts 2–3). The Irish government and the Irish nationalist community in Northern Ireland did not abandon their political objective of Irish unity, but they agreed to pursue it by exclusively peaceful means and accepted that at the time of signing the agreement the majority of the population in Northern Ireland wanted to maintain Northern Ireland’s membership of the UK.

Irish nationalists recognised that the fluidity of the GFA on the ultimate end point is central to its success, as it has allowed both unionists and nationalists to work within its framework (Todd 2018). The peace process was facilitated by the integration of the Irish state and the UK within the EU, including the open borders and cross-border cooperation that is part of that wider EU integration process. As an institution, the EU had not played any substantial role during the conflict and had not been involved in the peace negotiations, but it did recognise, and also financially support, the peace process and peace agreement (Doyle 2015; Guelke 1988). The GFA achieved international recognition as an iconic example of a successful peace process and as a potential role model for other conflicts. The fluidity of the agreement on identity, the absence of a border, and the existence of the cross-border bodies was made possible within the existing EU framework. In the following decades, the level of economic and social integration between the two parts of the island was transformed. This increasing integration has been maintained, in spite of ongoing internal political problems in Northern Ireland, which in 2017 led to the suspension of the parliamentary assembly and power-sharing executive. It is this positive outcome, even in the absence of a final constitutional settlement, that Brexit threatens.

Brexit and Northern Ireland

In the 2016 UK referendum on Brexit, Northern Ireland voted to remain in the EU, with 56% voting against Brexit. The division on Brexit reflected the political division between unionists and nationalists, with evidence that voters from the ‘middle ground’ also voted for continued membership of the EU. A survey of 4,000 adults in Northern Ireland by the ‘Northern Ireland Assembly Election Study’ asked respondents to ‘self-define’ either as Irish nationalist, as unionist or as ‘neither’ and analysed their voting behaviour on Brexit. Of self-defined Irish nationalists, 88% voted to remain in the EU, while 66% of self-defined unionists voted to leave. Of those who self-defined as neither Irish nationalist nor Ulster Unionist, 70% said they had voted to stay in the EU (Garry 2016: 2). This voting behaviour aligns with the positions of the Northern Ireland political parties. All of the significant political parties in Northern Ireland are local and none of the mainstream UK parties has any significant electoral support in Northern Ireland. The two major Irish nationalist parties, Sinn Féin and the Social Democratic and Labour Party (SDLP), supported continued EU membership, as did the two smaller pro-union parties, the Ulster Unionist Party and the centrist Alliance Party. The major unionist party, the Democratic Unionist Party (DUP), and the smaller and more conservative Traditional Unionist Voice, campaigned to leave. The political parties campaigning for remain polled slightly over 58% in the May 2016 Northern Ireland Assembly elections and this was reflected in the 56% that voted to remain in the Brexit referendum. The more moderate unionist UUP had called for a vote to remain; however, 58% of their voters voted for Brexit, while 25% of DUP supporters voted to remain, despite their party being the leading voice in the Northern Ireland pro-Brexit campaign (Garry 2016: 6).

The referendum campaign in Northern Ireland was dominated by discussion on the economic implications for a fragile post-conflict economy, the loss of the open land border on the island, and the impact on the peace process reflecting the major political divisions in the region (McCann and Hainsworth 2017).

In the aftermath of the referendum, and during the Brexit negotiating process, the question of a border on the island of Ireland became the major issue that prevented an agreement between the UK and the EU that was acceptable to both sides. It became clear at the start of the process that the requirements of the customs union and single market would lead to a closed border on the island of Ireland. Without special provisions for Northern Ireland, Brexit necessitates the creation of a hard border. As the customs union requires a common external tariff to be maintained by all EU countries, this tariff would apply to the UK following its withdrawal, therefore goods ‘will have to be checked at borders’ and this ‘will require a hard Border between north and south in Ireland’ (Sutherland, quoted in McGee and Ferguson 2016). If the UK is outside the European single market and also outside of EU environmental and labour protection standards, this would be an additional reason for the EU to insist on a closed border (Barnier 2017). There were alternatives to closed borders, however, and notwithstanding the relatively closed border on the island of Cyprus the EU applied flexible rules and allowed goods from the Turkish Cypriot part of the island to enter the EU as EU goods (Skoutaris 2016). In the Brexit discussions, the solution that received the most attention involved either the whole of the UK remaining in the single market (for a limited time period) or Northern Ireland only remaining in the single market, with a *de facto* customs and regulatory border on the Irish Sea, between Northern Ireland and Britain. The ‘Irish Sea’ solution would give a unique status to Northern Ireland in relation to the EU that was different to the rest of the UK, although the territory remained part of the UK sovereign state. The idea of an Irish Sea border was acceptable to the nationalist parties in Northern Ireland, and the Irish government. Given the very small scale of the private sector in Northern Ireland and the importance of the peace process, an agreement to leave the land border open and keeping regulatory checks to the sea and air crossings of the Irish Sea was acceptable to both the EU Commission and EU member states and it would also not be subject to a WTO challenge (Fabbrini 2017). However, this solution was vehemently opposed by the DUP and hard-line supporters of Brexit in the British Conservative Party, who believed it would create a symbolic barrier between Northern Ireland and the rest of Britain and weaken British sovereignty.

Negotiations on the UK ‘withdrawal agreement’ with the EU resolved most issues including the length of the transition, the UK’s financial liabilities and the status of EU citizens in the UK. However, the British government ruled out staying in the customs union or single market and the Irish government and nationalists feared that this would lead to a closed border and the weakening of the cross-border institutions that had successfully built integration. This would mean a return to a pre-peace process status quo, with the social and economic costs that this would entail. There was also the fear that, if custom posts and security installations are built on the border, they would also become part of a narrative, from the small group of militant nationalists who had opposed the peace process, that the process had ‘failed’ and this would be a strong mobilisation tool for those seeking to collapse the peace process in its entirety. For unionists, it would strengthen demands to abandon the reform process embedded in the GFA and in particular its north–south dimension. For Irish nationalists, a hard border would symbolise the collapse of the peace process and be seen to mark an end to a process of gradual reform and integration.

The result of the general election in June 2017, called by British prime minister Theresa May in a bid to secure a larger majority for her negotiation strategy with the European Union, resulted in the failure of the British Conservatives to secure a majority in the new parliament. To form a government, they reached a 'confidence and supply' agreement with Northern Ireland's DUP, which agreed to support the Conservative government on Brexit, financial votes and votes of confidence. This gave the DUP a privileged position in Downing Street and a disproportionate influence on the Brexit negotiations. During the negotiations that followed the election, Prime Minister May, in an internally inconsistent statement, ruled out remaining in the customs union and also opposed the 'Irish Sea' solution, while at the same time stated her committed to keep the land border open (May 2018). Given the UK position and the uncertainty about the future trading relationship, the EU proposed to postpone a decision on the precise model to be adopted, while legally committing both sides to keep the border open. This commitment to keep the Irish land border open, regardless of what future relationship the UK had with the single market, was agreed between the EU and the UK and became known as the 'Irish backstop'. Initially the EU wanted this to only apply to Northern Ireland, but in order to reach a draft agreement reluctantly extended it to the entire UK, at the suggestion of the British government. The question of the Irish border and the Irish backstop was the most problematic issue in the negotiations leading to the Draft Withdrawal Agreement (European Union 2018).

The Draft Withdrawal Agreement of 2018 set out a framework to avoid customs checks on the Irish land border, involving initially a transition period to the end of 2020, during which time all EU single market and customs rules will continue to apply to the UK as a whole. The transition period could be extended, once for a time-limited period, and a decision to extend would have to be made by July 2020. During the transition period both sides would 'use their best endeavours' to negotiate a new trade relationship between the EU and the UK, which among other things will seek to avoid a hard border on the island of Ireland. If no long-term trade deal has been agreed by the end of 2020 (or by the end of the agreed extension period), then a backstop consisting of 'a single customs territory between the (European) Union and the United Kingdom' would be triggered. In this case, Northern Ireland would remain aligned with the rules and regulations of the EU single market, even if the regulatory framework in place in the rest of the UK deviated from that of the EU, in order to avoid regulatory checks on the Irish border. In these circumstances, checks on Irish Sea crossings, in addition to those already in place regarding animal and plant health and safety, could be required if the rest of the UK is not conforming to the rules of the single market. Either side could request a review of the backstop, but it requires a joint decision of both the UK and the EU to end it.

The 'Irish backstop' solution was opposed by hard-line pro-Brexit leaders in the Conservative government as it would prevent UK from leaving the customs union if it applied to all the UK, and opposed it as an infringement of the UK's sovereignty and territorial integrity if it applied only to Northern Ireland. As a result, the agreement was defeated in the UK Parliament on 15 January 2019. Following this parliamentary defeat, the British government adopted a position of refusing to agree to any deal that included a special status for Northern Ireland in the context of Brexit, leading to a further parliamentary rejection of the withdrawal agreement on 12 March 2019. In these negotiations the British government was surprised by the extent to which the EU supported Ireland as a member state, and also as a party to the binding agreement. In the debate on the question of the Irish border there was a conflict between the ideal of the primacy of the UK territorial sovereignty, which the UK argued would be weakened by the Irish backstop solution, versus the rights of Ireland

and Irish citizens in Northern Ireland to have the terms of the GFA honoured. The failure to agree a managed Brexit, and the threat of a hard Brexit, led to a renewed discussion on Irish unity on both sides of the border. In these circumstances Irish unity was discussed not only as a desirable end goal but also as something that is possible in the short term. This is a very significant shift in both elite and public opinion.

Brexit and the changing discourse on Irish unity

With the GFA, the Northern Irish conflict moved from a secessionist conflict, in which international opinion supported the sovereignty of the UK, to the international recognition of an agreement between the UK and Ireland. This shift in the international emphasis on whose sovereignty was recognised, and what form that recognition of sovereignty took, was felt during the Brexit negotiation process in the support given by the EU for Ireland's demand that there should be no hard border on the island. There was also a shift in the way in which the status of Northern Ireland was viewed by the population in both parts of Ireland. A significant percentage north and south of the border, more than at any time in the past, do not recognise the unqualified sovereignty of the UK over Northern Ireland. This is driven by a desire not to return to the pre-1998 status quo and also by a greater acceptance that Irish unity at some time in the future is not just possible but may also be desirable.

The Northern Ireland Assembly elections held in March 2017, which were the first following the Brexit referendum, resulted for the first time since partition in a representative assembly in Northern Ireland which did not contain a majority of members who could be described as unequivocally unionist, that is, those committed in every circumstance to Northern Ireland remaining in the United Kingdom. In that election, only 45% of the population voted for traditional unionist parties; 40% voted for parties committed to Irish unity, with 15% voting for smaller parties and independents, many of them defining themselves as 'cross-community', or campaigning on 'anti-economic austerity' or the environment (Phoenix 2017). The fact that less than 50% of the population voted for parties for whom opposition to Irish unity is a core policy is a significant symbolic and practical change, especially as it reflects ongoing demographic change (Northern Ireland Executive 2017).

The significance of the election result is supported by evidence from opinion polls. In the aftermath of Brexit a number of polls indicated that, faced with Brexit and the possibility of border controls, the Irish nationalist population in Northern Ireland has become both more unified and more militant in their views. Polling data on support for a united Ireland has shown volatility and it is very sensitive to the precise wording of the questions, to the methodology and to the political context at time of polling. The polls, however, show Irish nationalists willing to positively support a referendum on Irish unity, marking a distinct break with previous polling trends. There is evidence that a majority of the 15% of the population who do not vote for mainstream unionist or Irish nationalist parties would, in the context of a 'hard' Brexit, shift their support from the status quo and would consider voting for Irish unity in order to stay in the EU (*Irish Times* 2019; Lucid Talk 2018). This shift in the view of non-nationalists, while being driven by the potentially negative outcomes of Brexit, is also supported by the liberalisation of the Irish state, which passed referenda to legalise same-sex marriage in 2015 and to liberalise access to legal abortions in 2018. An *Irish Times* poll (March 2019), which framed the question differently to the Lucid Talk poll, asking for opinion on a border referendum to be held 'now' and without mentioning Brexit or a hard border in the question, also recorded increased support for a poll among nationalists and a large

number of ‘don’t knows’, in particular among those not identifying as either Catholic or Protestant. The poll asked respondents to identify as Catholic, Protestant or other, rather than using the political terms nationalist and unionist, which is considered to reflect voting intentions more accurately. With these qualifications, which would be expected to reduce the percentage of those indicating support for Irish unity, of those self-defining as ‘Catholic’, 58% would vote for unity ‘now’ and 18% would vote against, with 23% undecided. While 75% of self-defining Protestants would vote no, 9% would vote yes and 16% were undecided.

The overall picture from these polls is that nationalists have become more supportive of Irish unity in the context of Brexit, even in the short term, while the traditionally pro-UK union bloc has become more fragmented at the margins. This fragmentation is reflected in the views of individuals from a unionist background, involved in business, trade or cross-border engagement, who campaigned in Northern Ireland for the UK to remain in the EU (McCann and Hainsworth 2017: 333). It also reflects the views of the major economic interest groups, including the Ulster Farmers Union and the Confederation of British Industry (CBI) in Northern Ireland, who following the publication of the Draft Withdrawal Agreement in November 2018 supported the draft deal, and specifically the ‘Irish backstop’ if the alternative were a hard Brexit, rather than a vote to remain in the EU (BBC 2018). The volatility in the 2018 and 2019 polls is significant compared to the relative stability of previous polling, as, for the first time since modern polling has been conducted in Northern Ireland, credible opinion polls are showing that in the event of a ‘hard Brexit’ with border checks a majority of the population could vote to join a united Ireland in order to rejoin the EU (Lucid Talk 2018).

The Irish government does not want the debate on the Brexit negotiations to become entangled with a call for a border poll, and its policy is to defend the GFA as providing the framework for the peaceful development of the island of Ireland, and to prevent a hard border on the island (Coveney 2018). It anticipates that, in a post-Brexit world, if there is a negotiated agreement that does not impose a hard border, then the demand for Irish unity will become more muted. In the circumstances where it is not possible to prevent a border and where demands for a united Ireland grow, under the terms of the GFA, the British secretary of state for Northern Ireland ‘shall’ exercise their power to call a referendum, ‘if it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland’ (GFA 1998: annex A). The Agreement also commits the British government in the event of a vote for Irish unity to legislate for a united Ireland (GFA 1998: annex A). The British secretary of state has some discretion in their judgement on whether the level of public support for a united Ireland justifies the calling of a referendum, but when a majority clearly exists they are bound by the agreement to hold a referendum. This position is reinforced by the EU commitment to follow the German precedent, which means that, in the event of a positive vote on Irish unity, Northern Ireland would not have to go through the normal application process but would be regarded as joining the EU on the day it joined a united Ireland (European Parliament 2017). This is a different situation to the position of Scotland, where at the time of the Scottish referendum on independence in 2014 Spain did not support the idea of future independent Scotland automatically ‘rejoining’ the EU, as they feared creating a precedent for Catalonia. Spain, however, along with the other member states of the EU, supported the consensus on the right of a united Ireland to EU membership for all of its territory including Northern Ireland, as in this case achieving unity would be based on an agreement between the Irish and British governments. In these circumstances, international recognition of Irish unity would not be problematic.

Conclusion

The GFA reformulated the legal basis of British sovereignty over Northern Ireland. It replaced an absolute assertion of sovereign right (and a parallel assertion of sovereignty in the Constitution of Ireland) with the recognition that British rule rested on the consent of the people of Northern Ireland. This reformulation was set out in an international treaty between the UK and Ireland and was lodged with the United Nations. The GFA gave a legal basis to the recognition of the rights of Irish nationalists in Northern Ireland and the rights of the Irish government as a signatory to the treaty. The international recognition of British sovereignty from 1998 is based on an international agreement that includes the necessity of continued popular support to maintain the status quo. The Agreement set out a process where a referendum on changing the status of Northern Ireland could be held and Irish unity achieved, but prior to Brexit this provision was rarely discussed, as the power-sharing executive, the process of internal human rights reform and the increased cross-border integration set out medium-term objectives broadly acceptable to both the Irish nationalist and Ulster unionist populations. Brexit undermined this process, which had created the prospect of stability in the medium term and the possibility of the slow evolution towards a new polity in the longer term. At the same time the impact of Brexit has made a vote on Irish unity also a vote on EU membership. This not only makes a border poll on Irish unity more likely to be successful than at any time in the past but has also led to an increasingly tense political atmosphere in Northern Ireland.

The radical challenge to the GFA from Brexit led to a widening of the existing political divisions in Northern Ireland. Hard-line unionists have used the opportunity of Brexit to disrupt the cross-border cooperation and integration, which they had opposed during the peace negotiations. Unionist political elites are not opposed to the idea of a hard border, as it will turn Northern Ireland inward, away from Europe and Ireland, towards an increased dependency on Britain. Irish nationalists and the majority of centre-ground political opinion in Northern Ireland wish to remain in the European Union and to retain and strengthen cross-border cooperation. As a result, Irish nationalist discourse on the question of Irish unity has shifted significantly in response to Brexit. Before the Brexit referendum, repeated opinion polls suggested that half or more of those who voted for Irish nationalist parties did not want to call a referendum on unity in the short run and if a referendum were called they would vote against immediate change, fearing it would trigger a violent backlash (BBC 2013; Irwin 2002). Polls now suggest that the Irish nationalist community in Northern Ireland, in the context of a hard Brexit and a return of a hard border, would vote for Irish unity (Daly 2018–19; *Irish Times* 2019; Lucid Talk 2018). In addition, and in a significant change of long-term trends, the 12–15% of the population who do not self-define as nationalist or unionist would in certain circumstances vote for unity in order to rejoin the European Union. This increasing support for Irish unity undermines the certainty of UK sovereignty.

What the Northern Ireland case demonstrates for the question of the recognition of new states is the way in which the GFA altered the international recognition of British sovereignty. It also changed the perception of people of on the island of Ireland, opening up a number of possible agreed futures. The British government appeared unaware, until the Brexit negotiations, of the implications of the GFA for international recognition, or for the complex set of rights on the island of Ireland that the treaty put in place. This change meant that it was possible for the EU and the governments of its member states to support the position of the Irish government on the question of maintaining an open Irish border. In addition to the framework provided by the treaty, the EU's own interests are served by

defending the rights of a member state against the demands of a state which is leaving, reinforced by the GFA's parallels to the EU's own approach to peacebuilding external to its borders (Visoka and Doyle 2016). As the EU has primarily based its support for the Irish government on the commitments made by the UK in the GFA, this means that the open border, the peace process and the increased level of cross-border integration are no longer simply domestic matters for the UK as the recognised sovereign government of Northern Ireland, as they rest on an international treaty signed by Ireland, a member state of the European Union.

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TOWARDS A CRITICAL AGENDA ON STATE RECOGNITION

Gëzim Visoka

Introduction

This handbook has brought together leading international scholars to examine the law, politics, and ethics of state recognition in theory and practice. The vast diversity of perspectives included in this volume clearly demonstrates that the subject of state recognition has not managed to consolidate its own research programme. Instead it has remained a subcategory of another research programme or paradigm, such as wider debates on international norms, secession, self-determination, international intervention, great power politics, preventive diplomacy, violent conflicts, ethnicity, identity politics, and conflict resolution. The resulting fragmented body of knowledge on state recognition has prevented the development of more comprehensive and reality-adequate accounts that take into account the politics, law, history, sociology, and economics of state recognition in theory and practice. Most importantly, existing literature lacks critical approaches to state recognition.

This chapter offers a critical look at these existing debates on state recognition and proposes future research directions. It argues that the existing knowledge on state recognition and its dominant discourses, norms, and practices need to be problematised and freed from power-driven, conservative, positivist, and legal interpretations, and be reoriented in new directions in order to generate more critical, contextual, and emancipatory knowledge. The overarching stance proposed in this chapter is that the dominance of Western perspectives on state recognition has resulted in producing apathetic knowledge about the people and states left outside the society of recognised states. This epistemic injustice not only has repercussions for producing conceptual and theoretical knowledge, which is far from the lived reality of these state-like entities, but also contributes to the reproduction of existing power relations, global normative and political orthodoxies, and exclusionary practices towards peoples and groups who seek to realise their collective right to self-determination (see Visoka 2018b). Therefore, a critical and emancipatory research agenda on state recognition is long overdue to generate more empathetic knowledge towards subjugated peoples who struggle for recognition in their quest to become a sovereign state.

In order to generate critical, emancipatory, yet problem-addressing knowledge, future research should focus first on unpacking and deconstructing existing discourse and practices to reveal their anomalies, flaws, and inconsistencies, and second on offering new perspectives

that contribute to emancipatory outcomes and better alternatives to existing knowledge and practices. This chapter proposes three major areas for future research on state recognition, which should: (i) expose the politics of knowledge and positionality in state recognition studies and seek epistemic justice for and decolonisation of the discipline; (ii) study more thoroughly the “recognitionality” regimes encompassing competing discourses, performances, and agential assemblages; and (iii) explore the normative grounds for regulating the recognition of states in the international system and promote the duty to recognise new states. This chapter is organised as follows. In order to identify the existing assumptions and anomalies underpinning the existing theories of state recognition, it first explores why there is no critical theory of state recognition. The second and main part offers a preliminary outlook for three major areas of future research on state recognition. The chapter concludes with a nuanced discussion of the viability of and potential obstacles to such research on state recognition, and proposes several approaches to overcoming them.

State recognition studies: a critical appraisal

In most social science debates, including international relations and political science, research tends to be organised around mainstream and alternative theories, paradigms, and approaches. The alternative research agendas in these debates often move towards developing critical accounts which highlight the tensions of existing knowledge and propose emancipatory solutions (see Visoka 2018a). Such alternative and critical research agendas have emerged across international law, international relations, peace, conflict, and security studies. These critical turns seek to denaturalise and decentralise existing paradigms and theories by unravelling their limits and implications and offer new alternative pathways for reconstructing knowledge. For example, critical international law seeks to reveal the limits of existing international legal thinking and highlights alternative ways for approaching rules, norms, and institutions in international law (Singh and Mayer 2014). Critical international theory seeks to oppose neorealist and positivist views of global affairs and opens up the possibility for alternative normative and emancipatory politics in a wide range of subjects concerning human rights, identity, justice, security, peace, development, norms, institutions, and the environment (Devetak 2018). Critical peace and conflict studies offers alternative pathways to sustainable peace by displacing the focus from liberal peacebuilding and neo-liberal state-building to local, hybrid, and post-liberal forms of peace (Mac Ginty 2011; Richmond 2011). While this critical literature exists in a wide range of subjects in international relations, the field of state recognition has yet to take a reflective, critical turn. Why is there no critical theory of state recognition? How can such an epistemic lacuna be explained?

Most of the critical perspectives in international studies, broadly defined, tend to adopt an anti-state and anti-establishment ontological and epistemological commitment. This is regarded as particularly problematic for critical theorists, who, by advocating for state recognition by default, could be seen as reproducing a Eurocentric conception of statehood where recognition has been historically used as colonial instrument to safeguard the expansion of international society without damaging the dominance of Western states. Whether through imperialist and violent methods or through the rule-based international order, the same states remain in control of who enters and who remains outside the society of states.

Exercising organised and structural violence is a core function of the state, intrinsically associating it with power, order, authority, control, and violence. Critical theories thus widely view the state as an ontological enemy of human freedom and emancipation. Consequently, they are applied to examine cosmopolitan possibilities for reorganising political

communities along post-national constellations. State recognition studies so far, and rightly so, have been almost entirely embedded in methodological nationalism, with the focus exclusively on external and internal state actors while omitting other social actors and individuals involved and affected by state (non-)recognition (see Wimmer and Schiller 2002).

Related to this ontological antipathy towards the state, what has prevented the consolidation of a critical research programme on state recognition is also the lack of a systematic body of knowledge on state recognition. This fragmented knowledge has made it difficult to properly examine existing tensions in the theory and practice of state recognition. One of the purposes of this handbook is to bring together different disciplines, theories, approaches, and case studies to gain a more comprehensive understanding of the strengths and shortfalls of existing knowledge, and ultimately to explore new pathways for rethinking the conceptual viability and empirical suitability of state recognition as we know it now. A distinct and proper research programme on state recognition – not necessarily a unified theory or account – is essential for developing more reflective and critical knowledge on the theory and practice of state recognition.

Perhaps the most obvious reason for insufficient critical perspectives on state recognition is that existing approaches have adopted positivist, statist, and problem-solving orientations that make it difficult to challenge dominant orthodoxies. Robert W. Cox (1981: 128) maintains that the problem-solving approach takes “the world as it finds, with the prevailing social and power relationships and the institutions into which they are organised, as the given framework for action”. To resolve problems, knowledge needs to be generalised, categorised, quantified, and simplified. For example, international lawyers take a dogmatic view and follow only legal narratives and norms, omitting broader sociopolitical dynamics and practices that underpin state recognition in world politics. The futility, circularity, and poverty of legal thinking on state recognition can be most clearly noted in the work and outcomes of the International Law Association’s Committee on Recognition and Non-Recognition in International Law, which between 2009 and 2018 held a number of meetings and issued four reports, including a final resolution. The limited legal toolkits and conceptual frameworks for studying the recognition of states have significantly undermined the ability of legal scholars to study the broad and diverse diplomatic practices and dynamics of state recognition. The debates are still embedded in fruitless discussions of the criteria of statehood; the competing constitutive and declarative character of recognition; the denial of the duty of states to recognise new states and the obsession with the obligation of states with the non-recognition of states emerging in breach of fundamental norms of international law; the prevalence of methodological nationalism among scholars whose legal opinions more often than not resemble their government’s foreign policy objectives; and the dominance of Western perspectives on state recognition.

Moreover, political scientists’ take on state recognition often fails to recognise the fluidity of the concept of state, micro-politics of diplomatic practices, complex entanglements, and multidirectional causality. They tend to prioritise quantifiable and decontextualised knowledge over context-specific and detailed knowledge (see Visoka 2018b). Comparative and normative studies tend to create categorisations which misrepresent the unique historical trajectories of each recognition-seeking state. Problem-solving thinking blinds the possibilities for critical thinking. Fiona McConnell (2009: 344) is right to criticise Western scholars for their “binary conceptualisation of geopolitical entities as either nation-states or anomalies deviating from this model”, with the anomalies’ “existence under-theorized and their achievements under-reported”. The quantification and qualification of state recognition have been present in all studies on state recognition and the vocabulary of theories and

findings has been deeply Eurocentric and oriented towards reproducing the existing order (see Coggins 2014; Griffiths 2016). Which big powers and how many countries have recognised a claimant state have to a large extent determined the epistemic worth of these states and shaped the research on their merits for statehood. Recognition scholars who use quantitative methods and deploy positivist and scientific mindsets seek to simplify knowledge, generate universal categories, and group countries accordingly at the expense of more detailed, contextual and reality-adequate knowledge, which they might not be aware that exist, might not find convenient to explore, or might be unable to reach it (see Florea 2017). This oversimplification, categorisation, and homogenisation of knowledge undermine the possibility for broadening the study of politics and practices of state recognition in the real world.

Another major reason for lack of critical theory of state recognition is related to the deeply embedded conservatism among dominant scholars, and chronic negativity towards state creation and their international recognition. Jens Bertelson (2013: 110) points out that “theories of recognition have been instrumental in justifying different forms of exclusion in world politics, thus bringing about a hierarchical relationship between those entities that merit recognition and those who do not”. While the main protagonists of international studies are sovereign states, other aspirant states that struggle to enter the international society are discriminated against not only politically by the conservative global order but also epistemologically by the existing Western-centric scholarship. The field of state recognition studies is dominated by an epistemological alarmism, which takes the shape of paranoia and fear that the emergence of new states exacerbates more chaos and disorder, ignoring the primacy of freedom, equality, and development as epitomising aspirations for independent statehood. There is a fear that the creation of new states and their subsequent recognition would result in changing the cartography of states and thus reshuffling the geopolitical constellation of interests, powers, resources, and relations. This is evident in many studies that associate state recognition with conflict, insecurity, and international chaos, while downplaying the emancipatory potential of self-determination and state expansion. Evidently, secessionist conflict tends to trigger stronger international reactions and the politics of recognition can become a source of conflict, but containment of these self-determination conflicts through existing legal and policy instruments has proven fruitless (see Weller 2009).

Western states and scholars (especially legal experts) are producers and pioneers of norms, rules, and practices of state recognition and non-recognition. The doctrine of statehood and recognition are very rigidly legalistic in nature and tend to produce and reproduce rules that suit the interests of dominant states (often hidden under the label of the rule-based international order). In particular, the scholars who have taken a paternalist view of this subject tend to produce knowledge and shape policymaking in such a direction that suits the current powers and their global dominance. What prevails in the existing state recognition studies is a lack of willingness to analyse the foundational categories underpinning statehood, secession, and most importantly recognition of states. Instead, scholarly work on recognition-seeking states tends to (re)produce ideologies, discourses, positionalities, and interests of either former host states or the other dominant states (see Ker-Lindsay 2012). They often advocate on behalf of powerful states and act as fanatical defenders of the existing international legal order, which discriminates against recognition-seeking states (see Paquin 2010). International legal scholars, such as Alexandrowicz (2017 [1952]: 381), have long advocated preserving the role of great powers as agents of international order and serve the “quasi-judicial function” of applying the rule of international law with regard to state recognition. These accounts on state recognition are directly implicated in reproducing the existing international exclusionary order. For instance, they take for granted

and obediently reproduce state-centric discourses on denying the right to statehood to certain groups while avoiding exploration of the duty of states to recognise states that fulfil the objective and core criteria of statehood. In particular, international law is attuned to generating prohibitory rather than emancipatory knowledge on state recognition (see Kohen 2006). It tends to criminalise and abnormalise state formation without the consent of the base state rather than play a constructive role in facilitating the coverage of international law around the world. Consequently, production and dissemination of knowledge that seeks to preserve the interests of existing powers comes at the expense of the rights and freedoms of subjugated peoples who see the creation of a new state as a sanctuary for collective emancipation and an escape from human rights abuses by the base state. In other words, by seeking to reproduce the existing state system and international order, it is unable to question the ontology and epistemology of recognition and the political, economic, social, and normative multiplicities surrounding it.

In this regard, mainstream scholarly perspectives on state recognition are embedded on colonial logics of research that intentionally or unintentionally serve the hegemonic interests of dominant powers to maintain current status quo and international order (see d'Aspremont 2018). Even though colonialism has officially ended as a state practice, it has left strong footprints in academia. Most scholars on state recognition come from Europe and North America. The theory of statehood, and with it the conceptual work on state recognition, tend to reflect Western legal thinking, which resembles the character and interests of Western states. Often their theories of state recognition are informed by their embedded experiences of statehood or vested interests, which do not necessarily correspond with the experiences and interests of recognition-seeking peoples and states. It is widely known that recognition as a diplomatic practice has its historical roots in the colonial era, where non-European states were required to adhere to a "civilisation process" before becoming a partial or full member of the international society governed by the laws of nations. As Tourme-Jouannet (2013: 668) maintains, recognition historically has been "the unilateral, individual, or collective instrument by which the civilized nations attested that a political entity was sufficiently civilized, and therefore sufficiently mature, to join the 'community of civilized nations'". For instance, the policy of non-recognition is historically affiliated with the discriminatory and racist practices of European states withholding recognition from new states and nations deemed "uncivilised", "savages", and "barbarians" (see Ringmar 2014: 450). While this discourse is unacceptable today, alternative language is used to deny recognition to "de facto" and "contested" states, such as illegal and unilateral actions, political and economic underdevelopment, the prevalence of internal ethnic and religious tensions, and human rights abuses. What the old and new discourses of non-recognition have in common is a hierarchical view of international politics that invariably discriminates against newcomers on the grounds of difference, which are in fact invoked more to exercise power and safeguard the existing order than to demonstrate any normative and ethical commitment to peace, justice, and development. Yet, as Ringmar (2014: 456) shows, "the civilized states of the world still need savages and barbarians who can help confirm them in their perceptions of themselves". It is the prevalence of contested states and unrecognised territories that is the very condition constituting the international society of sovereign states.

This desire to maintain status quo and colonial mindsets among state recognition scholars has resulted in the promotion of epistemological negativity, manifested through development of theories and concepts, and the gathering of empirical knowledge that frame recognition-seeking states in negative terms. Negativity biases are apparent across different debates on state recognition. Such negativity towards recognition-seeking states is evident in research that puts emphasis on counter-secession and counter-recognition campaigns, and spread fear of

precedents for other societies and states. Despite their warmongering and peace-breaking practices, former base states are quickly normalised and readmitted into international society, and the burden of seeking international affirmation and survival in a disfranchising international order falls on the recognition-seeking entity. While base states are considered proper subjects that deserve legitimacy and international admiration, subjects in claimant states are targets of alienation, subordination, and isolation. This negativity towards recognition-seeking entities is expressed through derogatory, discriminatory, and disempowering semantics. Recognition-seeking states are not only political and diplomatically dependent on others but also linguistically attached to certain adjectives. The discourse of separatism, irredentism, and secession is largely built on a negative perception of groups seeking independent statehood. Notions such as “unilateral secession”, “contested states”, “parent state”, “de facto states”, “disputed lands”, “unrecognised states”, “unrecognised statelets”, and “invisible countries” are not only normatively and politically loaded notions but also often incorrect depictions of the realities surrounding these states. Some scholars go as far as labelling unrecognised states as “odd”, “schizophrenic”, or “anomalous features of the international system and international society” (see Harvey and Stansfield 2011: 11). Recognition-seeking states are portrayed as geopolitical blackholes, deviant actors, and sites of illegality (O’Loughlin et al. 2014: 6). They are often depicted as ungoverned spaces and failed states – both notions connote an “inherently dangerous threat to the security of states and the international state system” as these states “may shelter terrorist organizations and other criminal networks that pose a threat to national security” (Clunan 2010). The negative ontology among scholars with regard to secessionist groups is also noted in the usage of derogatory terms, such as rebels, spoilers, or even secessionist rebels, which often result in abnormalising and dehumanising genuine struggles for freedom, liberation, justice, and equality (see Arjona et al. 2015). Another example is Adrian Florea’s (2017) quantitative study on de facto states, which, in addition to conceptual and definitional generalisation of diverse cases, uses strong language, such as “rebels”, “separatists”, “statelets”, “enclaves”, and “pariah entities” to describe states with different degrees of international recognition.

As a result of this Western-centric, conservative, neocolonial, negative biases towards state creation and recognition, existing research on this subject suffers from uncritical examination of the discourses, policies, and practices of recognition. More so, the knowledge–power nexus at the heart of this debate has real world implications whereby the wording of rules and norms of statehood and recognition results in their “worlding”, namely making recognition-seeking states targets of external intervention, exclusion, discrimination, and subordination both in scholarly knowledge and in international policy and legal practices. The remainder of this chapter is a preliminary overview of some of the critical extensions that research on state recognition could benefit from in the future.

Towards a critical agenda on state recognition

The field of state recognition studies has grown in recent years. As discussed in this handbook, there has been a proliferation of both quantitative and in-depth studies on various aspects of recognition-seeking states and their international significance. Cross-disciplinary efforts to provide better analysis of state recognition in world politics have also emerged (see Pavković and Radan 2011; Daas et al. 2015). Despite such promising developments, the field of state recognition studies remains in a state of epistemic circularity. To address some of the anomalies and loopholes evident in the existing

research on state recognition, the reminder of this chapter offers a preliminary outlook on three critical departures that new research on state recognition should explore. First, future research should expose the politics of knowledge and positionality of scholars in state recognition studies, as well as seek epistemic justice and decolonisation of the discipline. Second, future research should study more thoroughly the “recognitionality” regimes and explore the complex factors, multiple actors, and entangled politics that underpin the knowledge and practices of state recognition. Finally, future research should explore the regulation of state recognition in the international system, including the duty of existing states to recognise new states. These proposed areas for future research are not necessarily the only ones worthy of attention, but they do offer sufficient grounds for provoking a constructive, yet critical debate on the foundational, normative, and epistemological aspects of state recognition in world politics.

Epistemic justice and decolonisation of state recognition studies

Practices of recognition in world politics are at best institutionalised patterns of exclusion that affect the ability of recognition-seeking states to participate as an equal member of the international community. Knowledge on state recognition has followed this trend as well. Epistemic communities have been complicit in producing knowledge (normative, quantitative, and legal) on state recognition that may have contributed to denying various groups the right to self-determination. Often the epistemic community (especially legal, positivist, and comparatist researchers) arbitrarily defend the exclusionary norms and practices of the international society and seek, through pseudo-intelligent arguments, to retain the boundaries of the status and entitlements of existing dominant states in global politics. Such works on states struggling for recognition constitute nothing less than epistemic violence. In particular, denial of recognition can inflict collective harm, prolong oppression, and permit distortion and discrimination against the recognition-seeking subjects. Epistemic violence is unreflexive, unethical, and prone to supporting existing orthodoxies of who has and who does not have the right to independent statehood. When societies are not recognised, epistemic communities in world politics have also misrecognised the agency and knowledge of subjects and scholars coming from these unrecognised societies.

Existing theoretical approaches on state recognition predominantly seek to theorise or explain legal, political, and, to certain extent, normative criteria of state recognition (see Fabry 2013). A number of diagnostic studies highlighting the achievements and failures of scholarly debates on *de facto* and unrecognised states have failed to consider the dominant presence of geo-epistemological Western scholars and the implications this has for the theory and practice of state recognition (see Pegg 2017). International law is state-centric as it grants unequivocal power to existing states and imposes sovereign inequality on new emerging states (Warbrick 2003; Borgen 2010). “As a legal order based on sovereign states, international law favours stability and the integrity of its principal legal subjects”, note Christian Walter and Antje von Ungern-Sternberg (2014a: 3). State recognition scholarship mainly accounts for the legal and state practices of dominant Western states such as the United Kingdom and the United States of America. For instance, the influential work of Lauterpacht (1947), Kelsen (1941), Ti-Chen (1951), Talmon (1998), and Crawford (2006) all theorise on the legal dimension of state recognition by using examples from diplomatic and legal practices of dominant Western states. The logic of this Eurocentric theorising is first and foremost about setting boundaries to limit the scope of recognition-seeking groups access and membership in the club of sovereign states. The knowledge produced by the

epistemic community is subsequently reproduced by the international community. This nexus between Western-centred knowledge and state practices is normalised and globalised to set the main epistemic contours on state recognition.

Future research should problematise the politics of state recognition knowledge, showing their political roots and tracing how they have become normalised in theory and practice. The meaning and significance of state recognition needs to be expanded as well. Recognition is embedded in a pool of associated concepts and discourses, which also need debunking in order to elevate new perspectives on this subject. Sovereignty, territorial integrity, and legitimate authority should be unpacked critically and denormalised to recentre existing knowledge about statehood, sovereignty and recognition in contemporary world politics. Granting, withholding, or withdrawing recognition of such exclusive and effective authority over a particular territory and population profoundly shapes the character of the state and its access to the club of sovereign states. In other words, the territorialisation of political power without external recognition of that sovereign power by other states leads to contested forms of statehood with limited abilities to perform sovereignty at home and abroad. The current international norms on the self-determination of peoples entrapped by the consent of host state and constraining logic of the *uti possidetis* principle has forced many groups seeking independent statehood to choose violent methods and become vassals to great power politics to achieve their aspiration at any cost (Walter et al. 2014b). The post-colonial states who have benefited from territorial self-determination within the decolonisation context have become reproducers of violent politics and deniers of minority rights and their aspirations for both internal and external self-determination. As Griffiths (2016: 180) argues, “the members of the sovereignty club have incentive to exclude and the ability to do so”. Recognition-seeking states are by default discriminated against by the current international system, where they are not allowed to have a say in global institutions but the former host state is allowed to undermine its sovereign standing. The identity of states is shaped by recognition, derecognition, or misrecognition.

Future research should show that knowledge is always political, subjective, and value-ridden, while also remain open to all types and forms of knowledges, including knowledge produced by scholars coming from states and societies seeking international recognition. Denaturalising knowledge on state recognition is the first step towards developing a more empathetic, reflexive, and emancipatory vision for recognition-seeking states in world politics. In achieving this, future research should interrogate different disciplinary takes on recognition and expand the lexicon of different modes and definitions of recognition. In particular, future research should pay attention to previously neglected subjects, areas, actors, and processes in state recognition, and expand the scope of knowledge beyond narrow traditional debates. More broadly, future research should rethink the “epistemology” of state recognition. That is, it should critically interrogate the epistemological economy behind the production of particular knowledges, and unmask what purpose existing knowledges on state recognition serve. As the dominant knowledge does not represent the pluriversal views, historical experiences, and geocultural nuances of many other practices of state-becoming and recognition, future research needs to tackle this epistemic injustice and generate more representative, legitimate, and reality-adequate knowledge (Visoka and Musliu 2019).

Future research also needs to decolonise knowledge on state recognition. Decolonised approaches require “to engage, examine, retrieve and cultivate other ways of thinking about and being in the world that can form alternative points of departure to the hegemonic knowledges of empire” (Sabaratnam 2017: 7). This would require reordering

hierarchies of intelligibility, disciplinarity, and methodologies. The decolonised epistemology of state recognition reverses the order of knowledge – placing the local before the regional and international – as spatial and ontological scales for understanding recognition-seeking states and societies (see Smith 2012; Memmi 2006). The amount of local scholarship coming from recognition-seeking states is proportionally much smaller than that of external scholars owing to lack of resources, access and political isolation. Local voices in recognition-seeking states are often silenced and their perspectives channelled through intermediaries who are often foreign researchers. Decolonised approaches would not perceive these subjects as “mute objects or data points rather than serious interlocutors with an alternative standpoint or traditions of knowledge” (Sabaratnam 2017: 17). A decolonised understanding of state recognition would instead measure statehood dividend not only on standardised indicators, blueprints, institutional performance, and elite-level analysis but also through accounting for other subaltern actors, critical forms of agency, unrecognised diplomatic practices, and everyday forms and manifestations of sovereignty and recognition. In a decolonised understanding of state recognition, the question is not about isolating these contested states and their citizens but to tackle structural and ideational factors that reproduce the existing discriminatory and exclusionary order. Decolonised approaches should promote empathy, justice, and humanity towards the recognition-seeking subjects. Among post-colonial and indigenous studies scholars there is growing interest to “challenge the normative value of the dominant, hierarchical ways in which recognition is conceived and performed, particularly those that privilege the state as a recognising agent” (Balaton-Chrimes and Stead 2017: 2). In this regard, future research needs to take account of how the politics of recognition are embedded in hegemonic and colonial logics of power, control, and domination over certain societies. Societies in recognition-seeking states are entrapped under four layers of suppression and misfortune: undemocratic rule by national leaders able to prolong their rule as a result of non-recognition; the interference and hardship caused by the former host state; pressure coming from the patron state and its major competitors, who exploit the country for their economic and geopolitical interests; and the ignorance of local knowledge by international organisations and global human rights groups.

State recognition is currently associated with power politics and state interests. In this regard, state recognition studies are by default implicated in reproducing existing or state-centric order. Yet, many ethnic and minority groups view fully independent and sovereign statehood as “peerless and preeminent”, considering them “the ultimate political system for producing economic and security advantages [and] the only constitutive unit in the international system that possesses territorial sovereignty” (Rezvani 2015: 1). Although it is important to highlight the problematic nature of the state – including its aggressive and affective character – for many ethnic groups, creating their own state represents an existential solution and an aspiration for emancipation. Despite calls for global justice beyond the modern state, political theories of the state that developed advanced understandings of modern statehood and its heterodoxical, metaphysical, relational, and practical nature have concluded that the state is unlikely to vanish as the core framework for organising political, social, and economic life (Jessop 2016). Future research should retain an ontological suspicion of the state, while simultaneously exploring alternative arrangements for more emancipatory forms of statehood that enable individual and collective freedoms as well as promote global justice. Yet, a major obstacle to overcoming the existing conception of the state is the prevalent epistemic justice and dominance of Eurocentric thinking on recognition and statehood.

The debates on recognition-seeking states are spread across different, often overlapping disciplinary fields, such as those who look at post-Soviet *de facto* states, unrecognised states, or contested states, and those debates that study more broadly secessionist and intra-state conflicts. Such research on state recognition tends to be comparatist. It involves the inter-meshing of different case studies that either seek or have declared independent statehood but struggle for international recognition. O'Loughlin et al. (2014: 3) argue that "the will to homogenize these *de facto* states is pervasive and is evident in debate and reporting". These diverse and parallel debates often study the same contested and *de facto* states, yet end up overlooking their distinct features as well as their similarities with recognised states. Recognition-seeking states are inaccurately portrayed in policy and scholarly debates because they are seen as "transient phenomena expected to disappear" (Geldenhuys 2009: 45). Such epistemic misrecognition has serious ramifications for the socio-economic and political existence of communities living in these discriminated against and overshadowed societies. To serve justice to and normalise the existence of recognition-seeking states, future research should not only focus on the dimension of conflict and (non-)recognition when approaching these societies. As Georgio Comai (2018: 146) argues, "exclusive focus on conflict and recognition issues risks being a distraction from prevalent dynamics on the ground". In recognition-seeking societies, "the lives of ordinary citizens are generally ignored in the geopolitical discussions that involve the parent and patron states, as well as major powers beyond the region" (O'Loughlin et al. 2014: 29).

The context-specific knowledge which highlights the political preferences of citizens in recognition-seeking states is insufficiently represented in mainstream scholarly debates. As O'Loughlin et al. (2014: 26) show, it is possible to generate knowledge which recognises the preferences and political agency of subjects in unrecognised states. Lee Seymour rightly argues that "to know more about the causal and constitutive effects of recognition, the study of *de facto* states needs to move beyond the narrow focus on a heterogeneous set of unrecognized states" (see Closson et al. 2013: 680). Ethnographic research on state recognition is one methodological area overlooked by the existing scholarship (Kuus 2013). Generating critical and emancipatory knowledge on recognition-seeking states and societies requires endorsing situated knowledge as an epistemological and methodological basis for any engagement with the real world. Lived experiences, micro-politics, social and political forces, and the entanglement with external instances in claimant state should be the epistemological points of departure for critical analysis (see Musliu and Visoka 2019). At the same time, recognition-seeking states should also be included in other conceptual, thematic, comparative and area studies debates that mostly and exclusively focus on recognised states (UN members). This entails that existing international metrics, indices, and periodical and thematic statistical reports on states, democracy, freedom, peace, and development should expand and include recognition-seeking states as well. However, recent suggestions to blend research on unrecognised states with weak states (see Closson et al. 2013: 676) is not helpful as such a move would only stigmatise and marginalise these already-isolated subjects in world politics. Another major gap in state recognition studies is gender and its intersection with the politics of statehood, sovereignty, and diplomatic recognition. Current debates on state recognition almost entirely disregard the role of gender on diplomatic practices of recognition, most importantly the impact of non-recognition on women and other subaltern groups. That the editors of this volume struggled to secure contributions from female scholars is in itself a testament to the extent to which the discipline is male-dominated.

Recognitionality regimes

Scholarly debates on state sovereignty, secession, and self-determination disputes have stagnated in recycled debates about the merits and consequences of recognition. Semantics of state recognition are dominated by two competing theories, namely the declaratory and constitutive theories, both of which are covered in this handbook as well. The competing declaratory and constitutive theories of recognition emanating from legal thinking certainly should open the way for other more reality-adequate theories. The International Law Association's (ILA) (2018) Committee on Recognition and Non-Recognition in International Law concluded in 2018 that "the Constitutive/Declaratory dichotomy is of limited usefulness in analysing the role of recognition". On balance, neither the declaratory theory defended by international lawyers nor the constitutive theory defended by IR scholars and political scientists provide a solid basis for capturing the role, politics and dynamics of international recognition in the state-becoming process. Warbrick (2003: 237) stipulates that:

the "constitutive" theory and the "declaratory" theory, are neither compatible with the other and neither capable of dealing with all the circumstances in which recognition decisions arise, with the result that adherence to one or the other is apt to mislead in the borderline case.

Another major preoccupation among state recognition scholars is the impact of recognition-seeking states on international order, institutions, and great power rivalry. Macro-accounts of secession and recognition fail to capture the discursive, performative, and affective segments of state recognition. Notably, for a subject as polarising as state recognition, there is no scholarly consensus on the determinants behind the success of diplomatic recognition. Literature in general considers systemic factors that reflect preferences of great powers as well as broader international norms as key determinants of recognised statehood in contemporary times (see Newman and Visoka 2018; Visoka 2018b). Most of the scholarly work on statehood perceives the state as a social and material reality manifested through an effective government, territory, and distinct populace – detached from everyday performances. Similarly, literature on state recognition tends to view recognition as a formal act bestowed upon a claimant entity that marks their formal entry into the club of sovereign states. Such monolithic views not only fail to account for the nuanced and the multi-staged process of state recognition but also omit a broad range of modes by which emerging states engage with the international community prior to or without obtaining diplomatic recognition.

Although there is no regulatory mechanism which governs state recognition in law and practice, there is a "recognitionality" regime, which represents an assemblage of widely accepted and debated discourses, rules, norms, and practices which may explain the recognition of new states in international affairs. The concept of recognitionality, which mirrors Foucault's notion of "governmentality" (Foucault 1991), here denotes the broad range of discourses, tactics, strategies, guidelines, and techniques employed by different actors for granting, withholding, or withdrawing the recognition of states. Whereas the notion of governmentality captures techniques of power and governance in modern societies, the notion of recognitionality could be a useful derivative notion to describe the diplomatic techniques as well as fluid and situational practices underpinning the recognition of states. To make sense of the politics and technologies governing recognition as a diplomatic practice in international affairs, future research needs to engage more thoroughly with the micro-politics,

discourses, performances, and entanglements with other states – key ingredients for obtaining diplomatic recognition and admission to the international community.

Undoubtedly, recognition is a necessary condition of contemporary sovereign statehood but it is not constitutive of statehood in itself. The ability of new emerging states to act like a state and secure diplomatic recognition and membership of international organisations requires more than just satisfaction of most of the objective criteria of statehood. State recognition is a textually constructed social fact that is articulated through everyday acts of writing, talking, and performing recognition of others and the self. As argued elsewhere, diplomatic performances are what make new states recognisable entities in world politics (Visoka 2018b). Recognition is communicated through discursive, material and performative means. It is written in a specific language, using particular rationales. It is communicated in the form of a verbal note or public statement. It is transmitted through material means. Therefore, exploring cultures of recognition is crucial to making sense of the entangled nature of recognition, especially how meaning is constructed, how practices are improvised, and how recognition takes a political and material effect. Looking at the discourse, performance and entangled agency of states seeking recognition helps unpack the peculiar interplay of agents' knowledge, situational imitation and improvising, influence of identity and habitus, and the circulation of power and agency from the personal to the social and the global. In particular, studying discourses, practices, and assemblages in their everyday and mundane expression offers promising grounds for uncovering new modes of diplomatic resistance in world politics to navigate and overcome existing blockages posed by international norms, rules, and institutions. Moving beyond existing mainstream research orthodoxies will make it possible to reveal the indeterminacy of norms and politics of state recognition and show that it is the continued performance and reproduction of those norms that creates the perception of stability and continuity of existing regimes of recognition. In other words, it is the ritualised, habitualised, repeated, and performed diplomatic discourses and practices of states that contribute to the constitution and reproduction of existing regimes of state recognition (see Grzybowski 2017).

Central to understanding contemporary recognitionality regimes is disentangling different forms of recognition. It requires exploring plural modes of recognition, diplomatic agency, and interaction between different subjects in international affairs. Existing research on state recognition tend to fall into a binary trap between recognised and unrecognised state(hood). This handbook has tried to release the research from this entrapment by illustrating that underlying all modes of recognition and non-recognition are multiple other variations of recognition ranging from formal recognition to *de facto* and implicit recognition to various forms of pragmatic, situational, and temporal acceptance and engagement, suggesting that there are no simple binary practices and dualisms when it comes to state recognition. As argued elsewhere, diplomatic interactions and encounters prior to formal recognition take various forms of pragmatic acceptance and situational engagement (Visoka 2018b). Some state practices accept the existence of a state but avoid making a formal statement to that effect, or undertake practical diplomatic actions to imply acceptance while avoiding the potential consequences which may derive from formal recognition. This handbook has also examined the pivotal role of regional organisations, national and supranational parliaments, and transnational movements in decentring and pluralising the meaning and agency of state recognition. Moreover, alternative forms of recognition and deisolation beyond the central state could open up the possibility of ending the prevailing abuse of discretionary right by states. Supranational and subnational forms of recognition need to be taken into account as well. Bottom-up forms of moral and political recognition of societies deprived from freedom

can be an effective way of decentring state-centric forms of recognition. Despite the emergence of these plural forms of recognition, the literature fails to sufficiently discuss the political, legal, and diplomatic significance of these alternative forms of recognition. Future research should expand the existing vocabulary on state recognition by paying greater attention to alternative forms of recognition, engagement, and acceptance between states. The lexicon of statehood and recognition needs to be humanised to endorse recognition not isolation, and to promote emancipation not discrimination between and among societies with different access to the international system.

Much is known about the objective and subjective criteria of statehood, initially inscribed in the Montevideo Convention and later expanded in the practice of states and international organisations. Although “the international law of statehood has provided us with the fullest understanding of what entities must do to be accepted as a state ... it remains a legal understanding of a much more complex social and political process” (French 2013: 3). Becoming a sovereign and recognised state remains basically “a phenomenon not regulated by international law” (Abi-Saab 2006: 474). A great deal is also known about the benefits as well as the legal consequences of non-recognition of states. However, understanding is still limited of the context-specific criteria, influencing and determining factors, as well as diplomatic practices and agents behind the political decision of states to grant, withhold, or withdraw the recognition of other states. Future research on the recognitionality of states should decouple from the legal thinking on recognition and, instead, apply useful analytical tools emanating from existing research in international relations, sociology, political geography, and institutional ethnography to critically interrogate and trace practices of state recognition.

A performative view of state recognition needs to also pay attention to alternative, fluid, and unwritten diplomatic protocols which underline more accurately where the power lies, the decentred modes of agency, and unconventional methods of diplomatic interactions. Diplomatic performances materialise certain segments of the intentionality of statehood, while simultaneously contributing to the reconfiguration of state intentions and identity. Gilbert (1994: 104) maintains that, “in performance contexts, the truth, if any, is in the telling”. Exploring the performativity and enactment of statehood requires looking at a broad range of practices and events, such as press conferences, foreign policy speeches, diplomatic cables, and political meetings. The essence of making sovereignty is to perform again and again speech-acts and performative actions in order to acquire external recognition, acceptance, and legitimacy, as well as to normalise global socialisation with the new sovereign state. It is about using repeated actions and constructing new actions through reparation (see Rai and Reinelt 2015). Timothy Mitchell (1991: 94) argues that state “should be examined not as an actual structure, but as the powerful, metaphysical effect of practices that make such structures appear to exist”. Similarly, Alex Jeffrey (2013: 2) argues that “performances of the state are often more explicit where changes are desired in the existing inter-state system, where a particular political authority is seeking to assert or solidify a specific claim to the state”. Seeking state recognition as diplomatic performance challenges the solid and reified accounts of recognition as an intentional act and opens up the possibility for exploring different agencies, stages, forms, and tactics involved in the practice of state recognition. When tracing practices of state recognition we are able to identify and overcome blind spots imposed by narrow analytical categories and existing ways of knowing recognition in theory and practice. Unlearning existing ways of studying state recognition might open up the space for generating and learning afresh a new knowledge that corresponds better with the real world.

As some of the contributions in this volume have shown, existing debates have ignored extensively the everyday dimension of sovereignty, especially how local subjects experience

it, and how political elites have constructed it through various forms of local agency. They fail to point out how the micro-history of state recognition contributes to the understanding of how particular examples and cases shed light on and trace their wider impact. Everyday struggles for international legitimisation are important as they confront the existing sovereignty entrapments in world politics and open up the space for new forms of political subjectivity materialised through alternative integration in the international society. Diplomatic performances and entanglements in their everyday articulation provide insights into how norms, institutions and practices of sovereign statehood operate transversally at local, national, and international levels. This once again demonstrates the significance of exploring the everyday in IR to expand epistemological spaces for reconstructing a more pluralist discipline and for reshuffling our knowledge of what counts as a legitimate and recognised state in world politics, who deserves to achieve external self-determination, and how to redefine the cartography of states that elevate structural and overt violence through existing international, norms, rules, and regimes. Therefore, the everyday is a promising site for reshaping our knowledge of world politics, thereby revealing the limits of rationality and power, and unearthing the power of unknowns, uncertainty, and transversity. Performative diplomacy highlights the power of diplomatic improvisation and creativity in destabilising the current global order, in utilising loopholes in the international legal and political order, and in overcoming conservative policies regarding who has the right to become a state. Future research should cast greater attention to the variety of diplomatic performances as well as multiple forms of state recognition, including the role of domestic politics and personal and networked diplomacies in shaping the decisions of states for granting, withholding, or withdrawing recognition of other states.

Regimes of recognitionality explain also the normative evolution and the performative diplomacy shaped and imposed by existing powers upon recognising new comers in world politics. It needs to discuss the role of recognitionality as a disciplinary tool to condition the domestic and foreign behaviour of recognition-seeking states, as well as utilise their vulnerabilities to advance own interests at the global stage. So, another important feature of recognitionality regimes is the interdependency between recognised and unrecognised states. In other words, recognition is important not only for the aspirant state, but also for other recognised states as recognising others is the very act that constitutes the international society – namely the collective features that unites and differentiates sovereign states. Erik Ringmar (2014: 447) argues that “it was through practices of recognition, affirming sameness, and through practices of non-recognition, affirming difference, that international society came to constitute itself as such”. Without mutual and reciprocal recognition between states and societies there are no international relations. Power, status, and state identity exist only in being acknowledged by others. Recognition is a segment of power and as such it is a deeply relational phenomenon. Those states that recognise newcomers essentially perform an act of self-recognition. States need recognition by other states in order to enact state subjectivity in international relations. Recognition underscores the intersubjective constitution of international norms, order, and practices. Therefore, it is crucial to analyse how other states reinforce their own state sovereignty and self-recognition by the very act of recognising new states. Existing sovereign states become self-determining states by the practice of granting, withholding, or rescinding recognition of claimant states. On the other hand, it is crucial to examine critically how recognition as a practice in itself creates states with different statuses. Demand for recognition creates the conditions for servitude. It establishes colonial-like relations between the master and the slave. Seeking recognition from other states externalises the freedom of states and undermines self-worth and self-affirmation. By default, in

an environment that gives so much credit to diplomatic recognition, those entities that lack full recognition tend to suffer from ontological insecurity and decreased self-worth, which impacts the political and economic development of the country. In this regard, regimes of recognitionality need to highlight how the very act of recognition, which is intended to enhance claimant states' sovereignty and self-rule, creates complex forms of dependency towards external states, who often patronise and benefit from the contested statehood.

Studying regimes of recognitionality requires criticising and problematising techniques and practices of state recognition in order to debunk the entangled politics and interests which enable preserving existing interventionary and exclusionary order. Power politics and systemic features underlining the existing recognitionality regimes are by-products of micro-politics and bottom-up processes. Global interconnectedness produces many effects which are indirect, mediated, and delayed. The global arena is an open space where multiple actors, agencies, events, norms, entanglements, and estrangements take place. In such an environment, prospects for diplomatic recognition and admission into international society are not entirely determined by discursive and performative efforts, but also by situational entanglements and the suitability of assemblages of relations. Therefore, making sense of how states secure recognition requires exploring both exogenous and remote and unrelated agencies, events, relations, and dynamics that entangle to form temporary assemblages which can simultaneously facilitate or inhibit an emerging state's recognition and access in the international system. In particular, practices of diplomatic recognition by non-Western states remain overshadowed by extensive attention paid in scholarly debates to the legal and political practices of dominant powers, especially former colonial powers. Future research should explore non-Western rituals, practices, and cultures of state recognition to expand and differentiate knowledge on this evolving subject as well as to chart the road ahead for developing normative, legal, and policy mechanisms that would regulate state recognition globally. Geographies of state recognition are widely spread within and beyond the frontiers of existing diplomatic institutions. Work by political geographers, such as Fiona McConnell (2016), has shed light on some of the most ignored diplomatic practices of recognition-seeking states. However, it has not yet been considered by other traditional perspectives on state recognition. A scalar perspective on state recognition is particularly needed to map out places, sites, and scales that affect and are affected by state recognition or non-recognition. In this regard, future research needs to pay closer attention to and capture diplomatic practices of recognition unnoticed to date, to account for liminal stages and temporal encounters that underline the situated agency and micro-politics of state recognition.

The duty to recognise

Although state recognition is a fundamental feature of the state-based international system, recognitionality regimes are too fragmented at present to objectively judge the criteria for international recognition and less so to enforce a duty to recognise new states. In this context, a major loophole in the existing state recognition studies is the absence of political, normative, and legal discussions of the duty of states to recognise other states. In the past, efforts to collectivise state recognition via the UN system have failed owing to deeply embedded differences on the definition of state, statehood, and the role of recognition (Dugard and Raič 2006). Existing research accepts that recognition is a prerogative at the discretion of existing, recognised states. It is often stated that the "recognition of States is not a matter governed by law but a question of policy" (Lauterpacht 1947: 1). David Raič (2002: 34) explains that, "in the absence of the existence of a central organ or institution

which is competent to determine with certainty and finality whether a State exists under international law, this function is fulfilled by States through the act of recognition". Yet, the rules and politics of state recognition are in constant flux. For most of the twentieth century, the recognition regime has been an "exclusion mechanism ... that is the product of international diplomacy and the development and evolution of international norms" (Griffiths 2016: 5). Antony Anghie (2004: 78) shows that "recognition was granted by states not in accordance with any international principle, but according to the powerful and unpredictable expediencies of competition for colonies". At the heart of state recognition norms and practices is embedded a complex and fluid understanding of self-determination of peoples. Historically, state recognition was closely tied with the recognition of peoples for collective self-determination. Self-determination is seen as unproblematic for societies colonised by major Western powers, while other forms of non-Western colonialism by smaller regional powers are often disregarded (French 2013). Colonised communities, who prior to the colonisation or annexation enjoyed equal or similar administrative status as the appropriating state, often end up as ethnic minorities. Future research should question and unsettle the existing world order, which offers freedom, stability, and progress to certain states and regions at the expense of other suppressed and discriminated groups and recognition-seeking entities. It is also important to critically scrutinise the politics behind offering the right to self-determination to some peoples and denying it to others

Different pathways to self-determination and proclamation of independent statehood, which are not regulated by international law, are by default considered illegitimate and illegal (Walter et al. 2014b). State recognition is a socio-diplomatic and historically contingent practice, which has emerged only in modern times and as such it should be prone to change and transformation (see Fabry 2010). Future research should reverse this epistemic order and also pay greater attention to the question of state obligations for recognising other states. However, for this practice to become a more receptive instrument of emancipation and self-determination of peoples, it needs to be supported by epistemic, normative, legal and institutional changes. Future research should adopt a more receptive approach towards state creation and endorse the possibility of overcoming the existing status quo with regard to the regulation of recognition in law and practice as well as promote alternative knowledge on how to redefine the colonial era-imposed cartography of states, which balances justice and rights with order and prosperity for all concerned groups. Rather than siding with dominant conservative and realist conceptions of recognitions, critical scholars should promote liberal and emancipatory knowledge on statehood and recognition. If knowledge shapes policy and practice, it is better for the knowledge to be about changing the world rather than reproducing it. Epistemic recognition should precede other forms of political, legal, moral, and sub-state and societal recognition.

In this instance, it is important to examine whether the failure of states to regulate statehood in international law is the problem rather than the practices of groups seeking independence and recognition. International law has the scope to open up again to the possibility of regulating state recognition through legal mechanisms, as it did with many other issues, including decolonisation and the non-use of force (see Orford 2012: 281). The disciplinary boundaries of international law need to broaden to include more sociolegal analysis. A critical international law theory of state recognition would need to focus more on the empirical dimensions of recognition, enshrine more normative commitment towards groups seeking self-determination, and highlight the political and social responsibility and consequences of legal profession and knowledge-production on state recognition. When international law leans towards recognition-seeking and vulnerable subjects it can perform

an emancipatory function, providing legal and normative protection from hegemonic tendencies of the oppressive and dominant powers. Such research should highlight more robustly how recognition of existing states that enjoy only partial recognition would benefit from the protection of human rights and the effective ability of regional and international organisations to assist in socio-economic development and the protection of civilians, as well as mitigating and limiting undemocratic practices.

Existing theories and debates on state recognition have placed extensive attention on the prohibitory aspects of state creation and recognition to discourage changes to the existing violent cartography of states and externally imposed borders. There is more talk about the discretionary character of recognition and the duty not to recognise than about the affirmative and obligatory nature of exercising sovereignty and administering collectively and fairly international law. While at present there is “a duty not to recognize as lawful a situation created by a serious breach of a *jus cogens* obligation” (Talmon 2006: 107, emphasis added), no duty to recognise states created as a response to or in an attempt to prevent or avoid serious breach of a *jus cogens* obligation exists. Recognition of states is a fundamental form of administering the expansion of international law, acknowledgement of the collective right to self-determination, and affirmation of political emancipation of peoples who have been suppressed and denied freedom by the base state. By denying, delaying, or withdrawing the recognition of claimant states that have experienced these prohibited practices, existing states are effectively in breach of their responsibility to condemn international wrongful acts. The existing norm of non-recognition of states emerging from aggression or the use of force has been expanded to cases that have not emerged from breaching the fundamental norms of international law, such as Kosovo. In these instances, extended non-recognition of states has been and continues to serve as a source of intercommunal, national, regional, and global conflict.

In the current practices, it seems that the duty to recognise new independent states arises only when a claimant state is recognised widely by the international community, including major powers, which have assumed special responsibilities by enjoying unparalleled international authority. In other words, the duty to recognise or non-recognition is not driven by any regulatory normative or institutional framework but by external and situational pressure or incentives coming from diplomatic allies. Hersch Lauterpacht's (1947: 33) pioneering work on the duty to recognise held that: “in granting or refusing recognition the State administers international law: it does not perform a legally indifferent act of national policy ... the task of ascertaining the existence of conditions of statehood is essentially one of administration of international law”. The contribution of international law would be to advocate for the duty to recognise states to become a peremptory norm of general international law (*jus cogens*). This would require that the existing norm on the obligation of states for not recognising certain situations in breach of *jus cogens* to be supplemented with the duty of states to recognise claimant states that arise as a result of the base state's failure to uphold the responsibility for protecting the rights and interests of their citizens, including ethnic and religious minorities. Future research should investigate the normative grounds to make it compulsory to recognise claimant states that have experienced illegal use of force, genocidal acts, ethnic crimes, and racial discrimination, and have been denied the right to self-determination by the former base states (Weller 2008). In particular, international responsibility to recognise might arise particularly in cases of remedial proclamation of independence after a political community is stripped of political and self-governance rights, has experienced deliberately orchestrated, state-sponsored, and systematic human rights abuses, and has exhausted all diplomatic means for resolving the statehood dispute through

negotiated settlement (see Buchanan 2003). The duty to recognise remedial cases of proclamation of independence effectively would represent collective non-recognition of the acts of the former base state in breach of fundamental norms of international law. There are grounds to critically explore if the principal criteria for the state recognition of effectiveness and the presence of effective entities, as it was originally, should be reinstated and practised again. There are also grounds, as Grzybowski (2017: 432) argues, “for prudent arguments and decisions on concrete claims to state creation that will never live up to some ideal standard, but that can be made in reflection of the overall predicament and potential or likely consequences”.

Regulating state recognition initially requires outlining the normative and operative dimensions. While there is extensive, yet discorded research on norms, principles, and practices of state creation and recognition, future research should seek to develop more integrative and cohesive frameworks for outlining the principles and conditions of the duty to recognise states. Such a process first and foremost requires revisiting the criteria of statehood and reaching global consensus on the threshold for statehood. Following this, basic principles of the duty to recognise would need to be devised, highlighting that state sovereignty also implies international responsibilities, including the responsibility for formal recognition, the establishment of diplomatic relations, and the facilitation of the process for membership in international organisations. The duty to recognise should give priority to claimant states that fulfil both objective and subjective criteria of statehood, and have a just cause for statehood, including their remedial case for self-determination and effective capacity to act as a state.

Notably, the duty to recognise other states would most likely encounter strong resistance from existing states, including global and regional powers. Nonetheless, it is first and foremost an obligation of the epistemic community working on state recognition to advance knowledge on the duty to recognise and advocate for developing appropriate policy and institutional regulatory mechanisms. The pathway for the emergence of the duty to recognise states in promotion of global justice is difficult to be prescribed or anticipated in advance. International norms usually emerge and are accepted widely only after catastrophic events take place. This is the story with the prohibitory norms, such as genocide, war crimes, ethnic cleansing, and arms races, as well as regulatory norms, such as peacekeeping, protection of civilians, humanitarian interventions and the responsibility to protect, transitional justice, and peacebuilding (see Finnemore and Sikkink 1998). With regard to state creation and recognition, such a momentum has not materialised despite wars for independence and escalations of violence following the recognition or non-recognition of certain entities as sovereign states (as exemplified by the wars following the dissolution of Yugoslavia and in certain parts of the former Soviet Union). The Badinter Commission had a narrow function and did not tackle and advance the duty to recognise new states. Yet, it provided relevant grounds and deliberations that can serve as template for any future attempt to regulate recognition in the international system. Initially, the duty to recognise states could take the shape of a declaration, building on similar examples undertaken in the case of decolonisation, peaceful coexistence among states, friendly relations and cooperation among states. The duty to recognise could take the same path as the emerging right to peace, which, while still at an infant stage, could gain more global acceptance when circumstances permit. It could also take a path similar to the norm of responsibility to protect civilians by the host states and international community in situations of conflict. Such a move to regulate state recognition would require norm entrepreneurs representing international and

regional organisations, peace-loving states, global civil society, and the epistemic community (prominent lawyers, scholars, and intellectuals).

Finally, the question of how to implement the duty to recognise other states would require new research on creating the institutional framework, an appropriate body, and procedure for enforcing and implementing the duty to recognise states. The UN has often been seen as the appropriate body to administer collective recognition of states. However, the existing set-up and power-driven institutional setting with veto powers make the UN a less favourable institution for implementing the duty to recognise states unless fundamental changes are undertaken in the future. There is a risk that efforts for global harmonisation of rules on state recognition would be designed to accommodate the interests of dominant states, thus sealing the new exclusionary rules with devastating consequences for some recognition-seeking states. These challenges notwithstanding, it is crucial that the duty to recognise other states comprises effective enforcement mechanisms. For instance, under the terms of the duty to recognise, states that fail to extend recognition to entities which notably and factually fulfil both objective and extended criteria of statehood, or, even worse, withdraw recognition for political motives and in disregard of the statehood facts, would need to be sanctioned by the rest of the international community, including the derecognition of their capacity to act as a peace-loving nation and responsible member of the international community. Whereas recognition of the claimant state contributes to the expansion of international law, the withdrawal of recognition would constitute a failure to administer international law, and an irresponsible act that undermines the rule-based international order. Those states that fail to perform their duty to recognise could be stripped of membership, privileges, and access to multilateral bodies, and also face the consequences of their actions that undermine the right to independence.

While there are strong grounds for regulating state recognition, any move to establish a new norm – the duty to recognise other states – would result in strengthening the claims that recognition has a constitutive role in the creation of new states. It would also empower and delegate important powers to external actors to control the politics and dynamics of self-determination and state-becoming. These implications notwithstanding, regulating state recognition in such a way that would promote emancipatory politics, global justice, rights, and legitimate claims for statehood is likely to play a more positive role in promoting peace, justice, and equality in the world and overcome multilayered categories of states to ensure universal, inclusive, and non-discriminatory frameworks for governing relations between states and societies in the world.

Conclusion

This chapter highlighted some of the anomalies in existing state recognition literature, and proposed future directions for research. It pointed out that state recognition studies are dominated by particular and narrow epistemological frameworks for thinking and acting on world politics that directly impact on how the recognition of states is (re)produced both in theory and practice. The chapter proposed that future research needs to produce emancipatory knowledge which shifts attention from Western-centric frameworks of thinking towards more epistemic justice and decolonised knowledge. It proposed that the negative framing of recognition-seeking states should be replaced with more humanising discourses that offer fair and equal treatment as all other recognised states and societies. The chapter also proposed moving from a monolithic, legalistic, and narrow understanding of recognition in theory and practice towards exploring the recognitionality regimes and the pluriversality of discourses, performances, actors, and forms of recognition. Moreover, the chapter proposed

that, in order to address some of the anomalies encompassing state recognition regimes, future research should explore ways to regulate the duty of states to recognise other states in international law and politics. Regulating recognition would constitute an emancipatory act to ensure that the political cartography of states matches the real map of existing and emerging states. Understandably, existing theories and approaches are deeply committed to preserving the existing international order and are sceptical to change the existing recognition regimes. This makes it difficult perhaps to even take into account or debate, let alone implement, many of the proposed ideas in this chapter. Such scepticism should, if anything, motivate critical scholars to uncover the structures and actors as well as types of knowledge which prevent changes to the existing recognition regime and direct future research towards producing more emancipatory knowledge that contributes to global justice and better representation of subjugated states, peoples, and communities in world politics.

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