The Admission of New States to the International Community

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> *There are only very few branches of international law which are of greater, or more persistent, interest and significance for the law of nations than the question of Recognition of States . . . Yet there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven.*
>
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Abstract

While the political relevance of the recognition of new states is beyond all doubt, the rules of law which apply to this aspect of public international law remain uncertain. The new practice of recognition of the recently established states of Eastern Europe and the former Soviet Union since 1991 is said to have overridden the traditional principles of public international law regarding recognition. Indeed, the predominant declarative theory cannot explain this new practice convincingly. The integration of a new state in the international community does not take place automatically, but through co-optation; that is, by individual and collective recognition on the part of the already existing states. By the procedure of recognition, these states exercise their prerogative to determine in advance whether the newcomer, in their judgment, is able and willing to carry out all its obligations as a subject of international law, whether it will be a reliable member of the international community. Therefore, the ability and willingness of the new state to respect international law constitute the central criteria of statehood in terms of international law. They are decisive for the conferment of legal capacity under international law.

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1 The Significance of Recognition in International Law and the Contemporary Practice of Non-recognition

A *The Legal Effect of Recognition*

Recognition of a new state is an act that confers a status; as a result of recognition, the recognized entity acquires the legal status of a state under international law. In this sense, a (new) state is not born, but chosen as a subject of international law. Only when the new state has been recognized does it become a subject of international law, and this initially only with respect to the existing states recognizing it.[1] On admission as a member of the United Nations, the new state then becomes part of the globally organized community of states by way of co-optation.[2] After the decision has been taken to admit a state to the United Nations, its statehood cannot be called into question with the effect of contesting the validity of mutual rights and obligations arising from co-membership. This is true even if the decision to admit the state constituted, under substantive law, a contravention of the prohibition of intervention enshrined in Article 2(7) of the UN Charter to the disadvantage of a (Member) State.

The European practice of recognizing new states in Eastern Europe and in the former Soviet Union in 1991–1992, which was based on the guidelines adopted by the EC Member States on 16 December 1991,[3] is very informative as to the legal effects of recognition. The list of criteria lay down the conditions that had to be fulfilled before the Community was prepared to recognize the new states, and thus to agree to their admission to the community of states and to the international community: 'The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations.'[4]

In the literature, it has been claimed that the conditions listed in the guidelines are merely the criteria for the establishment of diplomatic relations — something which is in the political discretion of the states in any case — and not requirements for statehood in the sense of international law.[5] This opinion is not convincing for several reasons.

Although the EC Member States' intent was to implement recognition by establishing diplomatic relations, this was not the only legal effect. The criteria are not related in any way to the rules of international law and standard international practice in diplomatic intercourse, but rather are designed to evaluate the candidates

[1] See Ruiz Fabri, 'État (Création, Succession, Compétences). Genèse et Disparition de l'État à l'Époque Contemporaine', 38 *AFDI* (1992) 153, at 163 *et seq*.

[2] On the 'caractère cooptatif de l'accession à la communauté internationale' cf. Ruiz Fabri, *supra* note 1, at 169, 176.

[3] 31 ILM (1992), at 1486–1487.

[4] *Ibid*.

[5] Cf. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86 *AJIL* (1992) 569, at 588, 604; Hummer, 'Probleme der Staatennachfolge am Beispiel Jugoslawien', 3 *SZIER* (1993) 425, at 440; Charpentier, 'Les Déclarations des Douzes Sur la Reconnaissance des Nouveaux Etats', 96 *RGDIP* (1992) 343, at 351 *et seq*. See also Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice', 63 *BYbIL* (1992) 231, at 250 *et seq*.

applying for admission to the international community — and more specifically to the European community of states closely connected with one another by their consensus on political values as formulated in the principles of the CSCE — in terms of the reliability of these candidates as partners in international relations and the extent to which they are able and willing to be politically integrated. Only after the candidates had assumed these international obligations and political duties as cumulative criteria and had subsequently been recognized were they to be integrated into the community of states and the international community. This can be seen both from the events leading up to the recognition of Slovenia and Croatia by the EC Member States and from the guidelines themselves.

From the time of their declarations of independence up until their recognition, the 'states' of Slovenia and Croatia were still regarded and treated as constituent republics of Yugoslavia, i.e., as integral parts of the Yugoslav Federal State, and were not protected by the prohibition of intervention and the use of force laid down by international law. In the civil war that had broken out, their 'nationals' enjoyed protection solely from the protective character of humanitarian international law. The republics themselves or rather their 'rebel forces' merely acquired the legal status under international law of non-recognized parties engaged in civil war. Both the EC Member States and the CSCE participating countries started out from this assumption, even if they did go beyond these rules of *international law* and also postulated the requirement for *intra-state* disputes to be settled by peaceful means as well as a corresponding 'general' prohibition of the use of force as the product of the *political* principles of the CSCE.[6]

For the very reason that the Hague Peace Conference on Yugoslavia, in which these political principles were taken as the basis for negotiation, did not arrive at a solution to the crisis and was unable to put an end to the bloodshed, the German government called for the conflict to be 'internationalized' and propagated recognition as the way to achieve this; as the legal consequence of recognition, the prohibition under *international law* of the use of force was to become applicable.

The constitutive, legally operative effect of the recognition of new states is clearly illustrated by state practice with regard to Bosnia-Herzegovina. In view of the fact that right from the beginning Bosnia-Herzegovina did not constitute a functioning national body and its recognized government only controlled a very small part of the national territory, international recognition of Bosnia-Herzegovina conferred on it the status of a state under international law by way of a legal fiction.[7] Recognition did not function merely as a refutable assumption that the criteria of statehood were met; it actually served as a substitute for these features, which were obviously missing. There

[6] In the literature, the mere political character of the principles of the CSCE has been disregarded frequently.

[7] Cf. Judge ad hoc Kreca, Dissenting Opinion, ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, 11 July 1996, ICJ Reports (1996) 596. Kreca, Dissenting Opinion, *ibid*, § 26, at 686: 'legally, the recognition of Bosnia and Herzegovina within its administrative bounderies represented the recognition of a non-existent State'.

can be no doubt that, despite its defects, in particular its lack of effective power to rule throughout its territory, Bosnia-Herzegovina thus came into existence as a state in the sense of international law. Numerous Security Council resolutions emphasizing the sovereignty, territorial integrity and political independence of Bosnia-Herzegovina and calling for their universal acceptance bear witness to the fact that, after it had been admitted as a member of the United Nations, Bosnia-Herzegovina was regarded by the international community as a state protected by the prohibition of intervention and the use of force enshrined in international law.

B *Non-recognition as the Withholding of a Legal Status*

Non-recognition of an entity that is factually emerging as a state continues to be an exception in state practice. This is because internationally ostracizing a regime as an outlaw not only means that the entity is deprived of rights under international law, but it also has the undesirable consequence that it cannot be called on to fulfil international obligations and responsibilities, although the international community would have an elementary interest in doing so in order to guarantee the universality of international law. Thus, non-recognition is only considered as an option if the unreliability of the new state as a partner in international relations appears to be so serious that the community of states, on account of its self-image as a legal community, refrains from integrating the new state and keeps it away from the international community, despite the problems pertaining to international law that arise from the new state's position as an outsider in legal terms.

Nevertheless, there is no better illustration of the legal conviction held by the states that recognition of a new state under international law is significant as an act conferring a status than the practice of non-recognition.

It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognizing it as such. If it were to acquire this legal status before and independently of recognition by the existing states, solely on the basis of the three so-called traditional criteria of statehood (state population, state territory, effective government) — criteria which Rhodesia and the Serbian Republic in Bosnia-Herzegovina, like every de facto independent entity with a state-like organization, fulfill(ed) — this legal consequence under international law would occur automatically and could no longer be prevented by withholding recognition of the entity as a state. It would not be possible to bring about the 'negative' legal consequence intended by non-recognition, i.e. denial of the legal status of a state under international law. Legal personality under international law, which non-recognition was intended to prevent, would already have been acquired, and non-recognition would then in a sense be futile and would merely be an expression of political censure of the way in which the state came into existence, without this flaw having any significant legal consequences under international law.

Such an assumption is not consistent with state practice (Rhodesia,[8] the South African homelands and the Turkish Republic of Northern Cyprus[9]).

C *The Alleged Deficit in Protection under International Law for Non-recognized New States*

The argument put forward to justify the application of the prohibition of the use of force to stabilized de facto regimes that have come into existence as a result of factual developments, in particular by secession, but have not been recognized as states under international law is based on the alleged legal consequence that the territory concerned would otherwise be open to seizure by third states;[10] however, this scenario does not as a rule occur.

Although the former sovereign loses its territorial jurisdiction as a result of its factual displacement, it does not lose territorial sovereignty. For a third state that does not recognize the de facto regime as a state under international law, but treats it as a legal nullity, the 'mother country' retains territorial sovereignty. Thus, the third state does not regard the territory controlled by the de facto regime as *terra derelicta*.

The community of states did not recognize Rhodesia as an independent state and continued to regard the United Kingdom as internationally responsible and accountable. By regarding and treating the independence of the homelands Transkei, Bophuthatswana, Venda and Ciskei as invalid under international law, the United Nations continued to consider these entities as integral parts of the state territory of the Republic of South Africa, to which the prohibition of intervention and the use of force applied. Accordingly, elementary deficits in the protection of the law did not arise.

This was not so in the case of Palestine because of the unusual situation: when the United Kingdom ended its mandate, the League of Nations had already been dissolved and the mandate failed to be transferred to the United Nations' trusteeship system. Thus there was no territorial sovereign responsible for the territory under international law after the mandate had come to an end.

At the time, the prohibition of the use of force was extended to cover this territory without granting Israel, the third party beneficiary, its own status under international law. However, more recently, standard practice has tended to grant such entities their own legal position in order to avoid a vacuum in which international law does not apply.

This was the situation in the case of Macedonia after the foundation of the Federal Republic of Yugoslavia on 27 April 1996. After the community of states had acknowledged the dissolution of Yugoslavia, a vacuum arose which was only partially filled by the recognition of Slovenia, Croatia and Bosnia-Herzegovina. If Macedonia

[8] For Rhodesia cf. Green, 'Southern Rhodesian Independence', 14 *AVR* (1969–70) 155, at 160, 162 *et seq.* See also Klein, 'Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen homelands', 39 *ZaöRV* (1979) 469, at 486.

[9] Cf. SC Res. 541 (1983); SC Res 550 (1984).

[10] Cf. only Epping, in K. Ipsen (ed.), *Völkerrecht* (3rd ed., 1990), at § 8 II 1, 87 margin 13; C. N. Okeke, *Controversial Subjects in Contemporary International Law* (1974), at 104.

had not been treated as a state and placed under the protection of general international law, an area would have remained in which international law did not apply, a situation that would have run counter to the claim of universality made for international law and that would have had unacceptable consequences. Since the Federal Republic of Yugoslavia did not lay claim to territorial sovereignty over this former Yugoslav constituent republic, Macedonia would have been *terra derelicta* and would thus have been open to (military) intervention by third states. The EC Member States were of the opinion that this could not be permitted and thus conferred on Macedonia the status of a state under international law.

D *The Significance of the Procedure under Chapter VII of the UN Charter for Extending the Protection Provided by the Prohibition of the Use of Force to Cover New States Not Universally Recognized*

The problem of whether and, if so, to what extent a state or state-like entity enjoys the protection of the prohibition of intervention and the use of force is only relevant in practical terms during the interim stage between its coming into existence and its admission as a member of the world organization of the United Nations. After its admission, all obligations contained in the Charter, in particular the principle of the sovereign equality of all the Organization's members, which prohibits intervention (Article 2(1) UN Charter), and the prohibition of threat or use of force in the members' international relations (Article 2(4) UN Charter), are applicable in the relations between the new member and all the other members without prejudice to their mutual recognition as states under international law.

Admission as a member of the United Nations presupposes that the candidate is a state (Article 4(1) UN Charter). Thus, after the General Assembly's decision to admit a candidate — a decision that is binding also for those states that are outvoted (Article 4(2) UN Charter) — the validity of intergovernmental obligations contained in the Charter can no longer be operatively contested by any member in their relations with the member that has been admitted. Co-membership in the United Nations of states that have not recognized one another therefore leads to the validity, according to the Charter, of the major international obligations in intergovernmental relations.

Should a military conflict occur between a newly emerged or emerging state (*in statu nascendi*) and a member of the United Nations before the nascent state has been admitted, the question arises as to whether the member has violated the obligation contained in Article 2(4) of the UN Charter, an obligation whose protective character is also valid in relations with non-members. Whether an international conflict constituting a threat to international peace and security exists is a matter to be determined finally — and by a decision that is binding on the member — by the Security Council in the procedure under Chapter VII of the UN Charter. Within the framework of this procedure, the Security Council has to determine as a preliminary question whether or not the non-member affected by the member's use of force fulfils the criteria of statehood. In answering this question, the members represented on the Security Council are regularly guided by their own position in the question of whether

the de facto regime should be recognized as a state. The member exercising force and not recognizing the attacked non-member as a state will not necessarily be able to assert its own position unless it is a permanent member of the Security Council with a right of veto or a member under the patronage of a permanent Security Council member with a right of veto.

Only by way of the procedure under Chapter VII of the UN Charter can a member be urged with binding force and, if necessary, obliged to respect the prohibition of the use of force in its relations with a non-member not recognized as a state. It is only in this way and to this extent that the definition of aggression agreed on by the General Assembly on 14 December 1974 (Res. 3314 [XXIX]) — which, after an explanatory comment, declares that every state enjoys protection 'without prejudice to questions of recognition or to whether a State is a member of the United Nations' — can assume practical effect and the Security Council can ensure effective protection for non-members as well.

The procedure under Chapter VII of the UN Charter thus partially fills a lacuna in legal protection under international law, a lacuna that arises for the very reason and to the extent that, because of the lack of recognition or of co-membership in the United Nations, the legal consequences associated with recognition as a state or with admission to the world organization have not (yet) come about and a status guaranteed under international law without prejudice to recognition or co-membership in the United Nations does not exist.

The problem of protection for the non-recognized de facto regime against the use of military force can only be solved by way of procedural, and not substantive, law. A state that does not recognize another as a state, i.e. as a subject of international law, will not respect its territorial integrity, sovereignty or political independence if a conflict should arise. A rule under substantive law that the prohibition of the use of force should also apply in the relations between states that do not (mutually) recognize one another would, alone, merely defer the problem because the aggressor state would contest the statehood of the entity it has attacked (which it does not itself recognize as a state) in order to evade the applicability of the prohibition of the use of force.

The binding decision-making process under Chapter VII of the UN Charter, which all the members of the United Nations have agreed to be bound by, is the only way in which to effectively counter the legal point of view of the non-recognizing state and the consequences it draws from this non-recognition.

Apart from this particular procedure under international law and contrary to the doctrine of the de facto regime,[11] which is thus misleading on this point, the validity and operative effect of rules of international law in international relations always depend on the recognition (in whatever form) of the new state by the existing ones. This recognition can occur not only by the establishment of relations under a treaty,

[11] J. A. Frowein, *Das de facto-Régime im Völkerrecht* (1968), at 35–37 and 51–54; Brownlie, 'Recognition in Theory and Practice', in R. St. MacDonald and D. M. Johnston (eds), *The Structure and Process of International Law* (1983) 627, at 638.

but also by acknowledging the tortious liability of the new state under international law. Thus, contrary to what is claimed by Frowein,[12] these elements do not constitute evidence of the de facto regime being a subject of international law independent of its recognition as a state. Rather, they are the expression of recognition of at least limited international personality of the so-called de facto regime that has been accepted as a party to a treaty or called on to fulfil its duty to make reparation as a party to an international obligation capable of liability for an international crime and responsible under international law.[13]

So-called de facto regimes do not enjoy the protection of the prohibition of the use of force solely because they exist for a certain length of time in a pacified situation with a factual international status,[14] but because, and to the extent that, by acts that are legally relevant under international law, they are granted a particular international status that is guaranteed by the prohibition of the use of force. Thus, it is not true that a de facto regime assumes a certain legal position on account of its existence, without any particular recognition being required.[15] On the contrary, if and to the extent that a state entity is granted an inviolable international status, however limited, by another state that does not recognize it as a state under international law or by the organized community of states with binding effect for the non-recognizing state, i.e. in this sense at least partial 'recognition' as a subject of international law, the prohibition of the use of force and, depending on the international status of the entity in each particular case, possibly also other general rules of international law apply. Thus, in order for it to enjoy the protection of the prohibition of the use of force applicable in international relations, integration to a greater or lesser extent into the international community is always necessary by way of (collective) recognition and, depending on its scope, conferring on the entity full or merely partial international personality and hence its own status under international law. It is not the factual, but the legal stabilization and pacification of the de facto regime that is important. If the de facto regime is not recognized in this sense, it does not enjoy protection under international law. Here, too, as is generally the case in international law, a factual situation does not have normative force.

In the year between its factual independence and its admission as a member of the United Nations (April 1992 to April 1993), the former Yugoslav republic of Macedonia was not merely a de facto regime. Analysis of the practice of the EC Member States and the Security Council of the United Nations shows that, regardless of the dispute with Greece over its name and its flag, which had the effect of deferring its 'formal recognition', Macedonia had already been granted the status of a state in the sense of international law and was therefore protected under international law by the prohibition of intervention and the use of force. Hence, in this crucial sense, it had

[12] Frowein, *supra* note 11, at 69–166.

[13] In the last case, recognition is necessarily (by implication) retroactive, which means with effect from the time that the international crime took place. Otherwise, there could be no liability of the new state towards the old one for what happened prior to recognition.

[14] But see Frowein, *supra* note 11, at 224.

[15] But see *ibid*, at 51.

already been recognized as a subject of international law with only the establishment of diplomatic relations ('diplomatic recognition') still to take place.

The same is true of the Federal Republic of Yugoslavia in the period between its 'foundation' (27 April 1992) and its 'recognition' by the EC Member States (April 1996), as the EC Member States and the United States only disputed the claim made by the Federal Republic of Yugoslavia as to its identity, and not its status as a state under international law. They treated the Federal Republic as a legal personality capable of acting under international law with all the rights conferred and obligations incumbent on states under general international law. As diplomatic relations were continued, albeit on a lower level, the Federal Republic of Yugoslavia was granted the active and passive right of legation and was also certified as having the competence to conclude treaties, at the latest by the Dayton Agreements. It is in this sense that it was recognized as a subject of international law right from the beginning or in stages by implied conduct by those states that rejected its claims as to its identity. In contrast, the significance of the mutual sending of ambassadors after the declarations made in April 1996 was merely that of full 'diplomatic recognition' of the Federal Republic of Yugoslavia by the EC Member States.

2 The Ability and Willingness To Act in Accordance with International Law as an Overriding Criteria for the Recognition of New States and for Membership of a State in the United Nations According to Article 4(1) of the UN Charter

A *The Nature of this Criterion as a Standard*

The reliability of the new entity as a partner in international relations is the decisive criterion of statehood in the sense of international law. The existing states base their decision on whether to recognize the entity under international law on their assessment in this respect. Article 4(1) of the UN Charter explicitly mentions the ability and willingness 'in the judgment of the Organization' to carry out international obligations as a criterion for admission of new members to the United Nations, and by doing so merely stipulates what constitutes statehood in accordance with international law, i.e. the essentiality inherent to the state as a subject of international law. All other requirements for statehood according to international law, in particular the existence of effective power of control over a territory and its inhabitants, are derived from this one decisive criterion of the necessary ability and readiness to act in accordance with international law and, as such, take on the character of international standards. Thus, by recognizing the principle of de facto effectiveness,

international law is not acknowledging the alleged normative force of factual situations, but rather guaranteeing that its own claim to validity is enforced.[16]

On the one hand, the phrase 'able and willing to carry out these obligations' (Article 4(1) UN Charter) reinforces international law's claim to being a *legal* system. In addition, it is orientated towards the requirements of international practice, in which legal personality is conferred according to the states' practical interests in international relations.[17] Admission of new states as members of the international community takes place by an act of individual or collective recognition by the existing states, and these states base their decision on whether, in their opinion, the candidate is able and willing to act in accordance with international law. Insofar as it corresponds to the requirements of international practice, the existing states confer limited legal personality under international law on newly emerging states as 'candidates for statehood' even before their process of development is complete and before all the elements of statehood are fully present, as the case of Indonesia (1947–1949) clearly demonstrates; this limited legal personality later becomes full legal capacity.

The guidelines on recognition adopted by the EC Member States on 16 December 1991 also concentrate on the commitment of new states to the fundamental international obligations of states. In order to be able to be recognized, new states must 'have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations'. This implies the need for a credible undertaking to respect the prohibition of the use of force as applicable in international law and to recognize the obligation to settle disputes by peaceful means. It is expressed in more concrete terms in the 'commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes'. In addition, a general 'respect for the provisions of the Charter of the United Nations' is required. This lays down the minimum standard required under international law as outlined by the criteria for admission as a member of the United Nations (Article 4(1) UN Charter), criteria which a state must fulfil if it wishes to join the international community: it must be able and willing to carry out the international obligations incumbent upon it as a state.

Focusing on the ability and willingness of new states to carry out the international obligations incumbent upon them as subjects of international law, this phrase has proved to be sufficiently flexible to be able to take into account new developments in international law by adapting the international requirements made of new states for their admission to the international community. In this context, it is clear that, with the growth of international obligations incumbent on a state in areas that are traditionally regarded as domestic affairs, the requirements made by international law

[16] Cf. Doehring, 'Effectiveness', in R. Bernhardt (ed.), *Encylopedia of Public International Law*, Vol. II (1995) 43, 46; H. Schiedermair, *Herrschaftsgewalt und Rechtsfähigkeit im Völkerrecht*, *Juristische Ausbildungsblätter* (1984) 638, at 640.

[17] ICJ Reports (1949), at 178.

concerning the inner organization and constitutional structure of a state are also increasing; while only a state with exclusive jurisdiction over its territory can guarantee that the law concerning aliens, as applicable according to customary international law, will be respected, in principle only a constitutional state in which there is a separation of powers and which guarantees basic rights can fulfil the requirements concerning the protection of minorities and human rights under international law.

The smaller European community of states organized in the EC is not content with the universally valid minimum requirements of statehood laid down by international law. It regards itself as being committed to the principles of the Helsinki Final Act (1975) and the Charter of Paris for a New Europe (1990). These documents form the core of the new community with shared values comprising Europe, the United States and the former Soviet Union. If a state wishes to join this community, it has to meet more stringent criteria. It additionally has to recognize the CSCE obligations concerning the rule of law, democracy and human rights as 'valid', i.e. as politically binding, and has to guarantee the 'rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE'.[18]

The requirements made of new states in this context exceed by far the minimum standard required by international law insofar as such a standard has ever existed with respect to the protection of minorities. The fact that such preconditions exist has been and is still regarded as discrimination by new states that are waiting at the door to be let in. What for existing states already integrated into the community of states would be regarded as a violation of the prohibition of intervention — and, in contemporary international law, presumably also of the right of self-determination in domestic affairs of peoples and nations organized as states — appears to be legitimate in the case of new states still to be admitted to the community of states and to the international community.

The European community of states has in the past[19] and continues to consider itself justified in laying down such requirements for admission. Unless this is to be regarded as a violation of international law on the part of the existing states laying down these conditions — which in view of the duration and consistency of this state practice does not seem to be a convincing approach — this 'unequal treatment' can only be explained in terms of international law if it is assumed that, before their admission as members of the community of states, the new state entities are not yet subjects of international law, i.e. do not have external sovereignty with respect to third states, and that they only become subjects of international law by the legal act of recognition. Thus, as far as the preconditions of their international recognition are concerned, they cannot rely on the prohibition of intervention under international law. New states primarily have to prove themselves to be reliable partners in international relations in

[18] *Supra* note 3.

[19] For example, the practice of the Great Powers at the Congress of Berlin (1878) and the practice of the 'Principal Allied and Associated Powers', united in the 'Supreme Council' at the Paris Peace Conference (1919–1920).

the eyes of the existing states and, in addition, as able to be integrated into the political process of the CSCE in the eyes of the CSCE participating countries in order to be recognized on the basis of a positive judgment in this respect and thus to be integrated into both the international and, more specifically, the European community of states. New terms that do not yet form part of customary international law are laid down for new states in order to develop international law in a particular direction.[20] In this respect, the practice of recognition serves as a 'testing ground' to promote the international 'legal culture'; the recognition procedure is a suitable means for this because acceptance by the existing states is necessary in order for the new states to acquire international legal personality.

B *The Influence of this Standard on the Classical 'Elements' of Statehood According to International Law and on the Decision-Making Process*

The traditional requirement of de facto effectiveness is not an end in itself, but rather a means to enforce the validity of international law. The conditions laid down with respect to the de facto effectiveness required of a new state's power of control are intended to ensure that international law is respected in the territory concerned.[21] It is a matter of ensuring that the new state is viable and is hence in a position to guarantee permanently, reliably and responsibly the validity of international law in the territory it effectively controls. For the very reason that the requirement of de facto effectiveness satisfies elementary requirements of the international community, it cannot so easily be waived, and certainly not on a permanent basis. If the international community resorts to recognizing a fictive statehood,[22] this fiction of international law will have legal consequences and consequential burdens, as documented by the case of Bosnia-Herzegovina.

The community of states does not wish to endorse the de facto dual statehood of Bosnia-Herzegovina by conferring the status of states under international law on both entities (the Federation of Bosnia-Herzegovina and the Republic of 'Srpska') and instead continues to hold to the unity of the Republic of Bosnia-Herzegovina that it has recognized as a state, although the latter basically has no more than the power of representation in external affairs that it has been granted under international law. Thus, the community of states has to reduce the international obligations that usually apply in terms of guarantees obtained from new states and to a great extent assume these itself by establishing an international regime, as occurred on the basis of the Dayton Agreement.[23]

The lack of a clearly defined territory over which the new state claims the right to exercise sovereignty only detracts from its ability to be recognized if this flaw calls into

[20] Cf. Ruiz Fabri, *supra* note 1, at 172.

[21] Cf. *ibid*, at 165.

[22] 'Reconnaissance fictive et fiction étatique', see J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (1975), at 52–54.

[23] UN Doc. S/1995/999/Annex, see 35 ILM (1996), at 75.

question its effective existence as a whole, i.e. its ability to carry out its international obligations, and thus the security of international relations. The 'doctrine of the three elements' developed by Georg Jellinek as part of his general theory of the state[24] can therefore — even with respect to the element of 'state territory' — only constitute a criterion of the legal personality of new state entities to the extent that these formal criteria are borne out for international law by the requirements of international practice and the principle of the certainty of the law derived from them.

Even the necessary precondition of the external sovereignty of the new state, i.e. its legal independence with respect to its mother country and to third states, only takes shape in connection with the criterion of legal personality. In order to be recognized as an independent subject of international law, the new state must *itself* be in a position to carry out the international obligations incumbent upon it without being dependent on the will of another state.

C *The Ability and Willingness to Respect International Law as a 'Normative Constituent Fact'*

Direct consequences for the way in which new states are admitted as members of the community of states and the international community arise from the fact that the ability and willingness of the new state to respect international law constitute the central criteria of statehood in terms of international law; that is, they are decisive for the conferment of legal capacity under international law. The test of whether this 'normative' constituent fact is present in the 'person' of the new state cannot be carried out by simple subsumption, but requires a 'value judgment', which the existing states deliver in conjunction with their decision on whether or not to recognize the new state and which cannot be replaced by 'objective' declarations by third parties. The power of the existing sovereign states to decide whether to recognize the new state, by which they evaluate its reliability as a partner in international relations, means that the existing states continue to be the 'masters' of the procedure: by exercising their prerogative to evaluate the newcomer, they form their own final judgment concerning its ability and willingness to be integrated into the international community and to accept and adhere to its rules. For this reason, according to the legal conviction of the community of states as expressed in the practice of recognition as constantly exercised, new states do not have an enforceable right under international law to be recognized, even if they fulfil the so-called classical criteria of statehood according to international law.[25]

D *The Decision-making Process Concerning the Admission of New Members (Article 4(2) UN Charter)*

In accordance with Article 4(2) of the UN Charter, the final decision as to whether an

[24] *Allgemeine Staatslehre* (3rd ed., 1914), at 394–434.

[25] Cf. Ruiz Fabri, *supra* note 1, at 172; Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 *EJIL* (1993) 36, at 36.

applicant fulfils the substantive requirements for admission, as laid down in Article 4(1) of the UN Charter — i.e. whether it is a state that is peace-loving, that accepts the obligations contained in the Charter and is able and willing to carry out these obligations — is made by the Security Council and the General Assembly of the United Nations. From a procedural point of view, as set out in the Charter, the United Nations consciously decided against a system of accession by which all states can join the world organization by way of a unilateral declaration. The admission procedure enshrined in the Charter ensures that the relevant organs of the United Nations retain absolute authority in the procedure.[26]

Notwithstanding the substantive criteria for admission set out in Article 4(1) of the UN Charter, the organs of the United Nations that have the power to take such a decision, and indirectly the members represented in these organs, are therefore the 'masters' of the admission procedure according to Article 4(2) of the UN Charter. Thus, a claim to membership in the United Nations that can be enforced under procedural law against the will of the decision-making institutions — or at least against the will of a permanent member of the Security Council — does not exist; a new state cannot even enforce a claim to a decision being taken concerning its application for admission.[27]

The International Court of Justice (ICJ) recognizes the power of final judgment of the Security Council and the General Assembly. Thus, the interlocutory judgment of the ICJ in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina v. Federal Republic of Yugoslavia*) of 11 July 1996[28] is based on the assumption that a decision to admit a new state is binding on all members and cannot be contested under procedural law.

3 The Significance of the Right of Self-determination of Nations and Peoples in the Contemporary Practice of the Recognition of New States

A *The Practice of Decolonization*

In recognizing the statehood of nations emerging as independent entities after colonial rule from the beginning of the 1960s, the classical criteria of statehood according to international law, in particular the existence of effective power to rule by the new state, have no longer been carefully examined by the community of states. Instead, the new states thus constituted have been recognized and admitted as members of the United Nations without hesitation.[29] In this state practice, the main argument has

[26] Joint Dissenting Opinion of Judges Basdevant, Winiarski, Sir Arnold McNair and Read, ICJ Reports (1947/48) 57, at 84 *et seq*.

[27] Cf. H. Kelsen, *The Law of the United Nations* (1950), at 71.

[28] ICJ Reports (1996) 596, at 611, § 19.

[29] Cf. J. Dugard, *Recognition and the United Nations* (1987), at 64 *et seq*.

presumably not been an acknowledgement that the right of self-determination takes priority, so much as the following considerations. After the mother country has relinquished its claim to sovereignty, third states that recognize the former colony as an independent state no longer run the risk of violating international law by intervention. When the General Assembly adopted a resolution on decolonization in 1960,[30] the colonial powers abstained, but subsequently bowed to their fate and voluntarily gave up colonial rule by granting their colonial territories and peoples independence (with the exception of Spain and Portugal, who retained their colonial possessions until the end of the 1960s and the mid-1970s, respectively). Thus the question of whether the right of self-determination of peoples could be asserted in the practice of the recognition of new states even against the will of the mother country, i.e. whether it limits the prohibition of intervention, did not need to be settled.

Incidentally, after the mother country had exempted itself from liability for the former colony under international law by renouncing its claim to sovereignty, the community of states had no choice but to make the newly independent state internationally responsible by recognizing it as a subject of international law in order to prevent the creation of an area in which international law did not apply, something which would have been detrimental to international law's claim to universality.

This aspect — the need for the new states to be integrated into the international community immediately — was presumably a decisive factor in the state practice of immediately recognizing the new, often unstable state entities that had emerged as a result of decolonization and of admitting them as members of the United Nations directly after they had gained independence, without a lengthy 'trial period'. Respect for the right of self-determination of the colonial peoples now constituting themselves as states presumably merely complemented the decisive practical considerations.

B *Non-recognition of a New State on Account of Its Violation of the Right of Self-determination of Peoples*

In the case of Rhodesia, the community of states soon adopted a strict policy of non-recognition of the proclaimed independence of Rhodesia, as had first been practised from 1932 onwards as a reaction to the state of Manchukuo being established.

This was a fundamental decision that was not based on any doubts about the de facto effectiveness of the white minority regime.[31] The community of states refused to recognize this state under international law because the independence of Rhodesia as a state under white minority rule violated and frustrated the right of the people of Zimbabwe formerly under British colonial rule, i.e. the majority of the African population, to national self-determination; in other words, it refused recognition because the emergence of the new state under the conditions of rule by the white settlers created a situation that contravened international law from the point of view

[30] Declaration on the Granting of Independence to Colonial Countries and Peoples, Res. 1514 (XV), *UNYB* (1960) 44, at 49 *et seq.*

[31] J. Crawford, *The Creation of New States* (1979), at 78.

of the right of self-determination of peoples recognized as a legal title under international law by General Assembly Resolution 1514 (XV) of 14 December 1960.[32] Rhodesia remained ostracized and excluded from the community of states and the international community as an 'outlaw'.[33] In the eyes of the international community, the state founded by Ian Smith's regime suffered from an incurable 'congenital defect' on account of its violation of the right of self-determination, a defect that made it illegal under international law. Thus Security Council Resolution 217 (1965) of 20 November 1965 denied Rhodesia's declaration of independence any legal validity, and under the white minority regime Rhodesia was in no way able to be recognized and had no legal personality.

After the General Assembly had adopted Resolution 1514 (XV) on 14 December 1960, the attitude of a new state towards the right of self-determination that the colonial peoples had been promised became a test case for its allegiance to international law. By linking the decision concerning recognition to the principles contained in this resolution, it became clear that, in the opinion of the community of states, these principles had become positive international law and therefore contained fundamental international obligations that were applicable to every state. Thus, if it seemed probable that an entity would not carry out these obligations or had even declared its intention not to do so, this amounted to a denial of its being willing to respect at least the fundamental international rights, something that was required for it to be recognized as a new state.

In this minimum international standard — a standard whose content has varied in different periods of international law and which has to be satisified by a new state in order for it to be recognized as a subject of international law — we can see what is known as peremptory international law (*ius cogens*) taking shape, i.e. rules of international law regarded by the community of states as so essential for the system of international law as a whole that the willingness to respect these rules has become absolutely indispensable in the sense of an international *ordre public* in order for a new state to be admitted to the international community and such that the community of states is even prepared to accept difficulties in international relations as a result.[34]

Observance of the right of self-determination of peoples by the new state, a requirement that it has to meet before it can be recognized as a subject of international law, is not strictly speaking a new criterion of statehood in terms of international law, but rather simply the practical implementation in the more recent practice of recognition of the traditionally accepted standard of the ability and willingness on the part of the new state to carry out at least the major international obligations. The existing states have always regarded the ability and willingness of a new state to act in accordance with international law as a precondition of its being recognized and have

[32] Cf. R. Zacklin, *The United Nations and Rhodesia* (1974), at 45 *et seq*; Dugard, *supra* note 29, at 98.

[33] Dore, 'Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems', *Vand. J Transnat'l. Law* 13 (1980) 25, at 25; Kato, 'Recognition in International Law: Some Thoughts on Traditional Theory, Attitudes of and Practice of the African States', 10 *IJIL* (1970) 299, at 309.

[34] For the relation between non-recognition and *ius cogens* cf. Dugard, *supra* note 29, at 123–127, 152–154, 156–163.

assessed this ability and willingness in various ways. Thus, in the issue of whether the former Spanish colonies emerging as new states in Central and South America were to be recognized, the United Kingdom based its decision on a commitment on the part of these states to helping to put an end to the black slave trade; similarly, the League of Nations laid down the same condition for the admission of Ethiopia to the organized community of states. Thus, the prohibition of the slave trade can retrospectively be regarded as one of the first peremptory norms of international law.[35]

However, in terms of the significance of the right of self-determination of peoples in the practice of the recognition of new states, we should avoid drawing far-reaching, overly generalized conclusions from the case of Rhodesia.[36] On the basis of state practice towards Rhodesia and the homelands created in South Africa, it is only in the colonial context, if at all, that a violation of the right of self-determination of (native) peoples by the establishment of a racist white minority regime necessarily means that, as a legal consequence, a new state set up by this regime by way of secession is not able to be recognized.

C *The Significance of the Right of Self-determination of Peoples for the Legal Institution of Recognition in State Practice since 1990*

The significance of the right of self-determination of peoples for the recent practice of recognition after the end of the Cold War in 1989–1990 is generally overestimated.

The dissolution by mutual agreement of the USSR and of Czechoslovakia did not pose any problems with regard to the right of self-determination; the integration into the international community of the new states that emerged as a result of these dissolution processes was trouble-free. Recognition of the former Soviet republics therefore gives no reason to assume that the community of states has recognized a right of secession derived from the right of self-determination of peoples in any context other than the colonial one.[37]

In the conflict in Yugoslavia, the right of self-determination was only relevant to some extent at the beginning and only in discussions in Europe.

Consultations in the Security Council before the adoption of Resolution 713 (1991) on 25 September 1991 show that the community of states organized worldwide within the United Nations continues not to recognize the right of self-determination of peoples as a legal title under international law that justifies secession outside the colonial context.

In order to ensure the validity of the prohibition of the use of force in international relations as applicable under international law, the civil war in Yugoslavia (which is all it was to start with from the point of view of international law) had to be internationalized by recognizing the constituent republics Slovenia and Croatia as

[35] Cf. *ibid*, at 134.

[36] But see Crawford, *supra* note 31, at 106.

[37] The Baltic states represent a special case because their annexation by the Soviet Union in 1940, contrary to international law, was not recognized by several states, especially not by the United States. Therefore, although they have regained independence, they have not been recognized as new states; only diplomatic relations with them have been re-established.

independent states under international law. As the course of events initially suggested a process of secession, albeit one that had not yet been completed and that was still resisted by the mother country, recognition of the seceders as autonomous states at a time that would be judged premature according to the traditional rules of international law required a particular justification in terms of international law in order to avoid the charge of having violated the internationally applicable prohibition of intervention. As far as the situation in Yugoslavia was concerned, such a justification can only be seen in the violation or denial of the right of self-determination of the peoples seeking to acquire independence as states.

The Federal Republic of Germany deliberated the possibility of recognizing Slovenia and Croatia very early on and thus attempted to persuade its partners in the European Community that the right of self-determination should be interpreted as limiting the guarantee for the respect of territorial integrity and the unity of states in the sense of a right of secession enabling such entities to be recognized as the last resort in the event of no solution being reached by negotiations.

The first opinion delivered on 29 November 1991 by the Arbitration Commission convened within the framework of the Peace Conference[38] then altered the perspective of the European Community in this central question of international law. The Arbitration Commission judged the events in Yugoslavia to be symptomatic of a process of dissolution. The significance in terms of international law of the interpretation of the signs of disintegration in the Yugoslav federal state as a process of dismemberment lay in the fact that it facilitated the recognition of the constituent republics claiming independence, particularly Croatia, as autonomous states under international law. In the opinion of the Arbitration Commission, the process of disintegration was already so far advanced that the federal organs were no longer able to form an internationally significant will for the state as a whole which would have had to have been overcome when recognizing the constituent republics as independent states without violating the prohibition of intervention.

It was not until then, on this basis, that the EC Member States were able to agree on a common position in the question of recognition and to resolve existing reservations and legal doubts concerning the immediate recognition of Croatia. As the EC Member States proceeded to recognize Slovenia and Croatia on the basis of what they regarded to be the dismemberment of Yugoslavia, this did not create a precedent in favour of a right of secession that would play a decisive role in the practice of recognition in the European context. Although the process of dissolution in Yugoslavia — which the European community of states had confirmed on the basis of the first report delivered by the Badinter Commission — had not been completed by the time it recognized as independent states the first two Yugoslav constituent republics to declare their independence, the process already appeared to be irreversible. The fact that it waited until this point was sharply criticized from a political point of view, but from the point of view of international law this position was logically correct.

Even the EC Member States did not acknowledge a real right of succession, i.e. the

[38] Opinion No. 1, 31 ILM (1992), at 1494–1497.

right of a nation that had not even begun to constitute itself as a state to break away unilaterally from an existing federation and to create an independent state of its own; this was documented by the position they took *vis-à-vis* the desire for self-determination expressed by the Albanians in Kosovo, who in September 1990 declared this autonomous territorial entity an independent, sovereign state and claimed international recognition but who, on account of the Serbian policy of oppression, were not able to establish even a rudimentary organization.[39] In contrast to the situation in Slovenia and Croatia at the beginning of the conflict in Yugoslavia, the strict criteria of a right of succession — as acknowledged in the literature[40] in the case of systematic discrimination and persecution of an ethnic group by the state authority on account of its belonging to a particular group — were most likely to be fulfilled in this case; however, the European community of states passed over this fact in silence. It did not even consider the possibility of 'premature' recognition of this 'state' for the sake of its right of self-determination. In the present Kosovo crisis, the international community has again refused to recognize an independent state of the Albanians and is only willing to grant an autonomous status which shall be internationally guaranteed.

The significance of the right of self-determination in the recent practice of recognition of the independence of new states is limited to the fact that, in addition to the usual requirements, recognition depends on an authentic declaration by the nation concerned of its will to be recognized as an independent state. Thus, in the case of the Yugoslav republics seeking to gain independence, the plebiscites held on this matter were regarded as the undeniable expression of this will on the part of the nation; where there were doubts (i.e. in Bosnia-Herzegovina), a referendum was called for prior to recognition.

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[39] Cf. J. Marko, *Der Minderheitenschutz in den jugoslawischen Nachfolgestaaten* (1996) 205, at 214 *et seq.*

[40] Cf. only Doehring, 'Self-Determination', in B. Simma (ed.), *The Charter of the United Nations, A Commentary* (1994) 35, 40.