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 treatment 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-recognized 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).

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, 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. 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.

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 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,’ 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 global and regional documents such as the Charter of Paris (1990) and the Copenhagen Document (1990), 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 ‘Transdniestrian 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. 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. 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. 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.

References


