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BILATERAL RECOGNITION OF STATES

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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. 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.

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. 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. 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 \textit{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 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). 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 states – lacks persuasiveness. 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, each instance of authoritative application represents an interstitial extension of existing norms. 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.

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, 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. 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, international law cannot in the meantime countenance disrespect for the foreign state’s claim to territorial integrity and political unity.

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 effectiveness 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. 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.

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. 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), 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.
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, 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) ‘whether, 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 (Transdniestria, 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, 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 Hersh 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 Sobrie 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).
Bilateral recognition of states

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.


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).


34 For a detailed history of these events, see Fabry (2010: 179–202).

References


