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THE STATE BETWEEN FACT AND LAW: THE ROLE OF RECOGNITION AND THE CONDITIONS UNDER WHICH IT IS GRANTED IN THE CREATION OF NEW STATES

Abstract:
This article explores the role of recognition in State creation. Basing on an analysis of relations between effectiveness and legality in the process of State creation, it claims that recognition is constitutive of statehood as a subject of international law. The research revolves around the following themes: the role of effectiveness criteria and the conditions of recognition set by international law, the existence of "statehood without effectiveness" in cases of limited effectiveness but general recognition, the study of acquisition of statehood as a process and the notion of collective recognition based on the cases of Kosovo and Palestine. The argumentation is also supported by the analysis of de facto entities and aspiring States in international practice. It draws on the distinction between legal non-recognition and political non-recognition as able to shed some light on the complexity of international practice in this area. The article concludes that recognition is a pre-requisite of statehood, an essential criterion that may overcome weak effectiveness in certain legal contexts, though not a lack of independence. Conversely, effectiveness of government authority over population and territory does not lead to statehood in the meaning of international law in the absence of international recognition.

Keywords: constitutive effect, effectiveness, non-recognized entities, recognition, secession

INTRODUCTION

The creation of States has long been a central question in international law, although the important role of politics and effectiveness (i.e. "facts on the ground") has also given rise to doubts about the role of the international legal regime in the development of "law of statehood".[1]

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[1] J. D'Aspremont, *The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society*, 29 Connecticut Journal of International Law 201 (2014).

The appearance of new States makes the question still very much debated, and in terms of a definition it remains very difficult to understand and conceive the multi-faceted ways in which the new primary subjects of international law appear. The aim of this article is to make a contribution to this important part of international legal scholarship by reassessing the function and value of recognition, the conditions under which it is granted, and the role of recognition in international law of State creation.

While there is a vast literature concerning this traditional topic of international law, both "classical" and more recent, it remains subject to debate. As several authors have observed, theoretical questions have often obscured the matter[2] and they "do not help to explain recognition or to clarify the position of entities which are not recognized."[3]

The main thesis of this article is that the appearance of a new State in international law terms is dependent on its recognition by other States. Recognition, together with effectiveness, is a constitutive feature of statehood. Recognition does not have to be made through a formal act, it can also be performed *de facto*, but it needs to demonstrate an intent to treat the entity involved as a State.

The aim of this article is thus to explore how statehood is understood in practice. The practice of existing States is crucially important in this regard, but so too is the practice of the would-be States themselves. In parallel with the consolidation of their independence and authority on the ground, they must develop a strategy of international recognition (as have, for example, Kosovo and Palestine).[4] Consolidated *de facto* entities desperately seek international recognition, which they see as necessary to access "full" statehood (for example Somaliland).[5]

Empirical research on how accession to statehood is treated by existing States sheds light on a less doctrinal but more practical approach to the process of State creation. It brings a new contribution to the old debate on the value of recognition. Although most international law scholarship defends the State-as-a-fact and declarative view of recognition, empirical research highlights the central role of recognition in the process of State creation and evidences its constitutive character. The article will thus be a contribution to this crucial issue in legal scholarship.

In this article State creation is understood broadly and various hypotheses are distinguished with respect to the importance of effectiveness and international recognition. Its focus is on the legal effects of recognition, which are dependent on the legal and situational context of each State creation – whether through unilateral secession, realisation of self-determination, or as a result of succession in cases of parent state dissolution.

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[2] I. Brownlie, *Recognition in Theory and Practice*, 53 British Year Book of International Law 197 (1982); J. Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, Collected Courses of the Academy of International Law, 2011, p. 9; J. Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford: 2007, p. 17.

[3] J. A. Frowein, *Recognition*, in: Max Planck Encyclopedia of Public International Law, OPIL Oxford University Press, Oxford: 2010, para. 10.

[4] *Cf. below* section 4.

[5] *Cf. below* section 2.

In cases of secession, the practice shows that recognition by the parent State is of utmost importance. In the absence of the consent of the nominal sovereign, there is little probability that other States will recognize the secessionist entity as a State, however effective it may be.[6] The related question of the status of "non-recognized entities: or *de facto* authorities in international law also underlines the crucial function of recognition in the contemporary world. The constitutive power of recognition is highlighted by the fact that non-recognized entities are not generally considered as States, regardless of the degree of their effectiveness in controlling and governing a territory.[7]

Apart from some compulsory "negative rules" in international law with respect to state creation, a wide measure of discretion is left to the international community of States, which for obvious reasons are wary of recognizing secessionist entities as States. International law, being a law created by States, is hostile to secession, even though no rule of international law prohibits it.[8]

Moreover, the practice of accession to statehood contains a grey zone between an entity attempting secession – which would be an internal matter of the State faced with the attempt at secession – and full and uncontested statehood. Accession to statehood is a process. In the course of this process, the status of the would-be State is shrouded in ambiguity: Kosovo and Palestine are cases of partial, incomplete recognition; hence their undefined status in international law.[9] Thus it can be said that acknowledgement of the constitutive effect of recognition does not solve all the issues in this area. It does not give a clear answer to the traditional critique of the constitutive theory: how many and whose recognition? In cases where the international community is divided (Kosovo), there is no definite answer to the question of the territory's status.

A reassessment of the role of international recognition makes it possible to analyse the creation of a new State not as a question of existence/non-existence, or State/non-State, but as a *process* – a progressive and dynamic operation involving elements of both fact and law. The performance of certain legal acts and attempts to demonstrate effectiveness may be linked to a "recognition strategy" by States *in statu nascendi* or *de facto* authorities aiming at full and recognized statehood.

The following section 1 exposes the respective roles of law and facts in the State creation process, and the relationship between effectiveness and legality. The factual criteria for statehood, effectiveness, and the role of recognition are analysed before turning to the role of the legal conditions attached to international recognition and

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[6] *See below* section 3.

[7] A remark on the vocabulary used in this article: I do not use the terms "non-recognized State", as it contains a contradiction – if there is no recognition, the entity is not a State in the sense of international law. Nor do I use the expression "*de facto* State" – statehood being a legal status, a State in the meaning of international law is necessarily *de jure*. If it is *de facto*, i.e. without recognized international personality, it cannot be considered as a State "properly so-called".

[8] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo,* Advisory Opinion, 22 July 2010, ICJ Rep 2010, p. 403.

[9] *Cf. below* section 4.

the constitutive function of recognition. Sections 2 and 3 focus on the relationship between effectiveness and recognition. Section 2 examines situations of effectiveness but lack of recognition (whether due to legal barriers or not). In this section the issue of non-recognized entities in practice will also be analysed. The section ends with the question whether withholding recognition, except for cases of breach of conditions of international law, can be justified, especially in relation to the territorial integrity of a parent State. Section 3 deals with the opposite end of the spectrum, i.e. cases involving widespread international recognition of "states" with limited effectiveness. This point leads us to the analysis of State creation as a *process*, in which recognition plays a prominent role (section 4), and includes analysis of both collective recognition and the recognition strategies used by entities seeking statehood. Section 5 focuses on the role of recognition in State creation. The article closes with concluding remarks summing up the findings.

1. LAW AND FACT IN STATE CREATION: EFFECTIVENESS AND (IL)LEGALITY

This section explores the relation between the factual criteria of statehood and the legal conditions attached to recognition by States. The role of the effectiveness criteria is first analysed (1.1), then the legal conditions attached to recognition (1.2), and finally the mutual relations of both elements (1.3).

1.1 "State" as a fact: the criteria of effectiveness

The "criteria of fact" are often seen as the main criteria of statehood, even as the only criteria according to the tenets of a strict declaratory approach.[10] The Montevideo Convention is generally considered to lay out the criteria of statehood: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."[11] Before turning to an analysis of these criteria, it is worth noting that it is doubtful that the Montevideo Convention can be considered as the ultimate list of state criteria. They should rather be considered as indicative elements of the definition of a State. Moreover, this list is not complete and thus in and of itself cannot explain international practice with respect to state creation.

A missing, albeit fundamental criterion of fact and effectiveness is independence. This condition may perhaps be considered subsumed in the conditions of "government" – supposedly independent – and "the capacity to enter into relations with other States."

[10] *See e.g.* S. Talmon, *The Constitutive versus the Declaratory Theory of Recognition: Tertium non Datur?*, 75 British Yearbook of International Law101 (2004).

[11] Article 1 of the Convention on the Rights and Duties of States, Montevideo, Uruguay, 26 December 1933.

The criteria of population and territory seem self-evident as the role and the *raison d'être* of a State is to organize a political community of people inhabiting a given territory. There is no upper or lower limit concerning either the population number or the size of the territory.[12] However States "must possess some territory", even "an extremely small area, provided they are independent."[13]

External State borders need not to be precisely delimited,[14] as was already confirmed in the case of Poland's borders in the years immediately following its independence in 1918.[15] Moreover, many international borders are not precisely delimited and/or are the object of disputes, without casting any doubt on the statehood of the disputing State-parties.

A fundamental element of the definition of statehood is the effective and exclusive control of some territory. The exclusivity of control means factual independence. In turn, statehood equals *de jure* independence and sovereignty. The condition of effective government is closely linked to the criteria of territory: the government should be able to exert effective control over the given territory. There is some disagreement over the extent of effective control over a territory; in the classical doctrine this condition was quite strictly enforced.

The above criterion has been defined as "the most important single criterion of statehood, since all the others depend upon it."[16] Indeed, an effective and independent government is crucial to fulfil the criteria of factual independence and the ability to enter into relations with other States. At the same time however, this criterion is relative. In cases of self-determination in a colonial situation, a lower level of effective control has been required (and in some cases hardly any control at all).[17] In these cases the accession to independence was seen as essential to fulfil the right to self-determination of the colonized people. Independence from the colonial power, defined in practice as the withdrawal of the administrating power and its relinquishment of any claim to sovereignty, was deemed sufficient to grant recognition to a new State.

In cases of non-consensual secession or the dissolution of a federal State, the scope of control is more controversial. In principle a higher threshold is needed, although in practice a weaker control has also been seen as sufficient.[18] However, this may be no more than a question of appreciation: in reality the requirement of effective control by a government over its territory is difficult to assess and open to contestation. It has also

[12] Crawford, *supra* note 2, p. 46.

[13] *Ibidem*, pp. 46-47.

[14] *Ibidem*, pp. 48-52.

[15] "In order to say that a State exists… it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory" – German-Polish Mixed Arbitral Tribunal, *Deutsche Continental Gas-Gesellschaft v. Polish State*, 1 August, 1929.

[16] Crawford, *supra* note 2, p. 56.

[17] *See below*, section 3.

[18] *See* C. Warbrick, *Recognition of States Part 2*, 42 International and Comparative Law Quarterly 433 (1993) on British practice concerning the Republics of former Yugoslavia.

been argued that the application of this criterion is flexible, and that there is a presumption of existence of an effective government.[19]

A second fundamental criterion is independence,[20] and factual independence is generally considered as a fundamental requirement of statehood.[21] *De jure* independence, a synonym of sovereignty, is part of the definition of a State, sovereignty meaning that there is no formal authority above the State other than international law and a direct submission to international law. One should distinguish here between the definition of a State (independence *de jure*) and the criterion for statehood of "attainment of independence *de facto*", which is linked to the process of State creation and the recognition of a new State.

Independence *de jure,* and thus sovereignty, is the exclusive right to carry out the governmental function in a given territory and is part of the definition of a State and one of its attributes.[22] These attributes are protected by international law. They belong to every existing State. However, they are not strictly speaking "criteria" for statehood, rather they are bestowed upon the State once it has come into existence. They thus come later: the State possesses *de jure* independence and sovereignty only when it has already *become* a State, not when it is only *in the process* of establishing its statehood. During the process of establishing statehood, *de facto* independence is a fundamental criterion, although not in and of itself sufficient.

The fourth criterion of the Montevideo Convention – the capacity to enter into relations with other States – can be understood in two ways. In a first, functional sense, it is the ability to have direct relations with other States and to develop an independent foreign policy. In this sense it is a capacity inherent in statehood. Insofar as this capacity depends on the ability to effectively control a territory to the exclusion of other States, and to answer for its international relations, it can be defined as "a conflation of the requirements of government and independence."[23]

However, the capacity to enter into relations with other States can also be understood as the *legal capacity* to enter into relations subject to international law with other States. By definition, this legal capacity can only be recognized by other States. Existing States, via recognition, agree to put their mutual relations on the plane of international law. They

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[19] Th. Christakis, *The State as a 'Primary Fact': Some Thoughts on the Principle of Effectiveness*, in: Marcelo G. Kohen (ed.), *Secession – International Law Perspectives*, Cambridge University Press, Cambridge: 2006, p. 144.

[20] *Contra* Talmon, *supra* n 11, p. 116: "Factual independence of public authority as an additional criterion for statehood does not appear to be borne out by State practice'. According to this view, a State is constituted as a State in international law as soon as it fulfils the three criteria of territory, population and public authority, not necessarily independence in practice.

[21] Crawford, *supra* note 2, p. 62; Christakis, *supra* note 20, p. 145.

[22] Sovereignty was famously defined by Max Huber in the Island of Palmas case: "Sovereignty in the relations between States signifies independence. Independence 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." PCA, *Island of Palmas (or Miangas), United States of America v. Netherlands* (arbitrator Max Huber), 4 April 1928.

[23] Crawford, *supra* note 2, p. 62.

are the only actors of international relations able to conduct an assessment of the new entity's capacity to enter into relations with them under international law and to decide to put their mutual relations on this level and treat the other entity as a State, and not as a *de facto* authority. This capacity, earned via recognition, is a central feature of a State.

As a concept of international law, the capacity to enter into relations with other States depends on recognition. However "capacity", in the ordinary meaning of "ability", is a requirement which is equivalent to the criterion of government and can be fulfilled by *de facto* authorities, which are not treated as States. In practice *de facto* entities often possess a "ministry of foreign affairs" and have some sort of relations with neighbouring States, even if only to regulate some matters of common interest (for example in Somaliland).[24] And in the secessionist Moldovan region of Transnistria there is a government with a ministry of foreign affairs – the secessionist authorities have relations with Moldova and with Russia, however they have only "diplomatic relations" with other non-recognized entities of the post-Soviet area, e.g. Abkhazia and South Ossetia.

This criterion thus means that it is a *legal* capacity, the capacity to enter into relations with other States *on the level of international law*. It is dependent on the willingness of the existing States to put their relations on this level, in other words to treat this entity as a State, i.e. to recognize it.[25] However, as the next sub-section shows, recognition is dependent on the compliance with and respect for other legal conditions.

1.2 Legal conditions and non-recognition

The criteria of effectiveness have been supplemented by legal conditions governing recognition, and thus the creation of a new State. These conditions of international law have been defined as "rules which, if violated, form a bar to the acquisition of statehood by an otherwise fully effective entity."[26] These rules can be defined as "negative legal conditions', i.e. their breach triggers an obligation on the part of States to not recognize entities created in violation of international law norms, such as the prohibition of the use of force in international relations.

State-like entities have been created following violations of the right to self-determination and the prohibition of the use of force in international relations (Article 2 para. 4 of the Charter of the United Nations and customary law). The latter case is often linked in practice with the lack of factual independence from the sponsor State, whose illicit intervention has allowed the creation of a *de facto* authority. A recognition promulgated in spite of a violation of peremptory norms of international law would itself be a violation of international law.[27]

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[24] B. R. Farley, *Calling a State a State: Somaliland and International Recognition*, 24 Emory International Law Review 777 (2010), p. 808.

[25] Dugard, *supra* note 2, p. 51, writes that it is "an obvious truth that a State cannot comply with the fourth requirement of statehood under the Montevideo Convention without recognition by some States, as it will not be able to demonstrate a capacity to enter into relations with other States."

[26] J. Dugard, D. Raic, *The Role of Recognition in the Law and Practice of Secession*, in: Marcelo & Kohen (eds.), *supra* note 19, pp. 94-95.

[27] Article 40 of the ILC Articles on State responsibility.

Southern Rhodesia and the South African Bantustans are prime examples of entities created in breach of the right to self-determination. The Security Council called upon all States not to recognize Southern Rhodesia after the unilateral proclamation of independence by the white minority regime,[28] while the General Assembly condemned it as being in violation of the right of self-determination of the majority of inhabitants of the country.[29] In the words of John Dugard, "Rhodesia did not become a State because it was created in violation of the principle of self-determination, and because it denied fundamental human rights to the majority of its people",[30] despite its effective control of territory. These were the reasons of the refusal of all States to recognize Southern Rhodesia in accordance with Security Council resolutions, thus withholding State status from this entity.

In the case of the South African Bantustans, non-recognition was based on the prohibition of racial discrimination, as well as on the fictitious creation of these States, established not based on the free will of their peoples but as the result of the policy of *apartheid* carried out by the South African government.[31] It was not only a lack of independence, but vitiation *ab initio*.

The formulation of legal conditions governing recognition is an additional argument in favour of acknowledging the constitutive effect of recognition, as the legality of a State's creation needs to be assessed. In the absence of a central authority, this has to be decided by the existing States.[32] As a result of the existence of legal conditions governing the recognition of statehood the criteria of effectiveness are subject to law – State creation is no longer only a factual question, but also a legal question.[33] In this respect, Brownlie declared that questions of fact are foremost, but "the legal criteria have to be *applied*, and this may call for some rather nice assessments."[34]

Part of the disagreement over the value of recognition stems from a divergence about the meaning of "statehood". Of course, non-recognition cannot change a reality on the ground. A non-recognized, *de facto* authority can still perform some State functions, can call itself a State, and can be, as a matter of fact, a State in the sense of political science. The reality of the *status quo*, the situation on the ground, is of course acknowledged; however, the facts are adjudged illegal and as a consequence "it is the status, and not the 'reality' which is denied."[35]

Thus, if the legality of the process of creation of that authority is negatively assessed by the international community, then the legal status of a State, in the meaning of international law, is denied to the new entity. It has to be stressed that respect for peremp-

[28] Resolutions 216 (1965), 277 (1970).

[29] Among others, resolution 2262 (XXII).

[30] Dugard, *supra* note 2, p. 128.

[31] *Ibidem*, pp. 129-130.

[32] Frowein, *supra* note 3, p. 2.

[33] Christakis, *supra* note 20, p. 165.

[34] Brownlie, *supra* note 2, para. 10.

[35] *Ibidem*, para. 7.

tory norms of international law is not in itself a criterion or a condition of statehood, but are conditions of its recognition by third States. Recognition, as a pre-requisite for statehood, is itself conditioned on respect for some fundamental principles of law during the process of creation of the entity claiming state status.

The legality of the creation of a new would-be State thus necessarily has to be assessed. In the context of the current stage of development of the international community, this assessment can only be made by the already existing States. The fulfilment of the conditions for recognition opens the way to international recognition by existing States, even though it is by no means automatic: a process of State creation not in breach of peremptory norms does not mean that international recognition will automatically take place. As we shall see in more detail below, States retain a certain margin of appreciation. Conditions of recognition are not positive conditions, whose fulfilment leads automatically to international recognition and statehood; but negative conditions, the non-fulfilment of which creates an obligation on the part of other States to deny recognition.

Moreover, these rules cannot be called "conditions of statehood" strictly speaking, because in practice it is often their breach by another State which triggers an obligation on the part of the international community not to recognize the entity thus created. For example, in the case of a prohibition of the use of force in international relations, the use of force by a "sponsor State" may lead to the creation of a *de facto* authority on the territory of another State. It is the violation of a peremptory rule of international law *by the sponsor State* that gives rise to the obligation of non-recognition of the *de facto* authority.

The development of legal conditions attached to international recognition has led to a reassessment of the respective values of fact and law in State creation.

1.3 Law and facts in State creation

Both facts and the law play a role in the creation of a new State. With respect to the former, some effective existence of the entity claiming to be a State is necessary; without it recognition would be a political declaration without any legal effect. But the factual criteria need to be complemented by recognition to lead to the creation of a new State.

In this regard, it is misleading to speak of the "birth" of a new State, or to define a State as "natural-born".[36] A State is not a natural person, but a legal entity. Statehood is a legal status to which rights and duties are attached. A State does not appear in the world like a natural person does, but is a community of natural persons which acquire a specific status under international law.

States are not secondary subjects of international law, such as international organizations; they are not created by other States. However, the legal status of a "State" is granted as a result of international recognition. Statehood is the result of a complex

[36] Talmon, *supra* note 11, pp. 2-6.

relationship between facts on the ground, i.e. the actual existence of an independent and effective authority, and the acquisition of international legal personality.

The conceptual difficulty which arises is due to the fact that States are the primary subjects of international law; they exist by themselves independently, without the contribution of any other State. This building of the State in an autonomous manner is the very definition of sovereignty in its internal sense. However, in the complex process of State creation, the existing States play a role, often via international organizations (e.g. admission to the UN as a collective recognition; the importance of membership in international organizations, or being a party to multilateral treaties as part of a recognition strategy).

Hence, while States are not created by other States, their status and their international personality depends on recognition by the existing members of the international community. It also happens that States are actually created, or at least maintained or kept together, by the international community, such as Bosnia and Herzegovina after the Dayton agreements. which has been continuously recognized as a State.

Comparisons of State creation with the birth of a human being are misleading and do not assist in understanding the process of State creation or the criteria of statehood. Rather than being a natural person, a State is the archetype of a legal entity. Being a State is above all a legal status. Hence, the "facts on the ground" do not create a State within the meaning of international law. The cases of non-recognised entities demonstrate the constitutive value of recognition in the acquisition of the status of a state.

2. EFFECTIVENESS WITHOUT STATEHOOD: THE CASE OF NON-RECOGNISED ENTITIES

As stated above, the cases of non-recognised entities prove the essential value of recognition as a pre-requisite of statehood. Effectiveness without recognition can originate from a breach of peremptory norms of international law giving rise to an obligation of non-recognition (2.1). Recognition may also be withheld for reasons other than a legal obligation to withhold. The role of territorial integrity and its relation to the non-recognition of secessionist entities is thus analysed (2.4). Whatever their origin, non-recognized entities have an undefined place in the international legal system, and their qualification depends on the legal context (2.2). The innumerable difficulties they face underline the crucial importance of recognition in the contemporary world (2.3).

1.1. Legal conditions: non-recognition and *de facto* entities

As was described above, the proclamation of independence of Southern Rhodesia by a racist regime, in violation of the people's right to self-determination, led to an obligation on the part of all States to not recognize this entity as a sovereign State. Southern Rhodesia was not treated as a State by UN organs; the UN's position was that the process of creation of the Southern Rhodesian State was illegal and invalid, and thus it was not a State, nor was the situation merely one of non-recognition of an objectively existing

State.[37] As a result of this collective non-recognition, Southern Rhodesia did not acquire State status despite its effectiveness.

Following the creation of the "Turkish Republic of Northern Cyprus" (TRNC) in the territory occupied by Turkey after the 1975 invasion of Cyprus, all States were called upon, in UNSC resolutions 541(1983) and 550(1984), to not recognize the TRNC and not to aid the "secessionist entity". The Security Council also declared "illegal and invalid" "all secessionist actions", including the exchange of ambassadors between Turkey and the TRNC. This entity is not treated as a "non-recognized State" by the international community, but as a secessionist entity that cannot attain statehood because it was established as the result of a violation of the prohibition of the use of force in international relations.

Indeed, the effect of non-recognition is the impossibility for the entity concerned to acquire statehood. In the words of John Dugard, "the United Nations may order the nonrecognition of an entity that aspires to statehood and thereby effectively deny it international legal personality."[38] As an application of the general principle *ex iniura ius non oritur*, the legal status of a State cannot be granted to an illegally created entity.

At the same time, facts do have some consequences, and the above-mentioned principle must be balanced against the principle *ex factis ius oritur* in some respects. A *de facto* authority must be taken into consideration, which is an illustration of the pragmatic, realistic approach of international law. Hence the creation of an illegal entity may have some valid legal effects, even though the illegality of its creation gives rise to a duty not to recognize the entity thus created *as a State* within the meaning of international law. But state-like institutions and authorities may exist in fact. Some acts may be recognized in the interest of their inhabitants, such as the registry of births, marriages and deaths or private property rights, as the International Court of Justice ruled in the case of acts of South African authorities after the illegal annexation of Namibia by South Africa.[39]

International law has to acknowledge factual situations, i.e. the actual state of affairs. In accordance with international law's pragmatic approach, aimed at easing the situation of people suffering from violations of international law, an illegal activity may be regulated by international law. This is also the case in the international humanitarian law of armed conflicts, which regulate armed conflicts independently of considerations of *jus ad bellum*. Similarly, international law regulates situations of belligerent occupation, even though the forceful invasion and occupation of another State's territory is prohibited. Against this background, it should not be surprising that some consequences of the illegal establishment of a *de facto* entity may be regulated by law. The regulation by international law of the consequences of the illegal establishment of a *de facto* entity does not, however, confer upon it any legitimacy.

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[37] Christakis, *supra* note 20, p. 167.

[38] Dugard, *supra* note 2, p. 69.

[39] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, p. 16, para. 125.

Thus the non-recognition of entities as a state begs the question of the entities' place in the international legal system. Of course by definition they cannot possess a legal status recognised by the international legal order. Nevertheless, as they possess some degree of effectiveness, their behaviour may have legal consequences that have to be taken into consideration.

1.2. Non-recognized entities in international law

As indicated, denying statehood to *de facto* authorities begs the question of their place in the international legal system. Not surprisingly this issue is very complex. The status of non-recognized entities is not clear. "Secessionist entities" of course remain legally a part of the "parent State". In cases of their dependence upon the "sponsor-State" which established them, they may be considered as *de facto* organs of the sponsor State in some specific legal contexts. The close links between a *de facto* entity and a sponsor State have been analysed in depth in the case-law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICJ, and the European Court of Human Rights (ECtHR), as well as the international fact-finding mission set up after the 2008 Russian-Georgian war.

The ICTY Appeal Chamber decided[40] that, within the context of "individuals making up an organized and hierarchically structured group", characterized by "a structure, a chain of command and a set of rules as well as the outward symbols of authority",[41] the attribution of internationally wrongful acts to a State is possible if "overall control" over the group by that State can be proven. This attribution "to some extent equates the group with State organs proper."[42] It concluded that the Former Republic of Yugoslavia (FRY) exercised overall control over the Bosnian Serb armed forces to the extent that the latter were merely a *de facto* organ of the former.[43]

This case-law is of interest for our examination, as it establishes that an organized group (in this case exercising *de facto* territorial control) may be considered as a *de facto* organ of the State exercising control over it. Admittedly, the ICTY was chiefly interested in defining relations between the armed forces of the Bosnian Serbs and the army of the FRY within the context of international humanitarian law. Nonetheless, it also observed that "the FRY wielded general control over the *Republika Srpska* in the political and military spheres"[44] and that "overall political and military authority over the *Republika Srpska* was held by the FRY."[45] This case-law was confirmed later[46] and applied to the relations between Bosnian Croat *de facto* authorities and Croatia.[47]

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[40] ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadic*, 15 July 1999, IT-94-1-A.

[41] *Ibidem*, para. 120.

[42] *Ibidem*, para. 121.

[43] *Ibidem*, para 156.

[44] *Ibidem*, para. 157.

[45] *Ibidem*, para. 160.

[46] ICTY, Appeals Chamber, *Zejnil Delalic and others ("Celebici camp" case)*, 20 February 2001 IT-96-21.

[47] ICTY, Chamber of 1st instance I, *Prosecutor v. Tihomir Blaskic*, 3 March 2000, IT-95-14.

The *Republika Srpska* (or Bosnian Serb Republic), a *de facto* entity whose attempted secession from Bosnia and Herzegovina was recognized by no State (and indeed condemned by the UN Security Council[48]), could be seen as a *de facto* organ of the Federal Republic of Yugoslavia. Its armed forces were adjudged to be so tightly coordinated with and dependent upon the FRY's army that they had no real autonomy. In the words of one author, "the acts of the Bosnian Serb army, the VRS, were not those of private persons or of a private group; they were the acts of an entity exercising governmental authority over large parts of Bosnian territory in concert with the Yugoslav army (the VJ) and on behalf of the FRY."[49]

In the *Genocide*[50] case, the ICJ did not reach the same conclusion concerning the applicable criteria, as it applied the test of "complete dependence".[51] However, the Court ruled that should this test be fulfilled, the group or entity may be equated with State organs.[52] The conditions laid down by the ICJ are very strict, but not impossible to fulfil. As it was concerned with the issue of attribution of responsibility for the Srebrenica massacre, it only considered the situation in July 1995, a time in which the links between FRY and the Bosnian Serb leadership were still powerful, but less strong than in previous years.

In a different context, the relations between a *de facto* entity and a sponsor State had to be assessed by the ECtHR in order to determine the jurisdiction of state parties to the Convention. In the case *Loizidou v. Turkey*,[53] the Court was called upon to review the legality of the seizure of the applicant's property located in the Northern part of Cyprus, under the administration of the TRNC. The Court declared that the Turkish army "exercises effective overall control over" the Northern part of the island. Furthermore, in *Cyprus v. Turkey*[54] the TRNC's relationship to Turkey was defined as one of a *de facto* local administration of the sponsor State: "Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support."[55]

Thus the TRNC has been defined, in accordance with the provisions of the ECHR, as a "local administration" of Turkey, and Turkey thus bears full responsibility for its

[48] Resolution 787 of 16 November 1992.

[49] A.J.J. De Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia*, 72 British Yearbook of International Law 255 (2001), p. 275.

[50] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment of 27 February 2007, ICJ Rep 2007, p. 43.

[51] *Ibidem*, para. 392.

[52] *Ibidem*.

[53] ECtHR, *Loizidou v. Turkey*, Judgment of 18 December 1996, Application no. 15318/89, para. 56.

[54] ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, Application no. 25781/94.

[55] *Ibidem*, para. 77.

acts. This solution is closely linked to the specificity of the European Convention on Human Rights as "an instrument of European public order" and the need to avoid any vacuum in the European system of human rights protection.[56] Nonetheless this case law makes a useful contribution to the attempt to determine the legal consequences of the existence of non-recognized entities and their qualification in public international law.

The ECtHR case law was further developed in the case of Transnistria,[57] a region of Moldova which attempted to secede in the early 1990s under the name of "Moldovan Republic of Transnistria" (MRT), with the substantial help of Russian troops. It has continued to survive thanks to the economic assistance of the Russian Federation. The ECtHR's earlier stance was confirmed as a general principle, that "[w]here a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support."[58] The Court had no difficulty in reaching the conclusion that the MRT "remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation."

The expression "local administration" is a qualification consistently used to define a non-recognized entity when it is closely linked to an existing sponsor State through the presence of this State's troops and its large dependence on it. It is important to emphasize that in both the cases of the TRNC and Transnistria, the military intervention of Turkey and Russia, respectively, was decisive to their creation. The fact that foreign military intervention is a direct cause of their existence, linked with the continued presence of sponsor State's forces and the entity's general political and economic dependence on the sponsor State, explains the use of the term "local administration" of the sponsor State.

The nature of the relationship between South Ossetia and Abkhazia and the Russian Federation was analysed by the Independent International Fact-Finding Mission on the Conflict in Georgia. Its analysis concerned the period up to the outbreak of the 2008 armed conflict. In the case of South Ossetia several factors, such as the large number of South Ossetians possessing a Russian passport, the *de facto* control exercised by Russian officials on the governmental institutions of South Ossetia, the presence of Russian citizens in key functions in various ministries and in the security structure, were evidence of South Ossetia's lack of independence and *de facto* control by Russia.[59] Abkhazia was in a similar situation. Many Abkhazians have a Russian passport and vote in Russian elections. However, Russian control over the security apparatus was less extensive than

[56] *Ibidem,* para. 78.

[57] ECtHR, *Ilascu and Others v. Moldova and Russia*, judgment of 8 July 2004, Application no. 48787/99.

[58] *Ibidem*, para. 316.

[59] Report of the independent International Fact-Finding Mission on the Conflict in Georgia, pp. 132-133.

in South Ossetia and there remained a will among the inhabitants to retain some independence from Russia.

In the opinion of the Fact-Finding Mission, South Ossetia was an "entity short of statehood",[60] while Abkhazia was more effective and less dependent on Russia and could thus be qualified as a "State-like entity."[61] It is worth noting that the Mission found that the "claims to legitimacy" of both secessionist entities were "undermined" by the expulsion of ethnic Georgians from these territories. As "Abkhazia does not meet basic requirements regarding human and minority rights, especially because it does not guarantee a right of safe return to IDPs/refugees",[62] it should not be recognized as a State. It seems that the lack of respect for human rights was thus an additional reason not to extend international recognition to these entities. In the case of the expulsion of a part of the population, this may also be linked to a breach of the right to self-determination, as a substantial part of the territories' population is not present anymore and thus unable to take part in the determination of the territory's fate.

A different situation concerns purely *de facto* territorial authority, such as was the case Southern Rhodesia, a rather unique case of a non-recognized entity that was not established by a sponsor State but by internal forces, and thus could boast factual independence. The following sub-section demonstrates that non-recognized entities set up with the decisive help of a sponsor State are often in a situation of dependence towards them. In practice, their options are limited by the lack of international recognition.

1.3. Non-recognized entities in practice

The concrete situation of non-recognized entities in practice highlights the paramount importance of recognition for statehood.

The above-discussed case of the MRT illustrates the vulnerability of a *de facto* authority lacking international recognition. Its existence is generally considered to be possible thanks only to decisive Russian intervention during its secession attempt from Moldova in the early 1990s, as well as Russia's continuing economic and financial assistance. This support clearly demonstrates the MRT's dependence on Russia, i.e. its lack of effective independence. At the same time MRT's sponsor has not shown any wish to extend recognition; Russian authorities prefer to maintain the status quo as a way to exert influence on Moldova.[63] As a non-recognized *de facto* entity, Transnistria is treated as an instrument of Russian foreign policy.

MRT also suffers from its vulnerability towards its sponsor State, i.e. the Russian Federation. It is disconnected from normal international life; for example, it cannot receive foreign direct investment, its currency is not convertible, and it cannot borrow money on the international markets. The only State willing to invest or lend funds is

[60] *Ibidem*, p. 134.

[61] *Ibidem*.

[62] *Ibidem*, p. 135.

[63] *See* K. Calus, *Power politics on the outskirts of the EU: Why Transnistria matters*, LSEE blog, available at: http://blogs.lse.ac.uk/lsee/2014/06/19/transnistria-power-politics/ (accessed 30 May 2017).

Russia, hence its dependence on its sponsor-State is enhanced by the lack of recognition, creating a vicious circle.

Yet the MRT case also shows that a non-recognized entity has to rely on recognized States to survive. In order to function more or less normally and to circumvent problems raised by its undefined status, MRT must rely on institutions involving recognized States. This allows MRT to exist indirectly on the international stage, but also renders it more dependent on its sponsor-State or its parent-State. For example, MRT's goods are exported to the European Union thanks to Moldova's agreement to the registration of Transnistrian companies as Moldovan. In turn, however, they have to adapt to the foreign economic and trade choices made by Moldova, on which they have no influence. In 2008, the EU extended autonomous trade preferences to Moldova, waiving customs duties on imports of Moldovan goods.[64] As Transnistrian companies had the possibility to register in Moldova, their exports to the EU rose sharply.[65] On one hand this somewhat relieved the secessionist region's economy from its almost complete dependence on Russia, but on the other hand it made it dependent on the international trade choices of its "parent-State". As a Deep and Comprehensive Free Trade Area agreement was concluded between Moldova and the EU, MRT, faced with the risk of losing an attractive market, has to adapt to the new legal context, on which it did not wield any influence.

Viewed from the other side of the coin, in their relations with a *de facto* entity the "parent-State" and its partners face a choice between a policy of isolation or engagement. For the non-recognized entity itself, isolation carries catastrophic consequences. Thus MRT's dependence on Moldova is a result of its acceptance to benefit from the Moldovan State's policy of engagement, the only other option being total dependence on Russia. Registration of Transnistrian companies in Moldova was actually in contradiction with the Transnistrian authorities' strict separatist official stance, but it was the only way to access the EU market.

Similarly, in the case of Somaliland non-recognition prevents the non-recognized authority from functioning normally: "[C]ontinued non-recognition has deleterious consequences for Somaliland. Non-recognition denies Somaliland access to 'bilateral donor development assistance' or the support of international financial institutions. It also imperils Somaliland's survival."[66]

The huge difficulties faced by non-recognized entities prove that international recognition is constitutive of statehood in the contemporary world. A non-recognized entity is disconnected from international organizations, international trade relations, and the international financial system. It suffers from isolation and/or dependence on a sponsor State. In the latter case, this factual dependence is also fostered by the lack of

[64] Council Regulation (EC) no. 55/2008 of 21 January 2008.

[65] A. Lupusor, *DCFTA in the Transnistrian Region: Mission Possible?*, Policy Brief, Expert-Group, 20 September 2015, available at: http://www.expert-grup.org/en/biblioteca/item/1173-implementare-aa-transnistria&category=184 (accessed 30 May 2017).

[66] Farley, *supra* note 25, p. 813.

recognition, thus making it all the more difficult to obtain (the vicious circle). In both cases the non-recognized entity is not able to take part in normal inter-State relations.

The analysis of the situation of non-recognized entities in the international legal system clearly shows that without recognition an authority, however effective, cannot be considered to possess international legal personality, which comes only with the willingness of existing States to treat it as a State. This leads to the next point, on the conflict between secession and the territorial integrity of the "parent-State".

1.4. Secession and the territorial integrity of the 'parent state'

In the sub-section above, the effects of a breach of a peremptory norm of international law on the attempt to create a State were analysed. The present section is about the relationship between an attempt to create a State through secession and territorial integrity. Is the territorial integrity of a parent-State able to prevent the creation of a State? In other words, is recognition by the parent-State a necessary condition for the creation of a new State?

In its Advisory Opinion on the Kosovo declaration of independence, the ICJ confirmed that "the scope of the principle of territorial integrity is confined to the sphere of relations between States."[67] Territorial integrity does not apply to an attempt at secession from within the State, leading the Court to judge that "general international law contains no applicable prohibition of declarations of independence."[68] However, this does not mean that recognition of an attempt at secession is always lawful. Premature recognition – before the secessionist entity has managed to consolidate statehood – is a prohibited intervention into the internal affairs of another State. Moreover, contemporary practice shows that agreement to secession by the parent State, often made through its recognition of the secessionist entity as a State, is crucial. That can be illustrated by the examples of Chechnya and Somaliland.

Chechnya fulfilled all the factual criteria of statehood after it proclaimed independence and managed to resist Russian's attempts at re-taking control by force. However, in the absence of any international recognition, it did not benefit from the protection against the use of force granted to States by international law. According to the declaratory theory, the effectiveness of Chechnya's independence should have sufficed to create a State. However, no State has ever treated Chechnya as a State. In the absence of any international recognition, Chechnya cannot be considered as having attained statehood within the meaning of international law.

International law rules on the prohibition of the use of force thus did not apply to relations between Russia and Chechnya; Chechen secession was always treated as a purely internal Russian affair.[69] In spite of Chechnya' real and undisputable effective-

[67] ICJ, *Kosovo* Advisory Opinion, p. 437, para. 80.

[68] *Ibidem*, p. 438, para. 84.

[69] *See e.g.* T. Grant, *The Recognition of States: Law and Practice in Debate and Evolution,* Praeger Publishers, Westport: 1999 at 29; Christakis, *supra* note 20, pp. 146-147; *see also* Dugard, *supra* note 2, pp. 136-138.

ness since 1991 – and at least after the 1996 Khasavyurt Accord putting an end to the Russian Army's attempt at regaining control of the breakaway region[70] – Chechnya has always been treated as a part of the Russian Federation, and the 1999 Chechen-Russian conflict was treated as an internal armed conflict. In this case, opposition to secession by the parent State was clearly the reason, at least at the political level, for the lack of recognition of Chechnya. This example shows that the establishment of *de facto* independence and effective government does not automatically lead to statehood under international law.[71] It also highlights that without international recognition, a territorial entity, however effective, cannot claim the rights and protection afforded to States by international law. Chechnya had no chance to successfully claim the benefit of international norms such as the protection of territorial integrity from third States or the prohibition of the use of force in international relations.

The facts in the case of Somaliland can be distinguished, as it has maintained factual independence and relative stability for 25 years, since the time when the parent State, Somalia, descended into anarchy. However, no governmental authority has existed for several years in Somalia; since its creation the government of transition has not been able to exert effective control over large parts of the country. Even though Somaliland fulfils all the criteria of effectiveness, it has not been granted recognition by any State. However, without recognition it is not regarded as a State. This case demonstrates that recognition has a constitutive effect on statehood within the meaning of international law.[72]

The lack of recognition of Somaliland in spite of its effective existence on the ground may be explained by a political preference on the part of the international community for a settlement of the Somalian conflict based on the concept of a single State. The UN Security Council affirmed the importance of the territorial integrity and unity of Somalia[73] and the creation of a federal state system.[74] The Somaliland question has always been treated as a part of the general collapse of the Somalian State.

A specific insistence on territorial integrity (defended in and of itself, and not in conjunction with the prohibition of the use of force in the UN Charter) can be found in the African Union (AU) Charter.[75] One of the purposes of the AU is "to defend [African States'] sovereignty, […] territorial integrity and independence."[76] The reaction of organs of African organizations, in particular the African Union, to secession attempts has often been to insist on the national unity and territorial integrity of the

[70] Available in English at: http://peacemaker.un.org/russia-khasavyourtdeclaration96 (accessed 30 May 2017).

[71] Christakis, *supra* note 20, pp. 146-147.

[72] *See also* Dugard, *supra* note 2, pp. 53, 56.

[73] For the latest example, resolution 2275(2016).

[74] *Ibidem*.

[75] Theodore Christakis, quoted by F. Ouguergouz and D. L. Tehindrazanarivelo, *The Question of Secession in Africa*, in Kohen (ed.), *supra* note 19, p. 257, fn 16.

[76] Art. 2c OAU Charter (Addis-Abeba Charter); Art. 3.b of the Constitutive Act of the African Union.

State.[77] In the cases of Somaliland and the Anjouan secession attempt, AU organs refused to recognize the secessionist entities, in spite of having realized some level of effectiveness and *de facto* independence.[78]

The recognition of Eritrea following its secession from Ethiopia is not generally considered as a true exception to these "rules", because it concerned a State which had earlier gained independence from a colonial power. Eritrea re-gained independence from Ethiopia, but within the former, colonial borders.[79] At the same time, the resolute non-recognition of Somaliland by the African Union is clearly in contradiction with this earlier practice, as this entity has been designed and created as a revival of the earlier State of Somaliland, which obtained its independence from the United Kingdom in 1960 – even if only for five days – before uniting with former Italian Somalia. The leaders of Somaliland have proclaimed independence and exercise effective control within the borders of the former British Protectorate of Somaliland, thus without infringing the respect of former colonial borders.[80]

This position with respect to Somaliland would seem all the more in contradiction to the usual practice in that the AU recognized South Sudan, a clear case of secession outside of colonial or post-colonial situations. However, the latter case of South Sudan was a case of "consensual secession", even if the parent-State's agreement was brought about by decades of conflict. In the practice of African States and organizations, great weight is given to agreement of the parent-State, whether in secession from former colonial borders, thus respecting the principle of *uti possidetis*, or in cases of "simple" secession, such as in the case of South Sudan.

The question naturally arises: What is the relationship of this practice to general international law? Under international law, agreement by the parent State is not a necessary condition of accession to statehood of a secessionist entity. Territorial integrity does not protect a country from an attempt to secede. If agreement by the parent State were a condition for recognition by third States, and thus for full statehood, an effective entity following secession, however consolidated and long-standing, would not have any chance of ever reaching statehood. It would also mean that territorial integrity actually can be opposed to a secessionist entity, when it is actually only opposable to other States. However, if opposed by a parent-State, a high degree of factual independence is needed.[81]

Somaliland fulfils this condition of factual independence and effectiveness. The lack of recognition, and thus of state status, can be explained by the specific interests of the African Union and international community in the unity of Somalia and in an overall settlement of the Somalian conflict.[82] Moreover, the priority placed by the African

[77] Ouguergouz & Tehindrazanarivelo, *supra* note 75.
[78] *Ibidem*, pp. 270-271.
[79] *Ibidem,* pp. 267-268.
[80] Dugard, *supra* note 2, pp. 139-140.
[81] Crawford, *supra* note 2, p. 63.
[82] Farley, *supra* note 25, pp. 809-810.

Union on this issue is acknowledged by Western States, which show an "aversion to pre-empting the AU [which] stems from a desire not to meddle in Africa's affairs."[83] There is a general preference of States for solutions to internal conflicts that favour territorial integrity and State unity. For obvious reasons, States are wary of recognizing entities established by unilateral secession attempts as States.

Faced with this situation of an effective and reasonably stable entity lacking state status, and thus confronted with huge difficulties in their day-to-day functioning, some authors advocate Somaliland's sovereignty in a progressive fashion,[84] while others more decisively state that Somaliland fulfils the criteria of statehood and thus should be recognized as a State by the international community.[85]

Recognition by the parent-State is not, strictly speaking, a legal condition of statehood or of recognition by other States, but in practice it is often crucial. The case of Kosovo perfectly illustrates the difficulties involved with recognition of a unilateral secession against the opposition of the parent-State. While Kosovo has attracted many recognitions, at the same time it continues to face strong opposition, thus leaving its status ambiguous.[86]

This section on effectiveness (without recognition) has shown its essential character in the definition of a new State. However its value in cases of a weak effectiveness greatly depends on the legal and political context. Thus cases concerning the recognition of statehood in situations of limited effectiveness on the ground are dealt with in the next section.

3. STATEHOOD WITHOUT EFFECTIVENESS: CASES OF LIMITED EFFECTIVENESS BUT BROAD RECOGNITION

The above sections have shown that international recognition is of immense importance for effective entities seeking statehood. Effectiveness alone does not make a State; recognition is an additional but necessary criterion of statehood.

In the opposite case scenarios, i.e. of entities displaying limited effectiveness, international recognition can have a status-creating effect. In international practice, entities with weak effectiveness, e.g. where the government does not control the entire territory, is highly ineffective, or is violently contested from the outset of its "independence", may nevertheless be recognized as a State. There are even cases where the governmental authority has been purely nominal, was contested, and large parts of the territory were outside its control.

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[83] *Ibidem*, p. 812.

[84] N. Y.S. Ali, *For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination*, 47 Cornell International Law Journal 417 (2014).

[85] Farley, *supra* note 25, p. 787.

[86] *See below* section 4.

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Examples include the accession to independence of the Belgian Congo in 1960, when the government, itself divided in two camps, did not control the huge territory of the State and was confronted with secession attempts. Moreover, a state apparatus was almost non-existent.[87] Guinea-Bissau was recognized by numerous States and was still fighting for its independence.[88] It is possible to add the case of Bosnia and Herzegovina, which was recognized as a sovereign State even though the central government did not control much of its territory and was faced with secessions heavily supported by foreign powers, i.e. the Federal Republic of Yugoslavia and Croatia.

These cases are characterized by a serious weakness of the new authorities, to the point that there were serious doubts about the fulfilment of the most important factual criterion – an effective government. Nevertheless these entities became States within the meaning of international law because of their international recognition: a collective and virtually unanimous (in the above two cases at least) willingness on the part of the international community to treat these entities as States, i.e. to acknowledge that they possessed the rights and duties of States.

Recognition in these cases was the decisive criterion of statehood. Thus the question arises whether "effective government" is a criterion of statehood, or rather a part of the definition of a State and of a State's functions or obligations, but which does not necessarily always have to be present in practice. In some cases it is closer to a wish made on behalf of the new entity, or may be seen as an obligation on the part of the new entity to build up a functioning State. This is often done in coordination with the international community, through State and Nation-building.

Even though an effective government was lacking, international recognition was granted in the cases above because the legal basis of statehood was deemed more important than strict respect for the factual criteria. In cases of decolonization (for example, the Democratic Republic of the Congo, Guinea-Bissau), the realization of the right to self-determination constituted the fundamental legal basis for the recognition of the new State(s).[89] Factual independence from the colonial power was deemed more important than the presence of an effective government. The new State could even be represented by a nominal government. The new States' right to independence, in colonial situations based on the right to self-determination, guaranteed their international recognition even when the criterion of effective government was absent. Despite the lack of effective government, the new State's right to exercise its authority was recognized. After independence was granted by Belgium, the right to govern this territory was recognized as belonging to the new Congolese State.[90] The new State's independence did not breach the administrative powers' territorial integrity, and recognition was rather a tool for the international community to insist on the right of

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[87] *See* Crawford, *supra* note 2, pp. 56-57.

[88] Cited by Christakis, *supra* note 20, p. 149.

[89] UNGA Resolution 1514(XV), Declaration on the granting of independence to colonial countries and peoples.

[90] Crawford, *supra* note 2, p. 58.

the new State to exist rather than the recognition of an effectively functioning State apparatus.

The situation of Bosnia and Herzegovina is different, as it was recognized despite the lack of agreement and recognition of the parent State. The characterization of the breakup of the Socialist Federal Republic of Yugoslavia (SFRY) as a "dissolution",[91] and not as a series of secessions, allowed third States to avoid waiting for the agreement of the "parent-State" to extend international recognition to the new States. As the SFRY was considered extinct, there was no longer a central authority able to consent to the 'secessions'.

These cases illustrate that statehood is a legal status, encompassing the right to govern the territory to the exclusion of all other States. To be effective, this right has to be recognized by the other States, as the legal status of a State has significance in only in relation to the other primary subjects of international law.

At the time of attaining its independence, South Sudan also had only a limited control over its territory. However, in its case its secession took place with the agreement of the parent-State. In the South Sudan case the relinquishment by Sudan of any claim to sovereignty was paramount.[92] Following its independence, South Sudan was quickly admitted to the United Nations and recognized by most States of the international community. Thus in this case, the relinquishment by the parent State of claims to sovereignty was crucial and opened the way to international recognition, despite the limited effectiveness of the new State.[93]

In a case of "early" recognition of an entity, i.e. before it displays an effective government and while it lacks the consent of the parent State to secession, such recognition would most likely be deemed premature and thus an illegal intervention into the parent State's internal affairs.

This also appears to be the case when State authorities "disappear" (so-called "failed States"). Even if there is no central government anymore, the international personality of the State does not disappear. There may be no State within the meaning of political science, but the State within the meaning of international law is still considered to exist (i.e. the case of Somalia in the 1990s). However it is not able to agree to secession of part of the country. Nevertheless, the case of the non-recognition of Somaliland was rather due to the international community's preference for a comprehensive settlement which maintained Somalia's territorial integrity. Only policy preferences make it possible to distinguish this case from the SFRY: both States were "in a process of dissolution"; however, in Somalia's case there was a continuous preference for a settlement within the framework of a single State. At the same time, there is nothing in international law to justify treating federal States and unitary States differently; the State's internal organisation is not relevant in this regard.

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[91] Arbitration Commission of the Conference on Yugoslavia (Badinter Commission), Opinion no. 1.

[92] *See* J. Vidmar, *Explaining the Legal Effects of Recognition*, 61 International and Comparative Law Quarterly 361 (2012), p. 368.

[93] J. Vidmar, *Territorial Integrity and the Law of Statehood*, 44 The George Washington International Law Review 101 (2012).

The central role of recognition in the building of the international personality of a new State explains the efforts devoted to "recognition strategies" by States *in statu nascendi*, in parallel with their consolidation of effectiveness on the ground. Entities aiming at full statehood use recognition and the build-up of their position in international law to help consolidate their statehood on the ground. Recognition may then be used against the State from which independence is being sought. However, because the acquisition of statehood is often a lengthy process some territorial entities are doomed to have ambiguous status for a prolonged period, during which they are in the so-called "grey zone": not yet fully States, but something more than "non-state actors". The role of recognition in this process of state creation is dealt with in the next section.

4. THE GREY ZONE OF STATEHOOD: ACQUISITION OF STATEHOOD AS A PROCESS

As has been shown, the acquisition of state status is a complex process, whereby the consolidation of the effective existence of the entity in reality and its quest for recognition are intertwined. International practice has evolved from individual recognition by individual States to patterns of collective recognition (4.1). Collective recognition, through membership in universal international organizations and becoming party to multilateral treaties, is thus used by would-be States in their "recognition strategies" (4.2).

4.1. Collective recognition of new States

Analysis of international practice shows that the acquisition of the legal status of a State (i.e. State creation) is a process wherein effectiveness on the ground and a parallel quest for international recognition both play a fundamental role. Effectiveness and recognition are often mutually reinforcing, while lack of recognition increases the lack of independence of non-recognized entities. Would-be States thus use a legal strategy of progressive recognition to advance their cases. Membership in international organizations, becoming a party to multilateral treaties – all are treated as steps towards international recognition and the achievement of statehood.

Admission to the United Nations is central to the strategies employed by non-recognized entities. Admission to the UN may be treated as an act of collective recognition: "all other States within the United Nations accept the existence of each other as legal persons, even if they do not recognize each other politically."[94] Admission into the United Nations secures the existence of a new State as an international legal entity. It is the primary aim of any secessionist entity aspiring to statehood.[95]

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[94] Dugard, *supra* note 2, pp. 57-58.

[95] *Ibidem*, p. 58.

Admission to the UN forces all UN member States to treat the new member as a State, which is "the essential function of the legal act of recognition."[96] However, in the practice of the Secretary General of the UN with respect to international treaties the problem of determination of States able to become a party to a multilateral treaty appeared. The basic question was: When a treaty is open to "States", how is the Secretary-General to determine which entities are States? The response of the Secretary General was the following: "If they are Members of the United Nations or Parties to the Statute of the International Court of Justice, there is no ambiguity."[97] Based on this, it seems clear that a member State of the UN or State-party to the ICJ Statute is a "State" within the meaning of international law.

When a new State is admitted to the UN, there is a consensus, and thus no ambiguity. Difficulties appear in cases of non-admission (e.g. Kosovo, Palestine), either because of the veto of a permanent member of the UN Security Council or because of failure to gain the required majority in the General Assembly. In such a case, entities seeking statehood try to become members of other international organizations. In the words of the Report of the Secretary General: "Since that difficulty did not arise as concerns membership in the specialized agencies, where there is no "veto" procedure, a number of those States became members of specialized agencies, and as such were in essence recognized as States by the international community."[98] In turn, the "Vienna formula" opens the participation in a multilateral treaty to, for instance, "all States Members of the United Nations or of any of the specialized agencies."[99]

Thus the next sub-section focuses on the recognition strategies of aspiring States, based on the examples of Kosovo and Palestine.

4.2. Aspiring States and recognition: the cases of Kosovo and Palestine

Kosovo proclaimed independence from Serbia on 17 February 2008. The international administration of Kosovo has been somewhat reduced, and the Kosovar government has increased its effective control over the territory. Kosovo has applied a voluntarist strategy of international recognition, garnering – according to its Ministry of Foreign Affairs – recognition by 111 States so far,[100] or more than half of the members of the United Nations. Nevertheless its status remains ambiguous.[101]

States are not usually ready to recognize the independence of entities established following a non-consensual secession, i.e. where there is no agreement or recognition by the former sovereign of the secessionist entity as a State. This has led many States

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[96] Hans Kelsen, *The Law of Nations: A Critical Analysis of Fundamental Problems*, Stevens & Sons, London: 1951, quoted by Dugard, *supra* note 2, p. 62.

[97] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, doc. ST/LEG/7/Rev.1, para. 79.

[98] *Ibidem*.

[99] Article 81 of the Vienna Convention on the Law of Treaties.

[100] *See* http://www.mfa-ks.net/?page=2,224 (accessed 30 May 2017).

[101] *See* Vidmar, *supra* note 93, pp. 143-144.

which recognized Kosovo to argue that it is a *sui generis* case, i.e. one that cannot be a precedent for other, similar cases.

However, Kosovo's independence and recognition cannot be considered as *sui generis*. While it is a very specific set of facts, such is the case in many situations of secession and subsequent accession to independent statehood. The specific circumstances of Kosovo's case should not place it outside the legal regime.[102] The line of argument that there is no precedent is "normatively undesirable, because it undermines the very fabric of international law."[103]

Several circumstances are legally relevant, and while their combination in Kosovo may well be very rare, and the precedent thus created "narrow",[104] it should not overshadow the fact that they still form the basis of an evolution in the law and practice of recognition. In any case, given the current lack of consensus it is all the more a part of the debate about the circumstances in which unilateral secession may be accepted and a secessionist entity recognized as a State.

Kosovo's path to independence was characterized by an internal armed conflict, followed by ethnic cleansing, and subsequently by the establishment of an international administration. Resolution 1244 is still in force and the international administration it set up is still functioning, even though it proclaimed the end of supervised independence and has transferred powers to the local administration.[105] Resolution 1244 does not contain any definitive decision as to Kosovo's final status, but does refer to "respect for the territorial integrity of the FRY". As such it does not bind Kosovar authorities,[106] but it may have been a factor which prevented States from recognizing Kosovo.

This is also a case of conflicts between the international regime created by a resolution of the UN Security Council, the evolution of the situation on the ground, and the expectations of a part of the international community. At the same time, the political situation has made it impossible to reach an agreement in the Security Council on changes to resolution 1244, or to a final settlement.

The international legal regime should be able to evolve over time to respond to changing circumstances. Over the ensuing years, the Kosovar government has progressively established its authority over "its" territory and population. Moreover, the re-integration of Kosovo into Serbia seems highly impracticable and/or improbable, as evidenced by the failure of the Ahtisaari plan. In light of the lack of agreement on autonomy, and the strong opposition to re-integration by inhabitants of Kosovo, in-

[102] H.H. Koh, *Reflections on the Law and Politics of the Kosovo Case*, in: M. Milanovic, M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion*, Oxford University Press, Oxford: 2015, p. 350.

[103] A. Peters, *Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?*, in: Milanovic & Wood (eds.), *supra* note 102, at p. 309.

[104] Koh, *supra* note 102, p. 359.

[105] J. Crawford, *Kosovo and the Criteria for Statehood in International Law*, in Milanovic & Wood (eds.), *supra* note 102, p. 286.

[106] ICJ, *Kosovo* Advisory Opinion, p. 449, para. 114.

dependence was seen by many as the only solution. Kosovo thus seems to be a case of "remedial secession", due to the earlier grave human rights violations and linked to an entrenched factual separation with Serbia, making re-integration politically difficult. Kosovo was able to use the period of international supervision to build its state structure on the ground and to convince other states of its ability to acquire independence. The internationalized process of state-building was no doubt decisive in the parallel processes of the creation of state structures and international recognition.

The case of Palestine is a prime example of the process and strategy of recognition used by those entities seeking to gain international recognition, always treated in practice by the authorities of would-be States as the key to full statehood. The question of the rights of the Palestinian people, the legal basis for its statehood, and the evolution of the legal issue since 1948 will not be treated here.[107] Instead this sub-section focuses on the Palestinian strategy of international recognition and its influence on the status of Palestine.

To date, 132 member States of the United Nations have recognized the State of Palestine. In addition, the "State of Palestine" was granted "non-member observer State status in the United Nations" by the General Assembly.[108] Jure Vidmar makes the point that "statehood cannot depend on voting procedures in international organizations."[109] Moreover, the status of observer does not wield the same effect as admission to the organization,[110] as the "Observer State" does not enter into treaty relations with member States. Furthermore, while many arguments are presented against the idea of "implicit statehood" through a vote in the General Assembly, at the same time it can be considered that voting in favour of the resolution implied at least an implicit, *de facto* recognition. A vote in the General Assembly cannot be treated lightly by member States, and the granting of Observer State status means a willingness to treat Palestine as a State, and thus carries with it *de facto* recognition.

Both Kosovo and Palestine are carrying out a strategy of recognition through membership in international organizations and by becoming parties to treaties and dispute settlement bodies, as highlighted by the recent developments surrounding Kosovo's and Palestine's respective applications to the Permanent Court of Arbitration.[111]

Statehood is the result of a dialectical process between fact and law. In both cases, the partial recognition and uncertain effectiveness have created an ambiguous legal status for both parties, putting them in the so-called "grey zone". These borderline cases show that the path to statehood is not always clear-cut, with definitive answers on the existence or non-existence of a State. There can be a "*status mixtus*" or "pre-State".[112]

[107] *See* Crawford, *supra* note 2, p. 434.

[108] UNGA, resolution A/RES/67/19 of 29 November 2012, para. 2

[109] J. Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 Chinese Journal of International Law 19 (2013), p. 22.

[110] See above on collective recognition.

[111] G. Zyberi, *Membership in International Treaties of Contested States: The Case of the Permanent Court of Arbitration*, ESIL Reflections No. 5, 10 March 2016.

[112] J. Weiler, *Editorial*, 24 European Journal of International Law 1 (2013), p. 1.

The next section addresses the conundrum of recognition as a constitutive element of state creation.

5. THE LIMITS TO ACKNOWLEDGING THE CONSTITUTIVE EFFECT OF RECOGNITION

The constitutive effect of recognition in contemporary international law is a consequence of the development of the legal conditions of recognition and the need to assess the legality of State creation. This assessment can only be carried out by existing States. Acting collectively, their recognition is the difference between being and not being a State in the meaning of international law. The weight of recognition is confirmed by the lack of international legal personality of non-recognized entities, their situation in practice, the statehood of entities with limited effectiveness but general recognition, and the importance of recognition for aspiring States.

Acknowledging the constitutive effect of recognition does not solve all the issues. A classical criticism of the constitutive approach is that a lack of international consensus can lead to recognition by only some member States, which leads to uncertainty and ambiguity as to the status of certain territorial authorities. However, the unsatisfactory nature of such a situation does not render it false or inappropriate. It reflects the complex nature and ambiguities involved in international practice. That said, there is nevertheless no fully satisfactory answer to the question: How many recognitions are needed to undoubtedly be a State? Admission to the United Nations has the value of collective recognition. A very large number of recognitions may even be conclusive. But a large number short of that, as in the case of Kosovo, does not yield any clear solution to the problem; and a widespread but not general recognition can create ambiguity rather than clarify the status of an entity.[113] As noted by one author: "How much recognition, and by whom, are questions that will remain with fuzzy edges. But no more fuzzy than when similar questions are posed as regards the emergence of new norms of customary international law."[114]

The main legal problem arising from this ambiguity of status is the question of the legal obligations of the non-recognizing States towards the non-recognized State.

The non-recognition of Israel by some Arab States, or the policies of non-recognition of East Germany by Western States and of West Germany by Eastern bloc States during the Cold War, in spite of their membership in the UN, are cases of "political" non-recognition, i.e. where non-recognition is an outcome of political disagreement. Common UN membership means that they accept each other's legal status as member States, even if they do not have diplomatic relations. Non-recognition by some States does not mean that international law is not applicable between them, i.e. that they do not have mutual obligations under international law (for example, as a minimum, to not resort to force). Political non-recognition – as expressed by a minority of States

[113] Vidmar, *supra* note 93, p. 144.

[114] Weiler, *supra* note 112, p. 3.

– does not influence the statehood of the non-recognized State and thus does not diminish the existence of international law obligations between them.[115]

When a "State" non-member of the United Nations is not recognized by a quite large number of States, the issue is more complex. At least an entity possessing some effectiveness and a substantial number of recognitions, such as Kosovo, has some solid claims to be treated as a State, even in the absence of an international consensus. As such, the non-recognizing States which ignore statehood when there are serious claims to this status (especially in cases of widespread recognition) "put themselves legally at risk if they ignore the basic obligations of State relations."[116]

Political non-recognition can be distinguished from legal non-recognition because of a violation of a norm of international law or a lack of real independence, often accompanied by a clear position of the UN on an obligation not to recognize, as in the examples of Southern Rhodesia and the TRNC. In these cases, there is a legal obligation of non-recognition and not to treat the entity as a State within the meaning of international law. In other words, legal non-recognition denies the new entity the legal status of State, whereas political non-recognition is more of a political statement and does not necessarily entail a refusal to accept the State's legal personality.

A typical case of political non-recognition was the withholding of formal recognition of Macedonia. International recognition by a majority of States only happened several months, and in some cases even several years, after the State had actually been established.[117] Moreover, no State contested the establishment of an independent Macedonian State, even Serbia (i.e. there were no territorial claims by the parent-State; independence was proclaimed as the SFRY was engaged in a process of dissolution). Instead it was a case of political non-recognition due to disagreement over the name of the new State, accompanied by *de facto* recognition as there clearly was a readiness to treat Macedonia as a State.[118] There was a clear recognition that Macedonia possessed the rights and duties of a State, but several States, especially members of the European Community, did not want to enter into diplomatic relations with Macedonia under its constitutional name. The EC stated that it was ready to recognize Macedonia as a State, which shows clearly that the lack of formal recognition was due to political reasons (the opposition of Greece to the use of the name "Macedonia"), but at the same time the EC generally acknowledged the existence of Macedonia and treated it as a State;[119] "[s]ince the issue standing in the way of recognition did not go to statehood, it is proper to conclude that Macedonia's status as a State was not in question."[120]

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[115] Frowein, *supra* note 3, para. 12; Dugard, *supra* note 2, pp. 61-64.

[116] Brownlie*, supra* note 2*,* para. 13.

[117] *See* M. Wood, *Macedonia*, in: Max Planck Encyclopaedia of Public International Law, OPIL Oxford University Press, Oxford: 2010.

[118] *See* Vidmar, *supra* note 92, p. 372.

[119] Warbrick, *supra* note 18, p. 437.

[120] *Ibidem,* p. 438.

Political non-recognition can thus be compared to a refusal to enter into diplomatic relations with a State. Political non-recognition does not call into question the status of the new State; it is often accompanied by a *de facto* recognition of the State.

CONCLUSIONS

International practice shows that international recognition plays a fundamental role in State creation. It is a pre-requisite of statehood under international law – a necessary, but not sufficient, condition of the acquisition of the status of a state.

The usual definition of a "State" according to the Montevideo Convention comprises the existence of an effective government exercising authority over a territory and a population independently from any other State, and the capacity to enter into relations with other States. This last criterion has been defined as a consequence of statehood and of government and independence, and as such is independent from recognition by other States. This approach is coherent with the conception of State creation as a matter of effectiveness. However, it has been shown in this paper that this capacity may be better understood as the *legal capacity* to enter into relations with other States, which is determined by already existing States themselves through recognition.

Moreover, the essential criterion of effectiveness has been complemented by conditions established by international law. Instead of being a legal fact (effectiveness creating legal consequences), State creation has become a process governed by international law. In the absence of a central authority, the legality of State creation can only be assessed by other States. Their recognition of the validity of the creation of the new State is thus constitutive of statehood under international law. The appearance of international law criteria changes the value of effectiveness, and thus the relationship between fact and law, and as a consequence the value of recognition. As State creation becomes a matter of international law, recognition becomes a legal condition of statehood.

The importance of the legal conditions is proven by the non-recognition of those entities created as a result of a breach of international law; however effective they may be, non-recognition, as a sanction of the illegality of their creation, denies them statehood. In most cases, their dependence on a sponsor State causes them to be considered as not much more than an organ of that State, although it must be borne in mind that such findings have been arrived at in specific legal and factual contexts. The practice of non-recognised entities, and/or aspiring States, illustrates that recognition is indispensable to attaining a meaningful existence in the contemporary international system.

The territorial integrity of the parent State is also a barrier to recognition of the statehood of a seceding entity. Although recent practice has evolved towards greater ambiguity in this respect, nevertheless the reactions to the independence bid of Kosovo have shown that recognition of a secession without the parent State's acceptance is not generally accepted; even States which recognised Kosovo have strived not to treat it as a precedent. The case of Somaliland also shows the weight still attached to territorial integrity, even in a situation of dissolution of the "parent-State". It also proves a point

made throughout this article: effectiveness and factual independence are of limited value without international recognition, which is how state status is ultimately acquired.

The value of recognition in situations of limited effectiveness on the part of the aspiring state varies, depending on the legal context. In cases of decolonisation, recognition acknowledges the right to statehood of the new State despite its sometimes limited effectiveness. This has constituted a fundamental step in the development of the legal aspect of State creation, as it is not merely a question of fact anymore but may, in the colonial context, be a way to realise the internationally guaranteed right to self-determination. The cases of secession are more complex, and in principle still face the barrier of the right to territorial integrity of the parent State. Unilateral secession, without consent of the territorial parent state, does usually not lead to recognised statehood. Leaving aside from the Kosovo case, there are contradictory practices in cases of "dissolution", i.e. when the central authorities are decaying or have become powerless or even non-existent. The loss of control of the Socialist Federal Republic of Yugoslavia over its secessionist Republics was described as a dissolution, opening the way to recognition of the former Republics as States. However, the implosion of Somalia's central government at more less the same time was not deemed to impair its territorial integrity and did not lead to the recognition of any entity claiming control over part of its territory. As has been demonstrated, such variance in the actual practice of State creation may best be explained by policy choices over what was rightly or wrongly considered as the best way out of a crisis.

The crucial importance of recognition leads would-be States to develop a "recognition strategy" through membership in international organisations – in principle reserved to States. This incremental quest for recognition is explained by emerging patterns of collective recognition and the role played by international organisations in State creation. At the same time, however, it is obvious that recognition in and of itself, however politically valuable, does not lead to the establishment of facts on the ground and the creation of an effective state (as the cases of Western Sahara or Palestine clearly show). The recognition of Kosovo by about two-thirds of the world's States and its attainment of some measure of effectiveness give it an ambiguous status.

Thus an overview of existing practice shows that there is no "objective" path to statehood under international law via compliance with a set of factual criteria on statehood. Collective recognition is not only necessary, it is at the same time constitutive. In this way collective recognition avoids the main shortcoming of the constitutive theory, i.e. arbitrariness and the relativity of statehood. However, in cases where recognition is widespread but not universal, the constitutive effect of recognition can create a situation characterized by ambiguity. The constitutive effects of recognition are also confirmed by the fact that non-recognized entities, however effective, exist in a legal limbo. Non-recognition in such cases can have many causes – not the least being a breach of the prohibition of the use of force by a secessionist entity's "sponsor-State", or the will of the international community to avoid ratifying the disintegration of a State, such as happened in the case of Somaliland.

Thus effective control of a territory is not in and of itself sufficient for a would-be State to exist in the realities of the current international scene. Without recognition, an entity is not a State and thus not a member of the international community and a full-fledged subject of international law; it is unable to use international law institutions and claim its protection. Recognition is a necessary but not sufficient condition of statehood. Recognition is a pre-requisite of statehood, an essential criterion that may even trump weak or partial effectiveness in certain legal contexts, although not a lack of factual independence. Conversely, the effectiveness of government authority over a population and territory does not lead automatically to statehood, within the meaning of international law, in the absence of international recognition.