

The Status of Unrecognized Quasi-States and Their Responsibilities Under the Montevideo Convention

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Introduction

Since 1945, the appearance of new States was influenced by different factors, from decolonization to the (re-)emergence of ethnic conflicts in existing States, requiring the creation of new state entities along such ethnic lines. Post-World War II decolonization led to the emergence of new States in Africa and South Asia,¹ and the collapse of the USSR in 1991 resulted in the reemergence of independent Baltic States and other States in the formerly Soviet territories of Central and Western Asia.² Similarly, the

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1. ROLAND BURKE, *DECOLONIZATION AND THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* 2 – 3 (2010).

2. ROLAND BURKE, *DECOLONIZATION AND THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* 2 – 3 (2010); WILLIAM E. ODOM, *THE COLLAPSE OF THE SOVIET MILITARY* 298 (2000).

breakup of Yugoslavia led to the re-emergence of six new States in the Balkans.³

The central problem of new States and of regions considering secession from existing States is their recognition. The international community in general and the United Nations (U.N.) in particular, have recognized most former colonies and most former Socialist Republics as independent States, including the Republic of Kosovo, whose recognition as a new State has been *sui generis*.⁴ Nevertheless, a large number of self-proclaimed States, such as the Nagorno-Karabakh Republic (the NKR) or the Turkish Republic of Northern Cyprus (the TRNC), remain unrecognized by either their neighboring States or the wider world community⁵ in the form of the UN General Assembly, despite meeting all the criteria of Statehood under the Montevideo Convention on Rights and Duties of the States.⁶ This ambiguity highlights some particular shortcomings of the convention and its inability to address the contemporary challenges that seceding regions face nowadays.

Undoubtedly, the problem of unrecognized States remains to be one of the most crucial contemporary issues of potential conflict at the global level. The political incidents such as the conflict in East Ukraine, the referendum in Catalonia,⁷ and even Brexit may lead to the emergence of a bigger number of seceding entities.⁸ These factors prompt the following research questions: how are modern self-proclaimed States treated under international law and comity? Are there any facts indicating that the existing legal framework and

3. BRIDGET COGGINS, *POWER POLITICS AND STATE FORMATION IN THE TWENTIETH CENTURY: THE DYNAMICS OF RECOGNITION* 90 (2014).

4. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 404 (July 22); Request for an Advisory Opinion of the International Court of Justice on the Question "Is the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in Accordance with International Law?" 9 – 10 (Apr. 17, 2009), <https://www.icj-cij.org/files/case-related/141/15638.pdf> (providing an overview of the "*sui generis* character of the Kosovo situation").

5. See Marc Weller, *Setting Self-Determination Conflicts: Recent Developments* 20 EURO. J. INT'L L. 111 (2009).

6. See generally Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

7. Alasdair Fotheringham, *Catalonia Referendum: What Actually Happens if the Spanish Region Declares Independence?*, THE INDEPENDENT (Oct. 4, 2017), <https://www.independent.co.uk/news/world/europe/catalonia-referendum-independence-what-happens-catalan-spain-police-declare-a7983246.html>.

8. Soon after the results of the 2016 EU Referendum in the UK had been announced, the First Minister of Scotland Nicola Sturgeon mentioned the possibility of a new Scottish independence referendum which means possible secession from the UK. See Severin Carrell, *Sturgeon Outlines New Scottish Independence Referendum Plans*, THE GUARDIAN (Apr. 24, 2019), <https://www.theguardian.com/politics/2019/apr/24/sturgeon-outlines-new-scottish-independence-referendum-plans>; Naimh McIntyre, *Brexit: No Deal Could Trigger New Independence Referendum, Says Scotland's Leading EU Expert*, THE INDEPENDENT (Oct. 14, 2017), <https://www.independent.co.uk/news/uk/politics/brexit-no-deal-scottish-independence-eu-expert-kirsty-hughes-a8000871.html>.

practice cannot adequately address the issue of seceding regions? Finally, can self-proclaimed States bear the same responsibility as recognized States?

After a thorough analysis of the problems and the background of modern self-proclaimed States, this article will identify substantial shortcomings of the existing version of the Montevideo Convention and makes recommendations for its improvement. The article is divided into three parts. Part I critically evaluates different approaches to recognition in general. It discusses the constitutive and declaratory concepts of recognition and analyses the legal effects of recognition on international and national levels. Part I also highlights the basic criteria of recognition codified in article 1 of the Montevideo Convention, and it critically evaluates territory, population, effective government, and the capacity to enter into diplomatic relations as factors of Statehood.

Part II analyzes modern unrecognized and partly recognized entities from historical and legal perspectives with the focus on the Moldavian Republic of Transnistria, the Nagorno-Karabakh Republic, the Republic of Somaliland, the TRNC, the Republic of Abkhazia, and the Republic of Kosovo. Part II also discusses the problem of definition of such entities.

Part III discusses the theory of State responsibility and applies the theoretical background on the unrecognized and partly recognized States. This Part also analyzes Kosovo as the exceptional case of international recognition.

The conclusion summarizes the shortcomings of the Montevideo Convention and suggests adding specific criteria in order to make the convention more efficient in settling the contemporary issues with the self-proclaimed entities.

I. Statehood and Recognition

This Part discusses the theoretical background of recognition and different interpretations of its legal power, as well as its legal effects on international and national levels with some examples from case law. It also analyzes the advantages and shortcomings of the traditional criteria of Statehood.

A. RECOGNITION OF STATES: THE BASICS

Recognition of States is the starting point of the analysis conducted in this article. According to James Crawford, a legal academic and judge on the International Court of Justice (ICJ), the term “recognition” generally means the recognition of another entity as a State.⁹ Recognition indicates that the entity’s government is lawful and is entitled to represent the State for all international purposes.¹⁰ But the practical meaning of recognition is quite

9. See IAN BROWNLIÉ & JAMES CRAWFORD, *BROWNLIÉ’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 144 n.5 (8th ed, 2012).

10. *Id.*

controversial. Under the constitutive theory, recognition is a criterion that is necessary for Statehood; under the declaratory theory, recognition just confirms the legal status of an entity.¹¹ Both theories will be examined in turn.

1. *Constitutive Conception*

Known as the “father of international law,” German jurist Lassa Oppenheim summarizes the constitutive conception as a principle under which the State can become an international person through recognition only.¹² His definition complies with Stefan Talmon’s statement of the “status-creating” nature of recognition.¹³ Under the constitutive model, recognition by others renders the entity as a State, and non-recognition consigns the entity to non-Statehood even if the entity has the attributes of Statehood, such as the possession of a territory, power over a defined population, and a government.¹⁴ This model is explained by Hersch Lauterpracht, who noted that the full international legal personality of rising communities cannot be automatic and that ascertainment requires a prior determination of fact by an international body or by existing States.¹⁵

This approach was criticized by James Crawford who claimed that no State can remove or limit any competence of other States established by international law relying on its own independent judgment only.¹⁶ According to Crawford, such an approach of recognition features the substantial difficulties of practical application.¹⁷ First, it is not clear how many States must express recognition; moreover, will the existence of the State be related only to those States that recognize it?¹⁸ Finally, will non-recognition by other States allow such States to treat an entity as a non-State for purposes of intervening in its internal affairs or annexing its territory?¹⁹

There is, however, some evidence of support for the constitutive theory in State practice. Malcolm Shaw says that if a new State and its government are established by unconstitutional means or by occupying a territory that is under the lawful jurisdiction of another State, then non-recognition will indicate non-conformity with the basic criteria of Statehood.²⁰ This idea was reflected by the Yugoslav Arbitration Commission Opinion No. 8, which

11. Stefan Talmon, *The Constitutive Versus the Declaratory Theory of Recognition: Tertium non Datur?*, 75(1) BRIT. Y.B. INT’L L. 101, 101 (2005).

12. LASSA OPPENHEIM, INTERNATIONAL LAW 125 (Hersch Lauterpracht ed., 8th ed., 1955).

13. See Talmon, *supra* note 11.

14. THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 2 (1969).

15. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 55 (1947).

16. BROWNLEE, *supra* note 9, at 146.

17. *Id.*

18. *Id.*

19. *Id.*

20. MALCOLM N. SHAW, INTERNATIONAL LAW 332 – 33 (8th ed., 2017).

stated that recognition by other States evinces conviction that the entity is real and confers certain rights and obligations on it.²¹

Another argument that Shaw refers to is the mere fact that an unrecognized entity has no access to the rights available to recognized States before the municipal courts.²² These facts show that despite its perceived weaknesses, the constitutive theory is still relevant and can explain the difficulties that the unrecognized entities have to cope with.

2. *The Declaratory Conception*

In contrast to the constitutive model, the declaratory theory states that recognition is the acknowledgment of Statehood that has already been achieved.²³ Crawford defines the recognition under the declaratory model as “a declaration or acknowledgment of an existing State of law and fact” and a “legal personality having been conferred previously by operation of law.”²⁴ According to Professor Fred L. Morrison, the practical difference between the constitutive and declaratory models is that under the constitutive model, the State’s act of extending recognition is voluntary, whereas under the declaratory model the State’s act of extending recognition is mandatory.²⁵ His statement reflects the Bosnian genocide case²⁶ where the Socialist Federal Republic of Yugoslavia argued that the allegations made by Bosnia and Herzegovina regarding the breach of the Genocide Convention²⁷ were irrelevant as both countries (being parties to the dispute) did not recognize each other as States at the time of the events in question. Nevertheless, the court dismissed this argument on the basis that both parties were recognized in the Dayton-Paris Agreement and, subsequently, the parties had to adopt recognition as well.²⁸

Crawford says that the Bosnian genocide case is evidence of a declaratory model being accepted by the International Court and suggests that substantial State practice supports the declaratory view.²⁹ Nevertheless, the practical significance of constitutive conception is clearly illustrated by the legal effects of recognition, which will be analyzed below.

21. Maurizio Ragazzi, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 INT’L LEGAL MATERIALS 1488, 1523 (1992).

22. SHAW, *supra* note 20.

23. GRANT, *supra* note 14, at 4.

24. BROWNLIE, *supra* note 9, at 145 & n.9.

25. See Fred L. Morrison, *Recognition in International Law: A Functional Reappraisal*, 34 U. CHI. L. REV. 857, 857 (1967).

26. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 47, ¶ 233 (Feb. 26).

27. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

28. General Framework Agreement for Peace in Bosnia and Herzegovina, Letter dated Nov. 29, 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/50/790 (Nov. 30, 1995).

29. BROWNLIE, *supra* note 9, at 145.

B. LEGAL EFFECTS OF RECOGNITION

As already mentioned, the contemporary State practice is based on the declaratory theory. This theory, as confirmed by article 3 of the Montevideo Convention, states that the political existence of a State is independent from its recognition by other States.³⁰ Nevertheless, recognition leads to a variety of legal consequences that may substantially affect the life of an entity in question.

Antonio Cassese says that recognition, being fundamentally a political instrument, has no direct legal effects because recognition alone does not confer any rights or impose obligations on a State.³¹ At the same time, Cassese outlines the threefold, indirect influence of recognition: it (1) testifies to the will of the recognizing States to allow international interaction with the new State; (2) proves that the recognizing States consider the new State as fulfilling the Montevideo criteria of Statehood; and (3) prevents the new State from altering its position by other States and claiming that it lacks Statehood.³²

Cassese's statement regarding the absence of direct legal effects of non-recognition, however, contradicts Malcolm N. Shaw's viewpoint. He says that even if recognition is regarded as a political tool, it entails legal consequences at both the international and national level.³³ To understand the significance of recognition, it is necessary to analyze both categories of its consequences.

1. *International Level*

Shaw says that an unrecognized State must be subject to the same rules of international law as a recognized State. In other words, the unrecognized State must obey international rules and cannot consider itself free from restraints of aggressive behavior.³⁴ Recognition, therefore, has no influence. The role of recognition, however, becomes important when the unrecognized State asserts its rights or other States try to assert its duties. At this point, Shaw's claim complies with Cassese's statement regarding legal effects at the international level. Shaw says, on a national level, however, the situation is completely different.³⁵

2. *National Level*

The legal effects of recognition at the national level are much wider than those at the international level. According to Shaw, the courts at the national level cannot themselves recognize the State or the government and,

30. Montevideo Convention, *supra* note 6, art. 3.

31. ANTONIO CASSESE, *INTERNATIONAL LAW* 73 (2nd ed. 2005).

32. *Id.* at 74.

33. *See id.* at 73 – 74.

34. SHAW, *supra* note 20, at 349.

35. *Id.*

therefore, must rely on the executive's political decisions. Shaw says that the recognition of States in this context—and particularly in the United Kingdom and the United States—is rather constitutive because the legal results within domestic jurisdiction completely depend on the act of recognition.³⁶

Shaw's viewpoint is largely supported by Martin Dixon, who analyzed and classified the internal legal effects of recognition in the United Kingdom. First, Dixon says that most of the laws of an unrecognized State may not be considered valid, and an unrecognized State cannot sue in its own name,³⁷ as was the case in *City of Berne v. The Bank of England*³⁸ or *Adams v. Adams*.³⁹ There is, however, the “acts of administration” exception, which was designed by Lord Denning M.R. specifically to mitigate the consequences for individuals.⁴⁰ Lord Denning explained that the Court “could take note of certain acts of foreign sovereign, if it [were] effective within a territory, even though the sovereign was not formally recognized by the UK.”⁴¹ As seen in *B v. B*⁴² and *R (Kibris Türk Hava Yollari v. Secretary of State for Transport)*,⁴³ this exception is not widely used and is applicable only to administrative and similar acts such as divorces.⁴⁴

Secondly, Dixon introduces the concept of the “acts of a delegated sovereign” as shown in the *Carl Zeiss* case.⁴⁵ In this case, the defendants alleged that the claimants had no legal right to sue because the German Democratic Republic (the GDR) was not recognized by the U.K. The Court decided, however, that the acts of the GDR administration might be accepted as valid because the administrative power was delegated to the GDR by the USSR—a sovereign that was recognized by the U.K.⁴⁶ This concept, despite being highly criticized for inconsistency with U.K. policy,⁴⁷ was later adopted in a *Gur Corp. v Trust Bank of Africa* case.⁴⁸

Third, Dixon discusses the problem of companies incorporated under the law of an unrecognized entity. These companies theoretically may have no legal personality in the U.K. because the U.K. does not recognize their jurisdiction. This problem was resolved by The Foreign Corporation Act of 1991 (FCA), which states that the consequences of the U.K.'s non-recognition will not affect the company if it is incorporated in a territory

36. *Id.*

37. MARTIN DIXON, *INTERNATIONAL LAW* 140 (7th ed. 2013).

38. See *City of Berne v. Bank of England* [1804] E.R. 636 (U.K.).

39. *Adams v. Adams* [1971] P 188 (Eng.).

40. See *Hesperides Hotels v. Aegean Turkish Holidays* [1978] QB 205 (Eng.).

41. DIXON, *supra* note 37, at 140 – 41.

42. See *B v. B* [2000] 2 Fam. 707 (Eng.).

43. *R (Kibris Türk Hava Yollari CTA Holidays) v. Secretary of State for Transport* [2009] EWHC 1918 (Admin) (Eng.).

44. DIXON, *supra* note 37, at 141.

45. See *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* [1966] 18 RPDTMC 497 (Eng.).

46. DIXON, *supra* note 37, at 142.

47. *Id.* at 143.

48. See *Gur Corp. v. Trust Bank of Africa* [1987] 1 QB 599 (Eng.).

having “a settled court system.”⁴⁹ The FCA proved to be effective in the *S.P. Anastasiou* case,⁵⁰ but, nevertheless, it was highly criticized by the European Court of Justice, which stated that the certificates used as evidence of incorporation under the TRNC law cannot be accepted because of the unrecognized status of the TRNC. Despite being politically correct, the ECJ’s decision was regarded by Dixon as “a retrograde step.”⁵¹

Finally, Dixon covers the international organizations or entities that are created under the laws of unrecognized States. He refers to *Arab Monetary Fund v. Hashim*,⁵² which proved that not only unrecognized States but also all the institutions established under their laws may lack legal personality in the eyes of recognizing States.⁵³

In summary, the analysis of legal effects demonstrates that international recognition highly influences the life of the State, its nationals, and its businesses. This means that despite the “declaratory” character of the Montevideo Convention in theory, it plays a rather “constitutive” role in practice when the situation concerns the rights and duties in a dispute settlement. But in order to understand why recognition has such a profound effect, it is vital to assess its basic criteria for recognition.

C. CRITERIA OF RECOGNITION

The previous subpart reflected on the theories of recognition and the legal effects of non-recognition, highlighting their practical importance. But it is also necessary to understand how the State is recognized, beginning with analyzing the criteria which are considered for recognition purposes.

Different States may consider different factors, but, in general, the most important ones include a clearly defined territory with a population, a government capable of exercising effective control on the territory, and independence in international relations.⁵⁴ These criteria are codified in the Montevideo Convention and are discussed extensively below along with other factors considered in State practice.

1. *Basic Criteria of Statehood*

The Montevideo Convention highlights the historically established principles of international recognition. In accordance with article 1 of the convention, the entity is considered as a State if it possesses the following qualifications: (a) a permanent population, (b) a defined territory, (c) a

49. Foreign Corporations Act 1991, c. 44 (Eng.).

50. Case C-432/92, R v. Minister of Agric., Fisheries and Food, ex parte S.P. Anastasiou Ltd., 1994 E.C.R. I-03087.

51. *Id.*; DIXON, *supra* note 37, at 144.

52. See *Arab Monetary Fund v. Hashim* [1991] 1 AC 114 (Eng.).

53. DIXON, *supra* note 37, at 145.

54. SHAW, *supra* note 20, at 334.

government, and (d) the capacity to enter into relations with other States.⁵⁵ These criteria will be analyzed below.

Because the Montevideo Convention has merely codified existing legal norms,⁵⁶ the qualifications mentioned in article 1 of Montevideo Convention are applicable to all subjects of international law in general.⁵⁷ Article 1, however, is often criticized for being too abstract and for being unable to respond to the claims of many entities aspiring towards Statehood.⁵⁸ Therefore, the named qualifications need more detailed examination and will be critically evaluated in the following sections of this article.

a. Permanent Population

A permanent population is the first qualification necessary for the existence of a State. Lassa Oppenheim defines population as “an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be different colour.”⁵⁹

Professor David Raič has outlined four main features of the population.⁶⁰ First, the term “population” should be distinguished from the term “peoples.”⁶¹ Indeed, the population of a country may consist of different ethnic groups following their own traditions, religions, and languages; for example, eighteen generalized ethnic groups in the U.K. form the country’s population.⁶² The history of self-proclaimed entities shows that different ethnic groups may provoke separatist actions,⁶³ and, for this reason, I find Raič’s division of these terms more than appropriate.

Second, there are no requirements on the minimal threshold of the population.⁶⁴ For example, both the Vatican (with a population of 1,000

55. Montevideo Convention, *supra* note 6, art. 1.

56. DAVID J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 99 (6th ed. 2004).

57. For instance, the definition suggested by Badinter Arbitration Committee reflected Montevideo criteria and describes a State as a “community which consists of a territory and a population subject to an organized political authority.” See Allan Pellet, “*The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples*,” 3 *EURO. J. INT’L L.* 178, 182 (1992).

58. See *INTERNATIONAL LAW* 217 (Malcolm D. Evans ed., 4th ed., 2014) (listing Chechnya, Kosovo, Northern Cyprus or Palestine as “aspirant States,” who according to Matthew Craven find little guidance in Article 1 of the Montevideo Convention). Further, Vaughn Lowe notes that the Montevideo Convention does not reflect that self-determination, democracy, and legitimacy are required factors of Statehood; see also VAUGHAN LOWE, *INTERNATIONAL LAW* 153 (2007).

59. OPPENHEIM, *supra* note 12, at 118.

60. David Raič is the Senior Legal Counsel of the Ministry of Foreign Affairs (Netherlands) and a professor at the University of Amsterdam.

61. DAVID RAIČ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 58 (2002).

62. *Regional Ethnic Diversity*, GOV.UK (Aug. 1, 2018), <https://www.ethnicity-facts-figures.service.gov.uk/ethnicity-in-the-uk/ethnic-groups-by-region>.

63. Timothy George McLellan, *Kosovo, Abkhazia and the Consequences of State Recognition*, 5 *CAMBRIDGE STUDENT L. REV.* 1, 6 (2009).

64. RAIČ, *supra* note 61, at 58.

people) and China (with nearly 1.4 billion people) are equally recognized States and full-fledged members of the world community.⁶⁵

Third, the permanent population must have the intention to inhabit the territory on a permanent basis.⁶⁶ Raič refers to the self-proclaimed Principality of Sealand, which was founded by Paddy Roy Bates in 1967 on an abandoned anti-radar platform, HM Fort Roughs in the North Sea outside British territorial waters.⁶⁷ Sealand claimed to have 160,000 citizens, but all the citizens had second citizenships and consisted of business professionals who lived permanently in their home countries.⁶⁸ Under international law, this entity had no population, because its “citizens” did not intend to live in that “State.”⁶⁹

The example of Sealand, however, is not relevant. According to U.N. rules, artificial installations cannot possess the status of islands; therefore, Sealand had no territory and could not in any manner be recognized as an independent State.⁷⁰ Moreover, in 1987, the United Kingdom extended the limit of its territorial waters from three to twelve nautical miles, bringing Fort Roughs—and the hapless Prince Roy—into British territorial waters and into the jurisdiction of the U.K.⁷¹ As the result, the U.S. Federal Communications Commission decided in 1990 that the Principality of Sealand is neither a State nor an entity capable of registering ships.⁷²

Nevertheless, the irrelevance of Sealand for illustrative purposes does not mean the irrelevance of Raič’s claim that the intention to inhabit is a factor of population. Raič’s point of view is supported by Dr. Gideon Boas, who reached the same conclusion by analyzing Oppenheim’s definition of population.⁷³ Boas says that as a population must be settled, there is a basic need for some form of stable human community capable to support the superstructure of the State, even if the inhabitants are traditionally nomadic.⁷⁴ Professor Boas then refers to the Western Sahara region, which for centuries has been inhabited by peoples keeping nomadic lifestyle and

65. *The World Factbook: China*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last updated June 19, 2019); *The World Factbook: Holy See (Vatican City)*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/vt.html> (last updated May 9, 2019).

66. RAIČ, *supra* note 61, at 58.

67. *Id.* at 59 n.37.

68. *Id.*

69. *Id.*

70. United Nations Convention on the Law of the Sea, art. 60, Dec. 10, 1982, 1833 U.N.T.S. 397.

71. Territorial Sea Act 1987, c. 49 (Eng.).

72. P. CHRISTIAAN KLIEGER, *THE MICROSTATES OF EUROPE: DESIGNER NATIONS IN A POST-MODERN WORLD* 174 (2013).

73. Dr. Gideon Boas is a Professor in the La Trobe Law School in Australia; he was a Senior Legal Officer at the United Nations International Criminal Tribunal for the former Yugoslavia. Dr. *Gideon Boas*, CROCKETT.COM.AU, <http://www.crockett.com.au/www/content/default.aspx?cid=691&fid=687> (last visited June 20, 2019).

74. GIDEON BOAS, *PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES* 163 (2012).

therefore constantly migrating (though within the territory's limits, which is important).⁷⁵

Fourth, the territory must be habitable. In support of his claim, Raič refers to the so-called Republic of Minerva, a micronation established by Michael Oliver, a millionaire from the United States.⁷⁶ Oliver asked several governments for recognition, but Raič says Minerva could never become a State because of the uninhabitable character of its territory.⁷⁷ Instead, ICJ Judge Crawford disputes that Minerva could not be legitimate under the U.N. Convention on the Law of the Seas (UNCLOS), which states that artificial islands cannot form the basis for territorial States.⁷⁸ The convention defines an island as a “naturally formed area of land, surrounded by water, which is above water at high tide.”⁷⁹ The Minerva Reefs, however, did not meet that requirements and therefore could not be regarded as a habitable territory. This fact alone made its recognition impossible.

In summary, the factors proposed by David Raič give a good explanation of the term “population” used in the Montevideo Convention and can, therefore, be used as a guidance for establishing whether the State meets the “population” requirement under the Montevideo Convention.

b. Territory

Territory is the second Montevideo criterion that needs to be discussed. Oppenheim has noted that “a State without territory is impossible,” and some piece of land is essential before one can accept the establishment of a State.⁸⁰ Hence, this subparagraph will analyze the legal meaning of the term “territory” in more detail.

According to international lawyer Jorri C. Duursma, a territory in the international law context consists of a land territory, internal waters, territorial sea, and air space above this territory.⁸¹ As confirmed by the ICJ in 2001, islands meeting these criteria can, therefore, be considered as territories sufficient for Statehood.⁸² Nevertheless, as was seen with the example of Sealand, it must be remembered that the term “island” must

75. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶ 152 (Oct. 16).

76. Mr. Oliver intended to create a tax-free micronation on The Minerva Reefs and even carried tons of sand from Australia claiming that after some construction work the Reefs would have become habitable. RAIČ, *supra* note 61, at 59 n.39; DAVID BELL MISLAN & PHILIP STREICH, WEIRD IR DEVIANT CASES IN INTERNATIONAL RELATIONS 24 (2019).

77. RAIČ, *supra* note 61, at 59 n.39.

78. James Crawford, *Islands as Sovereign Nations*, 38 INT'L & COMP. L. Q. 277, 279 (1989); see generally United Nations Convention on the Law of the Seas, *supra* note 70.

79. United Nations Convention on the Law of the Seas, *supra* note 70, art. 121.

80. M.N. Shaw, *Territory in International Law*, 13 NETH. Y.B. INT'L L. 61, 61 (1982).

81. JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD 116 (1996).

82. See Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 40, 97 (Mar. 16) (stating that “islands, regardless of their size . . . enjoy the same status, and therefore generate the same maritime rights, as other land territory”).

comply with article 60 of the UNCLOS; otherwise, it will not be considered as a territory for legal purposes.⁸³

Regarding the applicability of the term “territory” to islands, Professor Alberta Costi responds to a controversial issue: can a territory be formed by islands that *have become* uninhabitable? Referring to the ICJ decision indicated above, Costi says that islands, including coral atolls (which are uninhabitable) are part of a State’s land territory.⁸⁴ This contradicts Raič’s fourth criteria, which says that a territory meets the Montevideo Convention’s requirements only if it is habitable.⁸⁵ Nevertheless, Costi agrees that, in accordance with the UNCLOS, the atoll will no longer constitute an “island” if it is inundated or flooded at high tide. He also states that having become uninhabitable, the atoll is unlikely to be considered as a territory under the UNCLOS.⁸⁶ This complies with Raič’s theory.

In terms of case law regarding the legal status of islands, the most illustrative is *Island of Palmas*,⁸⁷ which outlined three key elements of territory (applicable not only to islands): sovereignty, population, and delimitation.⁸⁸ In this case, Arbiter Huber stressed the “continuous and peaceful display of the functions of State [. . . as] a constituent element of territorial sovereignty,”⁸⁹ which he considered as a decisive factor in resolving disputes respecting title to territory.⁹⁰ Huber’s formula of “display of sovereignty” has later been adopted as the standard of deciding territorial disputes because it was undeniable that territorial control is an essential element of the law of the territory.⁹¹ But what does the sovereignty mean? Referencing *Island of Palmas*, Vaughan Lowe says that sovereignty signifies the principles of non-intervention in the affairs of other States, prohibitions on the use of force and coercion, and the principles of sovereign equality and sovereign immunity.⁹² In other words, under international law, States “have sovereignty” over their territories rather than “ownership” over them.⁹³

Population as a criterion of Statehood has already been examined above, but delimitation needs more careful analysis. Delimitation means the control over a certain area and a requirement that the State should have reasonably determinate borders.⁹⁴ Regarding the latter requirement,

83. See *supra* text accompanying notes 70 – 79.

84. SMALL STATES IN A LEGAL WORLD 110 (Petra Butler & Caroline Morris, eds., 2017).

85. RAIČ, *supra* note 61, at 59.

86. SMALL STATES IN A LEGAL WORLD, *supra* note 84, at 110 – 11.

87. See *Island of Palmas* (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

88. SMALL STATES IN A LEGAL WORLD, *supra* note 84, at 110 – 11.

89. *Island of Palmas*, 2 R.I.A.A. at 840.

90. SURYA PRAKASH SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 72 (1997).

91. Sookyeon Huh, *Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)*, 26 EURO. J. INT’L L. 709, 713 – 14 (2015).

92. INTERNATIONAL LAW, *supra* note 58, at 138.

93. *Id.*

94. *Id.* at 156.

“reasonably” does not mean “strictly”: there are a plenty of examples when a State was fully recognized despite having unclear borders. For instance, David Raič points to Israel as an example of a State, which, despite having territorial disputes, was fully-recognized, even by confronting Arab States,⁹⁵ and was granted membership in the United Nations.⁹⁶ The rule of reasonable flexibility of the State’s frontiers was enshrined in North Sea Continental Shelf, where the ICJ affirmed that “the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries . . . [t]here is, for instance, no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not.”⁹⁷ Another example is Andorra which despite a lack of settled frontiers was recognized by a number of States.⁹⁸

The other important feature of a territory is that there is no specific condition concerning possession of sufficient land. Matthew Craven comments on this phenomenon saying that it is not the size of a State that is important but “rather the ability to rightfully claim the territory as a domain of exclusive authority.”⁹⁹

In summary, it can be said that sovereignty, population and delimitation are the three key features of the territory and there is no requirement on strictly delimited borders or a minimum size of the land. However, to maintain the existence of these three features, the territory must be controlled by the government—the third criterion of Statehood that will be analyzed further.

c. Government

This paragraph discusses the third Montevideo criterion: government. If an entity wishes to be recognized as a State, its territory and population must be legally controlled by the government.

Matthew Craven defines governmental effectiveness as “the government’s power to assert monopoly over the exercise of legitimate physical violence within a territory.”¹⁰⁰ The principle of governmental effectiveness (known as the effective control test) was embodied in the *Aaland Islands* case and implies that the State can only come into existence when its public authorities are “strong enough to assert themselves throughout the territories of the State without the assistance of foreign militaries.”¹⁰¹ This

95. According to Raič, Arab States—“despite claims to the entire territory of Israel”—did not deny Israel’s statehood; rather they claimed that Israel, as a State, did not meet the terms of Article 4 of the U.N. Charter. RAIČ, *supra* note 61, at 60 n.45; see *Political and Security Questions*, 1948 – 49 U.N.Y.B. 403.

96. G.A. Res. 273 (III), at 18 (May 11, 1949); S.C. Res. 70 (Mar. 3, 1949).

97. North Sea Continental Shelf (Fed. Repub. Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 46 (Feb. 20).

98. BROWNLIE, *supra* note 9, at 129 n.9.

99. INTERNATIONAL LAW, *supra* note 58, at 219.

100. See *id.* at 221.

101. *Of the International Committee of Jurists entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion Upon the Legal Aspects of the Aaland Islands Question*, League

interpretation complies with the traditional international legal theory and reflects the idea that a high degree of control is achieved by a high degree of consent by the people presumably making the government legitimate.¹⁰² The importance of effective government and the necessity of the effective control test can be clearly illustrated by the Belgian Kongo crisis. In 1960, the Belgian Congo was granted independence, subsequently becoming Democratic Republic of Congo, but was overthrown in 1965.¹⁰³ Some authors, like Professor Guy Vanthemsche,¹⁰⁴ suggest that one cause of the overthrow was the persistence of Katangan leaders and their foreign supporters.¹⁰⁵ But Crawford believes that the real reason was that the government of the new republic was too dependent on the former sovereign and subsequently did not have sufficient power to control the situation.¹⁰⁶ Therefore, Crawford concludes that, in case of secession, “the effective and stable exercise of governmental powers” is necessary for obtaining Statehood.¹⁰⁷ But the traditional theory does not question whether the effective government correlates with democratic principles. This means that authoritarian and dictator regimes, being effective though cruel, would under traditional theory also be recognized as governments as long as they can control the territory.¹⁰⁸ On the other hand, it must be said that the legislation of many recognized and legitimate States in Western Asia is based on sharia law, which is traditionally different from the approach of Western countries.¹⁰⁹ For this reason, requiring compliance with democratic principles as a criterion of Statehood would not be appropriate.

In practice, the international community considers not only the question of whether the government possesses sufficient power over the territory and its inhabitants but its compliance with other criteria, such as popular support, legitimacy, and the ability and will to fulfill international obligations.¹¹⁰ This point of view was supported by Matthew Craven, who

of Nations Journal Special Supplement No. 3 (1920); see INTERNATIONAL LAW, *supra* note 58, at 221.

102. Sean Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT'L & COMP. L. Q. 545, 547 (1999).

103. Roger-Claude Liwanga, *Judicial Independence of Republic of Congo: Myth or Reality?*, 56 J. AFR. L. 194, 196 (2012).

104. Guy Vanthemsche is a Professor at Free University Brussels (Vrije Universiteit Brussels) and the Secretary of the Royal Commission of History in Belgium.

105. GUY VANTHEMSCHE, *BELGIUM AND THE CONGO, 1885 – 1980*, at 203 (Kate Connelly, eds., 1st ed. 2012).

106. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 58 (2nd ed. 2006).

107. *Id.*

108. Brad R. Roth, *Governmental Illegitimacy in International Law: An Emerging Norm in Theoretical Perspective* (Fall 1996) (unpublished Ph.D. dissertation, University of California, Berkeley).

109. RAINER GROTE ET AL., *CONSTITUTIONALISM, HUMAN RIGHTS AND ISLAM AFTER THE ARAB SPRING 194* (Rainer Grote et al. eds. 2016).

110. See generally M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815 – 1995* (1997).

suggests that efficiency alone does not suffice for recognition and “is conditioned by other relevant principles such as the self-determination or the prohibition on the use of force.”¹¹¹ But are these principles universally approved? Obviously not, as different States apply different criteria. For instance, considering the case of *Republic of Somalia*,¹¹² John Hobhouse has developed the following set of criteria which the United Kingdom applies for considering whether an entity can claim governmental status. According to Hobhouse, the following must be considered:

- a. “whether it is the constitutional government of the State;
- b. the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the State;
- c. whether Her Majesty’s Government has any dealings with it and if so what is the nature of those dealings;
- d. in marginal cases, the extent of international recognition that it has as the government of the State.”¹¹³

Among these four, criteria (a) and (b) form the basic test of whether the entity is a government (which recalls the ‘effective control test’ and the requirement of legitimacy), while the other two—(c) and (d)—are rather matters of evidence.¹¹⁴ This approach was criticized by Talmon, who disagreed with the idea that the court should treat any evidence of “dealings” as an indicator of recognition.¹¹⁵ Nevertheless, this approach—in simple words, based on the effective control test and legitimacy—was widely adopted by courts in the United Kingdom.¹¹⁶

But what does legitimacy mean in the context of recognition? Vaughan Lowe outlines two aspects of legitimacy. Firstly, legitimacy means that the entity must have emerged in a manner that is “consistent with the principle of self-determination.”¹¹⁷ Secondly, Lowe agrees that however effective the control over a territory is, the government will not be recognized if it is “hopelessly undemocratic.”¹¹⁸ In this sense, the principle of democracy mentioned earlier, plays an important role in recognition. According to Allen Buchanan,¹¹⁹ the general conception of political legitimacy is based on the idea that the protection of basic human rights is the core of justice, and the very reason of existence of political power and minimal legitimacy

111. See INTERNATIONAL LAW, *supra* note 58, at 221.

112. *Republic of Somalia v Woodhouse Drake & Carey (Suisse) S.A. and Others* [1993] EWHC (QB) 54 (Eng.).

113. *Id.* at 68.

114. JONATHAN HILL, INTERNATIONAL COMMERCIAL DISPUTES IN ENGLISH COURTS 23 – 24 (4th ed. 2005).

115. Stefan Talmon, *Recognition of Governments: An Analysis of the New British Policy and Practice*, 1992 BRIT. Y.B. INT’L L. 231, 283 – 284.

116. Patrick Capps, *British Policy on the Recognition of Governments*, Apr. 2014 P.L. 229, 239 (2014).

117. INTERNATIONAL LAW, *supra* note 58, at 159.

118. *Id.*

119. Allen Buchanan is a Professor of Philosophy of International Law at Duke University.

(which is necessary for recognition of government) means that the political power must “satisfy minimal standards for protecting individuals’ rights by processes and policies that are themselves at least minimally just.”¹²⁰

To summarize, it can be said that government under the Montevideo Convention is an entity that has a control over a territory and its population and, in performing that control, guarantees the protection of basic human rights by legal methods and policies. In a broader meaning, popular support, willingness to fulfill international obligations, and respect of the principles of democracy are also considered for recognition purposes. But, in practice, the recognition of a government means the willingness by other States to enter into legal relations with the same. This forms the fourth Montevideo criteria, which will be discussed further.

d. Capacity to Enter into Legal Relations

Vaughan Lowe believes that the capacity to enter into relations with other States, being the fourth Montevideo criteria, is rather the consequence of Statehood than its condition and is, for this reason, quite paradoxical.¹²¹ Therefore, it will be the subject of analysis in this subparagraph.

The ambiguity of this criterion is that it is set out as a requirement of Statehood, but it is clearly impossible to have any diplomatic relations without being already considered as a State. Commenting on the situation with Palestine, Mahmoud Masud from Coventry University also points out the paradox of this criterion that the ‘would be’ State must demonstrate its capacity to enter into agreements with other States without relying on them and be able to enter into internationally recognized agreements, which may not be possible prior to recognition.¹²²

But Barrie Strain explains this principle in another way. He suggests that such capacity reflects the degree of independence possessed by an entity,¹²³ and his idea complies with the principles of sovereignty and effective control outlined above: Strain believes that if all States are equal in terms of international legal personality, then a sovereign State is accountable to no other entity outside the institution of international law.¹²⁴ Indeed, Texas, Ontario, and California have population, territory, and local government, subsequently fulfilling the first three Montevideo criteria. But they have no independence from the United States or Canada (respectively) and are unable to enter into diplomatic relations on their own. These entities, therefore, cannot be considered as independent States in the international context. This is also confirmed by article 2 of the Montevideo Convention

120. ALLEN BUCHANAN, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 259 (2004).

121. *INTERNATIONAL LAW*, *supra* note 58, at 157.

122. Mahmoud Masud, *Palestine and the Right to Statehood Under International Law: An Absolute Right That Has Become a Hope*, 22 *COV. L. J.* 9, 9 – 14 (2017).

123. Barrie Strain, *Palestinian Statehood: A Political Pipe Dream but a Legal Reality*, 7 *COV. L.J.* 1, 1 – 11 (2002).

124. *Id.*

that says that the “federal State shall constitute a sole person in the eyes of international law.”¹²⁵

Nevertheless, the capacity to enter into legal relations as a criterion of Statehood was highly criticized by Martin Dixon, who claims that “independence,” as it is understood under the Montevideo Convention, is quite unrealistic.¹²⁶ Dixon says that all States to some extent depend on each other (financially, or in terms of political support, etc.), and for this reason factual autonomy cannot be regarded as “independence” for legal purposes.¹²⁷ But Dixon introduces the concept of “legal independence,” which exists “if the territory is not under the lawful sovereignty of another State.”¹²⁸ As an example, Dixon mentions Slovakia and the Czech Republic, which are no longer legally united¹²⁹ and are regarded as sovereign States despite being highly dependent on each other.

There is, however, one more problem concerning this issue: the legitimacy of independence. A State may fulfill all four Montevideo criteria, but do the methods of achieving independence affect recognition? Dixon gives an answer by referring to self-determination: if the territory declaring factual independence is able to claim the right of self-determination, then it seems to be sufficient for attaining legal independence and, if other criteria are met, Statehood.¹³⁰ This principle was widely adopted for recognizing the independence of former colonies—for example, the State of Micronesia.¹³¹ It means that on a theoretical level, self-determination is regarded as a right of ethnical groups, and any ethnical group qualified as “people” can claim self-determination, independence, and Statehood.¹³²

The acceptance of self-determination leads to the acceptance of a right of secession. The former Soviet republics were also heavily reliant on this principle during the formation of new States after the dissolution of the USSR.¹³³ Despite limited support, the international community agreed that the Baltic Republics (Lithuania, Latvia, and Estonia) had a right to self-determination.¹³⁴ Even the Soviet Union—at that time ruled by Gorbachev’s government—agreed that the three Baltic States had a

125. Montevideo Convention, *supra* note 6, art. 2.

126. DIXON, *supra* note 37, at 120.

127. *Id.*

128. *Id.*

129. The dissolution was embodied by Slovak National Council’s Declaration of Independence of the Slovak Nation.

130. See DIXON, *supra* note 37, at 121.

131. REILLY RIDGELL, *PACIFIC NATIONS AND TERRITORIES: THE ISLANDS OF MICRONESIA, MELANESIA AND POLYNESIA* 52 (3d ed. 1995).

132. See DIXON, *supra* note 37, at 121.

133. See generally Lauri Mälksoo, *The Soviet Approach to the Right of Peoples to Self-Determination: Russia’s Farewell to Jus Publicum Europaeum*, 19 J. HISTORY INT’L L. 200 (2017).

134. In the case of Baltic States, it was restoration rather than recognition because Lithuania, Latvia and Estonia already existed as State before Soviet occupation. See NATIONAL IDENTITY AND ETHNICITY IN RUSSIA AND THE NEW STATES OF EURASIA 162 (Roman Szporluk, ed. 1994).

constitutional right of self-determination.¹³⁵ But Dixon believes that the European Commission has adopted a relatively narrow view of self-determination, secession, and Statehood; he says that “the Commission rejected the idea that ethnic groups and minorities enjoyed a right of self-determination and stated that such peoples can have their identity as a separate ethnic group recognized by the ‘mother’ State, but not in a way that guaranteed them independent Statehood.”¹³⁶ Nevertheless, lawful self-determination remains to be the most appropriate way by which a territory may achieve independence and Statehood.

In summary, it can be said that all four Montevideo criteria are closely linked, and on a theoretical level they form the minimal requirements that the entity must meet to be considered a State. But in practice, these principles are sometimes neglected. This can be illustrated by the example of Bangladesh, especially by the way this State was created. During the Bangladesh Liberation War in December 1971, the *Mukti Bahini* (also known as Bangladesh Forces) were granted massive military support by India.¹³⁷ It was a determining factor of a later formation of Bangladesh.¹³⁸ Martin Dixon says that the creation of Bangladesh is a classic example of the use of force, and yet, within three months, Bangladesh was recognized by the majority of other States and in the following year was granted membership in the United Nations.¹³⁹ Dixon says that Bangladesh had population, territory, and an effective government (though highly supported by India), but he believes that the militaristic way of creation of this State was illegal, and the international community ignored the use of force.¹⁴⁰ At the same time, in the case of the TRNC, it is always said the Republic is not recognized because its creation violated the principle of non-intervention.¹⁴¹ This indicates either some selectivity of compliance with principles of international law or the need to consider other factors of recognition.

2. *Other Factors of Recognition*

The Montevideo criteria are vital but not comprehensive. As was already said, different States have different approaches towards recognition, and in many cases the political situation and certain political goals greatly influence their decisions. This subparagraph will briefly analyze other factors that are considered for recognition purposes.

Shaw says that important (though not legally binding) evidence of Statehood is membership in the United Nations.¹⁴² Indeed, article 4(1) of

135. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL* 261 (1995).

136. DIXON, *supra* note 37, at 122.

137. Robert LaPorte, *Pakistan in 1971: The Disintegration of the Nation*, 12 *ASIAN SURV.* 97, 97–108 (1972).

138. *Id.*

139. DIXON, *supra* note 37, at 123.

140. *Id.*

141. *THE NON-USE OF FORCE IN INTERNATIONAL LAW* 17 (William E. Butler, ed. 1989).

142. SHAW, *supra* note 20, at 345.

the U.N. Charter states that an entity can be granted membership in the U.N. only if it: (1) is a State, (2) is peace-loving, (3) accepts the obligations of the Charter, (4) is able to carry out the obligations stated in the Charter, and (5) is willing to do so.¹⁴³ Therefore, according to the former President of the ICJ, Rosalyn Higgins, if a State meets these criteria, then it automatically complies with the traditional legal criteria of Statehood codified in the Montevideo Convention.¹⁴⁴ But this statement was criticized by professor John Dugard, who explained that on several occasions these requirements (and especially the requirement of independence and effective government) have been overlooked in the interests of self-determination.¹⁴⁵ Nevertheless, in practice the admission of an entity as a Member State of the United Nation can be regarded as the approved seal of Statehood on the new State.¹⁴⁶

The importance of compliance with the rules of the U.N. was also highlighted by the Statement No. 91/469 relating to the recognition of Russia and the entities that emerged in the post-Soviet area.¹⁴⁷ According to the statement, those entities had to comply with the provisions of the U.N. Charter and commitments of The Helsinki Final Act and the Charter of Paris (especially those regarding human rights and democracy), guarantee the rights of ethnic and national groups and minorities, respect the inviolability of all borders, and adopt all relevant commitments regarding disarmament and non-proliferation of nuclear weapons.¹⁴⁸ Despite the fact that this statement was designed specifically for post-Soviet Russia and the former Soviet republics, it reflects relevant principles that are applicable for recognition purposes in general.¹⁴⁹

D. CONCLUSION TO PART I

According to Montevideo Convention, the recognition of States is a declaratory act and is not regarded as a vital factor for the existence of the State. Nevertheless, it is a powerful political tool, which may have a massive impact at both national and international levels and on both individuals and businesses. State practice shows that in some cases recognition plays rather a constitutive role in the life of new States and is an important factor in dispute settlement.

It is basically presumed that to be recognized, the entity must meet the criteria given by article 1 of Montevideo Convention. Despite being

143. Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. Rep. 57, at 62 (May 28).

144. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 17 (1963).

145. JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 78 (1987).

146. *INTERNATIONAL LAW*, *supra* note 58, at 163.

147. *Statement Concerning the Future Status of Russia and Other Former Soviet Republics*, 7 EPC BULL. 772, 772 (1991).

148. *Id.*

149. See DANIEL HÖGGER, *THE RECOGNITION OF STATES* 56 (2015).

relatively unclear initially, these criteria were given concrete form by State practice, case law, and the works of legal scholars discussed in this part. But the recognition of Bangladesh or Bosnia and Herzegovina shows that in several situations a new State is recognized, even if it does not comply with Montevideo criteria, because the decision is politically advantageous for recognizing parties.

II. Non-Recognition, Unrecognized Quasi-States, and Partly Recognized States

In part I, great attention was paid to the principles of recognition, its theories and criteria. Part II applies this theoretical background to the contemporary issues to clarify the common reasons of non-recognition and evaluate the compliance of modern unrecognized States with Montevideo criteria. At the beginning, part II analyses the phenomena of unrecognized entities, including the problem of their definition and the contradiction between lawful self-determination and the ambiguous legality of secession. Then modern unrecognized and partly-recognized States will be discussed. At the end, this part will summarize the relevance of Montevideo criteria and their sufficiency.

A. THE PROBLEM OF DEFINITION

Giving a precise definition to unrecognized and partly recognized entities is the starting point of the analysis. This subpart discusses the different terms and definitions of self-proclaimed entities suggested by different legal scholars in order to find out the most appropriate ones.

At the moment, unrecognized States do not have a clear legal definition, or even a definite term. James Ker-Lindsay from the London School of Economics distinguishes three different terms describing an unrecognized or a partly-recognized entity: a “para-State,” a “quasi-State,” and a “pseudo-State.”¹⁵⁰ Ker-Lindsay says these terms are interchangeable; however, Sergius L. Kuzmin from the Institute of Oriental Studies (Russia) says that the meanings of these words are not identical, and the best term to describe unrecognized or partly recognized entities is as “de facto State[s].”¹⁵¹ Indeed, it correlates with the concept of “de facto recognition” which arises when there is some doubt as to the long-term viability of the State’s government.¹⁵² But this term was criticized by Professor Ernst Dijkhoorn from Leiden University for its narrowness: Professor Dijkhoorn says that the term “de facto State” does not cover all the entities that aspire to Statehood,

150. JAMES KER-LINDSAY, *THE FOREIGN POLICY OF COUNTER SECESSION: PREVENTING THE RECOGNITION OF CONTESTED STATES* 20 (2012).

151. P. CHRISTIAAN KLIEGER ET AL., *GREATER TIBET: AN EXAMINATION OF BORDERS, ETHNIC BOUNDARIES, AND CULTURAL AREAS* 65 (2016).

152. SHAW, *supra* note 20, at 341.

and for this reason he believes that the term “quasi-State” is more precise.¹⁵³ To support his point of view, Dijkhoorn refers to Professor Pål Kolstø, who describes a quasi-State as “a State that failed to develop the necessary State structures or regions that secede from another State, obtain control over the territory, but fail to achieve international recognition.”¹⁵⁴ For these reasons, we believe that the term “quasi-State” is the most precise term to describe such entities.

Kolstø’s definition not only gives a universal term for unrecognized entities but reflects the way of their establishment as well. Professor Deon Geldenhuys believes that unilateral secession is the most common origin of quasi-States.¹⁵⁵ His claim is supported by Shaw, who states that the principle *terrae nullius* is no longer apparent, as decolonization is at its end.¹⁵⁶ This means that the further creation of new States is possible only on the territories of the existing ones—in other words, by secession.¹⁵⁷ In contrast to self-determination, secession is not codified in international law and is hardly described in domestic laws.¹⁵⁸ Moreover, courts in the United States and Canada state that unilateral secession is constitutionally illegal unless the secession is agreed through some official, constitutionally-agreed process.¹⁵⁹ But it can be clearly seen in the example of the events in Chechnya in 1991 – 1994¹⁶⁰ that States are usually not inclined to recognize the independence of their seceding regions, and escalating argument may result in armed conflict between the official government and the secessionist forces—in other words, the constitutionally-agreed process under such circumstances may not exist.

Nevertheless, the response of other States may vary: as the case of Kosovo shows, an entity may not be recognized by the State that it secedes from, but it can be recognized by one or more other States and even by international organizations.¹⁶¹ At the same time, no State or organization has recognized the Moldavian Republic of Transdnistria, the Nagorno-Karabakh Republic, or the Republic of Somaliland.¹⁶² Reflecting this, Ker-Lindsay divides quasi-States into two groups: the “contested States”¹⁶³ (or partly recognized) and the three States mentioned above, which “are regarded as meeting the

153. ERNST DIJKHOORN, QUASI-STATE ENTITIES AND INTERNATIONAL CRIMINAL JUSTICE: LEGITIMISING NARRATIVES AND COUNTER-NARRATIVES 108, 115 (2017).

154. *Id.* at 110 – 11.

155. DEON GELDENHUYS, CONTESTED STATES IN WORLD POLITICS 29 (2009).

156. SHAW, *supra* note 20, at 157.

157. *Id.*

158. ALEKSANDR PAVKOVIC AND PETER RADAN, CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION 29 (2nd ed. 2016).

159. *Id.*

160. LAURA REES-EVANS, *Secession and the Use of Force in International Law*, 4 CAMBRIDGE L. REV. 249, 249 – 266 (2008).

161. JOHN DUGARD, THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO 206 (2013).

162. KER-LINDSAY, *supra* note 150, at 39.

163. *Id.*

criteria for Statehood but as yet have not been recognized by any UN member”¹⁶⁴ (in other words, unrecognized States).

Having analyzed the terms above, we would choose the term “quasi-State” to describe both recognized and unrecognized States and would use Pål Kolstø’s definition as the most appropriate explanation. But Ker-Lindsay’s division of all self-proclaimed entities into two groups is relevant for analytical purposes and will be used in the next subpart.

B. UNRECOGNIZED STATES

Ker-Lindsay outlines three quasi-States that are not recognized by any other legitimate State: the Moldavian Republic of Transnistria (TMR), the Nagorno-Karabakh Republic (NKR) and the Republic of Somaliland.¹⁶⁵ Each of them will be thoroughly analyzed in the following sections.

1. *The Moldavian Republic of Transnistria*

The Transnistrian conflict is considered one of the least violent separatist conflicts in the post-Soviet region.¹⁶⁶ Thus, the Moldavian Republic of Transnistria (the TMR) will be the first quasi-State to be discussed.

The population in the Moldavian Soviet Socialist Republic belonged to one ethnic group and it used to share the same religion before the Soviet occupation—so there were no clear historical prerequisites of separation.¹⁶⁷ Natalya Kharitonova from Moscow State University believes that the separation movement emerged in response to nationalistic calls for the unification with Romania and especially because of the two legislative acts regarding the official language that were considered as “discriminatory” against Russian-speaking people in the Transnistria region.¹⁶⁸ Following a number of protests against the official government of the Moldavian Soviet Socialist Republic (MSSR) and local referendums on the creation of an independent State (Transnistrian Moldavian Soviet Socialist Republic TMSSR), the Tiraspol City Council proclaimed independence in September 1990, but the claim was rejected by the government of the USSR.¹⁶⁹ Even today the TMR remains an illegally seceded region.

The TMR has a defined territory, a permanent population that meets professor Raic’s criteria, and a government that seems to have effective control over the territory. The TMR also has diplomatic relations with Abkhazia and Nagorno-Karabakh Republic.¹⁷⁰ Thus, it can be assumed that

164. *Id.*

165. *Id.*

166. THE EUROPEAN UNION, CIVIL SOCIETY AND CONFLICT 76 (Nathalie Tocci ed. 2011).

167. “FROZEN CONFLICTS” IN EUROPE 45 (Anton Bebler ed. 2015).

168. Natalya Kharitonova, *Приднестровье: Война и Перемирие (1990 – 1992 гг.)*, 17 Журнал РГГУ: Новый Исторический Вестник 187 – 197 (2008).

169. See V. ANDRUSHYAK AND A. ВОУКО, *История Республики Молдова. С древнейших времён до наших дней 335* (Ассоциация Учёных Молдовы им. Н. Милеску-Спэтару 2002).

170. These, however, are also quasi-States.

the TMR meets all of the Montevideo criteria and can theoretically be regarded as an independent State. Moreover, according to Judge Kovler's decision describing the Transdniestrian separation as an act of self-determination,¹⁷¹ it may seem that its separation from Moldova was legal. But Thomas D. Grant offers another point of view, which is based on the reliance of the separatists on Russian support.¹⁷² Grant's statement is highly supported by Mark A. Meyer.¹⁷³ Meyer outlines certain reasons of non-recognition of the TMR. First, he claims that the TMR has been highly supported by Russia's military forces from the time of Transdniestrian War and is still occupied by Russian troops,¹⁷⁴ which contradicts Crawford's statement regarding the effective and stable exercise of governmental powers.¹⁷⁵ Second, Russia is still assisting the TMR with economic support and is keeping pressure on Moldova by using energy and other levers; third, the TMR has had a poor human rights record.¹⁷⁶

All these factors taken together indicate the TMR's lack of governmental power; this itself means that the TMR fails to meet the basic criteria of Statehood¹⁷⁷ and subsequently cannot be regarded as a State but rather a de-facto regime on an occupied part of Moldova controlled by Russia.¹⁷⁸

2. *The Nagorno-Karabakh Republic*

In contrast to the relatively peaceful separation of the TMR, the case of the Nagorno-Karabakh Republic involves discrimination and sanctioned mass killings.

The disputes in the Nagorno-Karabakh region date back several hundred years, but in the 20th century they became particularly strenuous.¹⁷⁹ By the 1980s, the population on the territory of Nagorno-Karabakh, formally belonging to Azerbaijan Soviet Socialistic Republic (Azerbaijan SSR), consisted mainly of Armenians (75.9% of Armenians compared to 22.9% of Azerbaijanians in 1979)¹⁸⁰ that were discriminated by the Azeri government in the form of dissemination of Azeri culture and employing competent

171. *Ilascu & Others v. Mold. & Russ.*, 2004-VII Eur. Ct. H.R. at 147.

172. Thomas D. Grant, *Frozen Conflicts and International Law*, 50 CORNELL INT'L L.J. 361, 378 (2017).

173. The founder and the president of the Romanian-American Chamber of Commerce.

174. See Mark A. Meyer et al., *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova A Report from the Association of the Bar of the City of New York*, 61 REC. ASS'N B. CITY N.Y. 196, 280 – 81 (2006).

175. CRAWFORD, *supra* note 106.

176. Meyer, *supra* note 174, at 204.

177. This is according to article 1 of Montevideo Convention. See Montevideo Convention, *supra* note 6, art. 1.

178. Meyer, *supra* note 174, at 268 – 69.

179. Ali Mortazavian & Mohammad Ghiacy, *Regional and International Cooperation to Reduce Nagorno – Karabakh Conflict*, 10 J. POL. & L. 136, 140 (2017).

180. VLADIMIR EGHISHEI KHOJABEKYAN AND EDUARD LIPARITOVICH DANIELJAN, *REGULARITIES OF THE DEMOGRAPHIC PROCESSES IN ARMENIA IN THE 19TH AND 20TH CENTURIES AND AT THE THRESHOLD OF THE 21ST CENTURY* 235 (2004).

Azeri manpower in government departments on ethnic grounds.¹⁸¹ In response to these facts and following the proclamation of *glasnost*, the region reasonably intended to become part of Armenia and, after a full-scale war, proclaimed independence on January 6, 1992, as the Nagorno-Karabakh Republic (the NKR).¹⁸²

The NKR, however, was recognized neither by international community, nor by Armenia and now remains to be considered as an occupied territory of Azerbaijan.¹⁸³ The Karabakh War veteran and Professor of Baku Slavic University, Sadir Surkhay Mammadov, claims that the creation of the NKR was the occupation by Armenia and “one of the crimes against the international order.”¹⁸⁴ Indeed, after the territory was conquered by Armenian forces, the entire Azeri population was forced to flee from the territory, and the land corridor connecting the region with Armenia was occupied as well.¹⁸⁵ But Professor Amit K. Chhabra says that the peaceful request to secede from Azerbaijan SSR in 1987 was answered by Azeri authorities in form of sanctioned *pogroms*, mass killings, and actions of genocide when 400,000 ethnic Armenians were forced to flee from Baku, the northern part of the NKR, and rural areas in Azerbaijan.¹⁸⁶ Chhabra also claims that the invasion by Armenia was aimed at the protection of the NKR’s ethnic Armenians from Azerbaijan’s military operations to defend its territory.¹⁸⁷

The conflict in the NKR has been frozen since the cease-fire agreement in 1994 that followed the U.N. Security Council’s call for the withdrawal of all occupying forces.¹⁸⁸ Since then, the NKR has developed an effective government and legal system, provides democratic elections, and maintains relations with foreign States by means of their representative offices and through OSCE peace talks.¹⁸⁹ In other words, Amit K. Chaabra believes that NKR’s self-determination was consistent with the principles of international law, and the use of force was appropriate as a means to obtain independence.¹⁹⁰

181. Mortazavian & Ghiacy, *supra* note 178.

182. TIM POTIER, CONFLICT IN NAGORNO-KARABAKH, ABKHAZIA AND SOUTH OSSETIA: LEGAL APPRAISAL 8 (2001).

183. Weller, *supra* note 5, at 138.

184. Sadir Surkhay Mammadov, *International Law and the Nagorno-Karabakh War: Opinion on Political Aspects*, 45 POLISH POL. SCI. Y.B. 136, 140 (2016).

185. Weller, *supra* note 5, at 125 – 126.

186. Amit K. Chhabra, *Superpower Responsibility for State Recognition: Charting a Course for Nagorno-Karabakh*, 31 B.U. INT’L. L. J. 125, 131 (2013).

187. *Id.*

188. *Id.* at 132.

189. *Id.*

190. *Id.* at 153.

In summary, the NKR complies with the Montevideo criteria and nevertheless is defined as a de-facto regime rather than an independent State.¹⁹¹

3. *The Republic of Somaliland*

Different from the TMR and the NKR, the Republic of Somaliland is an interesting example of a former colony which, despite meeting all the criteria of Statehood, is still considered as a de facto regime.

The Republic of Somaliland claims to be a successor of the British Somaliland Protectorate, which existed until 1960 and was supposed to unify with the Somali Republic (a former Italian colony) into a Greater Somali state.¹⁹² But its implementation has faced a number of difficulties based on substantial linguistic differences between the two colonies and a traditional inclination for independence.¹⁹³ As a result, in 1969 the Somalian army seized power¹⁹⁴ and controlled the territory until the fall of the Barre regime in 1991.¹⁹⁵ In 1991, the Northern Region unilaterally seceded from the Somali Republic and called itself the Republic of Somaliland.¹⁹⁶

Today the Republic of Somaliland is considered a de facto regime despite meeting all four criteria of Statehood.¹⁹⁷ Somaliland's territory has been unchanged from the times of the British Somaliland protectorate with 3.5 million permanent inhabitants residing in it and a functioning government that uses every opportunity to enter into diplomatic relations with other States.¹⁹⁸ But the International Crisis Group states that meeting the Montevideo criteria is not valid if the entity is a legal part of an already recognized State.¹⁹⁹ Indeed, Somaliland remains a legal territory of the Somali Republic, and recognizing Somaliland would mean taking apart Somali.²⁰⁰ But this is contrary to opinion of the African Union (AU), which calls to consider the self-determination of the region. The AU's position is that the recognition of Somaliland should be considered from a historical viewpoint, taking into account the aspiration of the people.²⁰¹

191. BAHRUZ BALAYEV, *THE RIGHT TO SELF-DETERMINATION IN THE SOUTH CAUCASUS: NAGORNO-KARABAKH IN CONTEXT* 98 (2013).

192. PHILLIP BRIGGS, *SOMALILAND: WITH ADDIS ABABA & EASTERN ETHIOPIA* 16 (2012).

193. *Id.*

194. MOSHE Y. SACHS, *WORLD MARK ENCYCLOPEDIA OF THE NATIONS*, vol. 2, at 290 (7th ed. 1988).

195. Martin Doornbos, *Somalia: Alternative Scenarios for Political Reconstruction*, 101 *AFR. AFF.* 93, 100 (2002).

196. *Id.* at 95.

197. Janis Grzybowski, *To Be or Not to Be: The Ontological Predicament of State Creation in International Law*, 28 *EUR. J. INT'L L.* 409, 416 (2017).

198. MARLEEN RENDERS, *CONSIDER SOMALILAND: STATE-BUILDING WITH TRADITIONAL LEADERS AND INSTITUTIONS* 15 (2012).

199. *Id.* at 16.

200. *Id.*

201. Garth Abraham, *Lines Upon Maps: Africa and the Sanctity of African Boundaries*, 15 *AFR. J. INT'L COMP. L.* 61, 77 (2007).

However, Marleen Renders from Ghent University argues that recognizing Somaliland as a State “can trigger a cascade of border claims” and may result in a massive war in the whole region.²⁰² By stressing that the actual recognition of a State is a political decision and not a legal one, Renders confirms the statements made by Cassese and Shaw regarding the political nature of recognition.²⁰³

The examples of the TMR, the NKR, and the Republic of Somaliland clearly show that the recognition of a State is not entirely based on the principles of the Montevideo Convention but also highly depends on the political situation. But as will be seen below, non-compliance with criteria given by article 1 does not necessarily mean that the entity cannot get recognition as a State.

C. PARTLY RECOGNIZED STATES

The term “partly recognized States”²⁰⁴ is mainly used by Russian scientists to describe entities that may be recognized by some States but not by others.²⁰⁵ To analyze the legal status of such States from different sides, we shall refer to Ker-Lindsay’s division and discuss the Turkish Republic of Northern Cyprus (the TRNC), the Republic of Abkhazia, and the Republic of Kosovo in this subpart.

1. *The Turkish Republic of Northern Cyprus*

Similar to the situation of Somaliland, the Turkish Republic of Northern Cyprus (the TRNC) was established as a result of the ethnic conflict between two nations inhabiting the island of Cyprus.

The United Republic of Cyprus became an independent State in 1960, but the ethnic conflict between Greek Cypriots and Turkish Cypriots led to unrest followed by Turkish invasion in 1974.²⁰⁶ In 1983, the occupied Northern Cyprus declared its independence as the TRNC introduced its own government.²⁰⁷ But in 1983 the Security Council declared that the declaration of the new State by Turkish Cypriots was legally invalid and called on all States not to recognize the TRNC and to regard the Republic of Cyprus as the only Cypriot State.²⁰⁸ So far, the TRNC is only recognized

202. RENDERS, *supra* note 198, at 16.

203. *Id.*

204. Some scholars prefer using the term “partially” instead of “partly.” See Nina Caspersen, *Making Peace with De Facto States*, in UNRECOGNIZED STATES AND SECESSION IN THE 21ST CENTURY 13 (2017).

205. For example, Artem Sergeev applies the term “partly recognized legal entity” to the Republic of Kosovo. See Artem Sergeev, *Unilateral Law and Non-State Actors: Exploring a New Paradigm*, 19 GER. L. J. 65, 71 (2018).

206. GRANT, *supra* note 14, at 132.

207. Patrick Tani, *The Turkish Republic of Northern Cyprus and International Trade Law*, 12 ASPER REV. INT’L BUS. & TRADE L. 115, 116 (2012).

208. Robin White, *Recognition of States and Diplomatic Relations*, 37(4) INT’L & COMP. L. Q. 983, 983 (1988).

by Turkey and is separated by a 180-km “Green line” and the U.N. buffer zone from the Republic of Cyprus.²⁰⁹

If one applies the Montevideo criteria to the TRNC, it becomes obvious that the TRNC cannot be regarded as an independent State because it highly depends on Turkey. But its dependence on Turkey is not a mere fact, but rather a consequence of non-recognition. Dr. Yael Ronen²¹⁰ explains that the use of force by Turkey in 1974 is the reason for the existing illegality of the TRNC government.²¹¹ Hence, the crucial question in case of the TRNC is whether Turkish invasion in 1974 had legal grounds. Explaining the use of force, Turkey relied on article IV of The Treaty of Guarantee, which states that in the event of a breach of the treaty (for example, for failure to respect the constitution),²¹² the U.K., Greece, or Turkey (the guarantors) may take actions to prevent the breach and re-establish the State in accordance with the treaty.²¹³ According to professor Nasuh Uslu, the discriminatory proposals by President Makarios in 1960 provoked the anti-Turkish action within the State; and if professor Uslu’s statement is right, then the Turkish use of force may be considered legal.²¹⁴ But Dr. Ronen argues that it is not clear whether the Treaty of Guarantee allows the guarantor to protect *only part* of the population rather than the whole of Cyprus.²¹⁵ And because of this ambiguity, Turkey cannot prove the legitimacy of intervention and subsequently the legitimacy of the TRNC’s government. Dr. Ronen agrees that the violation of the Treaty of Guarantee was questionable, but it was clearly not legitimate for the Security Council to oblige non-recognition of the TRNC by other States.²¹⁶

But as Patric Tani from University of Manitoba claims, the non-recognition of the TRNC is not a legal conclusion but a political decision for the peaceful unification of Cyprus.²¹⁷ This is another example of a situation where non-recognition is used as a political tool rather than a legal conclusion.

209. RONGXING GUO, TERRITORIAL DISPUTES AND CONFLICT MANAGEMENT: THE ART OF AVOIDING WAR 117 (2011).

210. Dr. Yaël Ronen is an Assistant Professor at Sha’arei Mishpat College and a former diplomat in the Israeli Foreign Service.

211. YAËL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW 66 – 67 (2011).

212. Treaty of Guarantee, art. 1, Aug. 16, 1960, 382 U.N.T.S. 5475.

213. *Id.* art. 4.

214. In November of 1960, the Cypriot President Makarios submitted a proposal of thirteen (13) amendments included the changes of proportions of Greek and Turkish Cypriots in public sectors and therefore were considered as discriminatory against Turkish Cypriots. See NASUH USLU, THE CYPRUS QUESTION AS AN ISSUE OF TURKISH FOREIGN POLICY AND TURKISH-AMERICAN RELATIONS 1959 – 2003, 20 – 21 (2003).

215. RONEN, *supra* note 211, at 66.

216. *Id.*

217. Tani, *supra* note 206, at 132.

2. *The Republic of Abkhazia*

The idea of the independence of Abkhazia emerged in the early 1930s when the Abkhazian people suffered from Lavrentiy Beria's²¹⁸ "anti-Abkhazian drive" (forced migration of native inhabitants) and other anti-Abkhazian actions, including the closure of Abkhazian schools, and banning the use of the Abkhazian language in administration and publication.²¹⁹ This long-lasting tension has resulted in an armed conflict that broke up in 1992 when more than 16,000 people were killed and the Georgian forces were expelled from the Abkhazian region.²²⁰ Since 1994, The Republic of Abkhazia remains a self-proclaimed State,²²¹ and in 2008 it was recognized by Russia, Syria, Nicaragua, Nauru, and Venezuela.²²²

Despite being recognized by the named States, the international community and the Security Council regard Abkhazia as an occupied territory of Georgia.²²³ The Republic of Abkhazia has a population of roughly 200,000 people²²⁴ in a defined territory and a government that has been controlling the country since 1994.²²⁵ But its capacity to enter into diplomatic relations is significantly limited because only five countries have recognized the republic's Statehood; as a result, the Republic of Abkhazia is highly dependent on Russia.²²⁶

3. *The Republic of Kosovo*

The partly-recognized Republic of Kosovo has emerged as the result of the dissolution of Yugoslavia when it claimed its recognition in 2008.²²⁷ The history of its creation needs more detailed investigation and will be analyzed separately in part III. But a brief analysis of the legal consequences regarding Kosovo is necessary for a better understanding of its exceptionality.

The case of Kosovo is unique in that it is the only self-proclaimed State that was recognized by the United Nations and ninety-nine (99) States, including twenty-two (22) EU members.²²⁸ In 2010, the ICJ issued an

218. Lavrentiy Beria was a Soviet politician and a chief of Soviet secret police (NKVD).

219. POTIER, *supra* note 182, at 9.

220. ROMENA GURASHI & NENO GABELLA, A FEDERAL PERSPECTIVE ON THE ABKHAZ-GEORGIAN CONFLICT 15 (2017).

221. Edward Mihalkanin, *The Abkhazians: A National Minority in Their Homeland*, in DE FACTO STATES: THE QUEST FOR SOVEREIGNTY 155 (2004).

222. IRINA GETMAN-PAVLOVA & ELENA POSTNIKOVA, *Международное право. Учебник для академического бакалавриата* 69 (2018).

223. S.C. Res. 1808, ¶ 1 (Apr. 15, 2008).

224. Bruno Coppieters, *The Roots of the Conflict*, in A QUESTION OF SOVEREIGNTY: THE GEORGIA-ABKHAZIA PEACE PROCESS 19 (1999).

225. McLellan, *supra* note 63, at 3.

226. *Id.*

227. James Summers, *Kosovo: From Yugoslav Province to Disputed Independence*, in KOSOVO: A PRECEDENT? 3, 3 (James Summers ed., 2011).

228. DUGARD, *supra* note 161, at 206.

advisory opinion stating that the obligation to respect a State's territorial integrity "was not applicable to nonstate actors," that international law allows declarations of independence, and that "the adoption of the declaration of independence of 17 February 2008 did not violate general international law."²²⁹

The recognition of Kosovo is considered premature by many States. First of all, it is argued that at the moment of recognition Kosovo had no effective control over part of its territory—that is, the Serb enclave in North Kosovo.²³⁰ Indeed, the governance of a minority enclave in North Kosovo (inhabited by 60,000 Kosovar Serbs) is still contested by the Serbian and Kosovar governments.²³¹ Secondly, during proceedings before the ICJ in 2008, Cyprus highlighted the fact that Kosovo's government was not effective because of strong dependence on the armed forces, personnel, and other agencies of the third States.²³² And finally, the decision was criticized for its "judicial economy."²³³

Nevertheless, professor Marc Weller from the University of Cambridge says that the opinion of the court includes many important findings. Firstly, it declares that there is no prohibition of unilateral secession in international law and a State can be created through the constitutive will of the population "even in the absence of the consent of the previous central authorities."²³⁴ Secondly, the obligation to respect territorial integrity is not applicable to those seeking secession but operates only at the international level.²³⁵ Nevertheless, professor Weller agrees that such secession must be a last resort, and the parties must exhaust all possible ways of negotiation before seceding unilaterally.²³⁶ Weller also stresses that even if unilateral secession is inevitable, the seceding entity must respect and incorporate into their declaration "essential commitments relating to the international legal order."²³⁷ It reflects the requirements²³⁸ which the new entities that emerged on the post-Soviet territory had to meet in order to get recognition. And finally, Weller says that the seceding entity must respect the legitimate

229. Ralph Wilde, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 105 AM. J. INT'L L. 301, 301 (2011).

230. DUGARD, *supra* note 161, at 207.

231. Nora Stel & Chris van der Borgh, *Political Parties and Minority Governance in Hybrid Political Orders: Reflections from Lebanon's Palestinian Settlements and Kosovo's Serbian Enclaves*, 11 J. INTERVENTION & STATEBUILDING 490, 490 (2017).

232. Written Statement from the Republic of Cyprus to the International Court of Justice, at 45 – 46 (Apr. 17, 2009), <https://www.icj-cij.org/files/case-related/141/15609.pdf>.

233. Marc Weller, *Modesty Can be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?*, 24 LEIDEN J. INT'L L. 127, 130 (2011).

234. *Id.* at 146.

235. *Id.*

236. *Id.*

237. *Id.* at 146 – 47.

238. *Statement Concerning the Future Status of Russia and Other Former Soviet Republics No. 91/469*, 7 EUR. POL. COOPERATION DOCUMENTATION BULL. 1, 772 (1991).

interests and the rights of the States from which it is seceding (especially those concerning access to cultural property, sharing of resources, etc.).²³⁹

Weller believes that, if these conditions are met, then a unilaterally seceding entity can be recognized by the international community. And the case of Kosovo clearly shows that such recognition is practically possible.

D. CONCLUSION TO PART II

The examples of the States discussed above demonstrate the selective character of recognition. Whether the seceding region has obtained all the qualifications that are considered necessary for Statehood or not, other States will base their decision on their own political goals and will always tend to avoid political risks. That is why no State recognized the Republic of Somaliland and Armenia refused to recognize the NKR despite these quasi-States meeting the Montevideo criteria.

At the same time, Kosovo was recognized despite failing the effective control test and not meeting the Montevideo criteria. However, the case of Kosovo shows that seceding regions still have a chance to be recognized as independent States even if they do not meet one of the Montevideo criteria. This finding leads to the conclusion that article 1 of Montevideo Convention in its existing form is not capable to resolve the issues with quasi-States and probably needs to be amended.

III. The Responsibility of States

The international community may treat quasi-States differently, but the crucial importance of recognition arises when it comes to the matter of responsibility and dispute settlement.²⁴⁰ This Part analyzes the basic principles of States responsibility, assesses the ways of dispute settlement, and examines how recognition affects the responsibility of quasi-States.

A. BASICS OF INTERNATIONAL RESPONSIBILITY

Non-recognition leads to an inability to enter into legal relations between a quasi-State and a non-recognizing body or State. Consequently, it can affect dispute settlement.²⁴¹ In order to understand how non-recognition affects the efficiency of dispute settlement, it is necessary to discuss the basics of international responsibility and its consequences.

239. Weller, *supra* note 233, at 147.

240. ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* 127 (1993).

241. See NINA CASPERSEN, *UNRECOGNIZED STATES: THE STRUGGLE FOR SOVEREIGNTY IN THE MODERN INTERNATIONAL SYSTEM* 40 – 46 (2012).

1. *State Responsibility*

Before discussing the ways of dispute settlement and how non-recognition affects them, the theoretical basis of State responsibility must be outlined. According to Dixon, State responsibility occurs when a State violates an international obligation owed to another State.²⁴² Such obligation may arise from a bilateral or multilateral treaty, customary law, or from the non-fulfilment of a binding Court decision.²⁴³ The basic, internationally-recognized rules regulating issues of State responsibility are codified in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts²⁴⁴ adopted by International Law Commission (“ILC Draft Articles”). Draft Article 1 states that “every internationally wrongful act of a State entails the international responsibility of the State.”²⁴⁵ The ILC Draft Articles themselves do not explain what an “internationally wrongful act” is exactly, but Draft Article 3 states that an internationally wrongful act is characterized by international law.²⁴⁶ If we apply this notion to Dixon’s explanation above, then it can be clearly seen that the breach of a treaty, violation of customary law, or non-fulfilment of a judicial decision can be regarded as internationally wrongful acts. But it must be proved that the act is attributable to the State—in other words, the unlawful act must be committed by the State and not by private individuals acting for themselves.²⁴⁷

Dixon divides unlawful acts that are attributable to States into five groups. Firstly, Dixon highlights the activities of organs of the State.²⁴⁸ According to Draft Article 4, acts conducted by organs exercising legislative, executive, judicial, or any other function will be considered as acts of the State.²⁴⁹ Commenting on this statement, Vaughan Lowe explains that States will always be responsible for the acts of their agents²⁵⁰ but not for the acts of private individuals.²⁵¹ But Lowe agrees that the State may be responsible for the acts of its citizens if it fails to prevent their wrongful acts.²⁵²

Secondly, Dixon analyzes the activities of private individuals. Dixon agrees with Lowe’s statement regarding State agents and refers to *Bosnia and Herzegovina v. Yugoslavia*, which confirms that the State can be held liable for

242. DIXON, *supra* note 37, at 254.

243. *Id.*

244. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/10, at 31 (2001).

245. *Id.* at 33.

246. *Id.* at 36.

247. DIXON, *supra* note 37, at 258.

248. *Id.*

249. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 244, at 40.

250. For instance, the police, the military, and government officials.

251. LOWE, *supra* note 58, at 120.

252. *Id.*

the acts of its functionaries.²⁵³ But Dixon says that even private individuals can be held liable if they act on behalf of the State—as in *Yeager v. Iran*.²⁵⁴

Thirdly, Dixon discusses the activities of revolutionaries. Such activities normally are not attributed to States,²⁵⁵ which is clearly illustrated by the *Sambaggio*²⁵⁶ and *AAPL v. Republic of Sri Lanka*²⁵⁷ cases. But Dixon refers to Draft Article 10(2), which states that if the insurrectionist movement becomes the new government then its action will be regarded as an act of the State.²⁵⁸ To illustrate the application of this rule, Dixon refers to the *Bolivar Railway* case,²⁵⁹ where the tribunal held Venezuela liable for the acts of successful revolutionaries, which they committed before taking power.²⁶⁰ Nevertheless, Dixon says that the rule deriving from Draft Article 10(2) is not absolute and depends on the interpretation in each particular case. For example, Dixon cites *Short v. Iran*²⁶¹ where the tribunal decided that the Iranian government was not responsible for the actions of revolutionaries who participated in its establishment.²⁶² Their decision was based on two reasons. Firstly, the facts concerning the participation of revolutionary authorities were in doubt.²⁶³ Secondly, the revolutionary government was not in control when the events happened.²⁶⁴

Dixon also discusses the activities of groups acting in another State's territory.²⁶⁵ This situation was analyzed by the ICJ in the *Nicaragua* case.²⁶⁶ According to the court's decision, the State is held liable for such activities if the State has direct and effective control over the group which conducted a wrongful act on a territory of another State.²⁶⁷ This principle, known as the "effective control and dependency test" (or Nicaragua test) was highly criticized by Dixon and many other academic authors. Dixon says this test is

253. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Judgment, 1996 I.C.J. Rep. 595, ¶ 32 (July 11).

254. Monroe Leigh, *State Responsibility Toward Foreign Nationals – Expulsion – Liability of State for Actions of Revolutionaries – Relevance of Intent of Person Expelled During Revolution*, 82 AM. J. INT'L L. 353, 354 (1988).

255. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 244, at 50.

256. See generally *Sambiaggio* (It. v. Venez.), 10 R.I.A.A. 499 (1903).

257. See generally *Asian Agricultural Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (June 27, 1990).

258. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 244, at 51.

259. *Bolivar Railway* (Gr. Brit. v. Venez.), 9 R.I.A.A. 445 (1903).

260. TIM HILLER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 344 (1988).

261. *Short v. Iran*, 16 Iran-U.S. CTR 76, ¶ 34 – 35 (1987).

262. DIXON, *supra* note 37, at 261.

263. *Id.*

264. *Id.*

265. *Id.* at 262.

266. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

267. DIXON, *supra* note 37, at 262.

too strict and it can leave the victim State without any effective remedies.²⁶⁸ Dr. Mactheld Boot criticized the Nicaragua test by citing the *Tadić* case.²⁶⁹ In that case, the Appeals Chamber determined that the Nicaragua test was not persuasive because it did not comply with the logic of the law of State responsibility and because it was considered “at variance with judicial and State practice.”²⁷⁰ For this reason, the Appeals Chamber adopted the “overall control test” which was also applied by the Trial Chamber in the *Aleksovski* case.²⁷¹ Dr. Mactheld believes the “overall control test” is sufficient to clarify the responsibility of the foreign State,²⁷² but Dixon argues that the “overall control test” is weaker and subsequently less effective.²⁷³ In this argument, Dixon’s point of view is supported by the decision in the *Genocide* case,²⁷⁴ where the ICJ adopted the “effective control and dependency” test.

Finally, Dixon highlights the “primary responsibility” of the State. Dixon describes this responsibility as the one incurring because of a breach of some other international obligation.²⁷⁵ For example, in the *Janes Claim* case,²⁷⁶ Mexico was held responsible for the death of American superintendent Byron E. Janes, who was shot to death in 1918 by his discharged employee, Pedro Carbajal.²⁷⁷

In the case of quasi-states and secessionist entities, the task of establishing responsibility is complicated by the fact that the self-proclaimed entities often depend highly on one or more other States. For example, the Strasbourg Court was often inclined to shift responsibility for the TMR and the NKR to Russia and Armenia subsequently.²⁷⁸ But, in *Azemi v. Serbia*²⁷⁹

268. *Id.*

269. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

270. MACTHELD BOOT, *GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 554 (2002).

271. *See generally* *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999).

272. BOOT, *supra* note 270, at 554.

273. DIXON, *supra* note 37, at 262.

274. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia)*, Judgment, 1996 I.C.J. Rep. 595, ¶ 32 (July 11).

275. DIXON, *supra* note 37, at 262.

276. *Janes Claim* (U.S. v. Mex.), 4 R.I.A.A. 82, 83 (1926).

277. In the case, the local police were informed immediately but the police chief delayed the assembling of his men and as a result, Carbajal remained at large. In this case, Mexico was held responsible for failing to arrest Pedro Carbajal and subsequently for the death of Byron E. Janes. *See* GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 258 – 59 (6th ed. 1992).

278. BERNADETTE RAINEY ET AL., JACOBS, WHITE AND OVEY: *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 101 (2017).

279. *Azemi v. Serbia*, EUR. CT. H.R., ¶ 40 (Nov. 5, 2013), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-139052"\]}](https://hudoc.echr.coe.int/eng#{).

the European Court for Human Rights (ECHR) decided that the claim against Serbia for the State exercising control over Kosovo was not appropriate.²⁸⁰ For this reason, it is necessary to examine whether the self-proclaimed entity is under the effective control of any other State before making any considerations of its responsibility.

2. *The Consequences of Internationally Wrongful Acts*

The customary law shows that any breach of an international obligation entailing responsibility leads to legal consequences.²⁸¹ If the wrongful act has caused damages, then in accordance with Draft Article 42 the injured State is entitled to invoke the responsibility of another (responsible) State.²⁸² First of all, the responsible State must cease the wrongdoing and guarantee its non-repetition.²⁸³ After the wrongdoing is ceased, the victim State may claim for injuries.

Dixon says that the most common consequence of State responsibility is the obligation to compensate injuries in the form of reparation.²⁸⁴ If the responsible State refuses to make reparations or pay compensation, then in accordance with the U.N. Charter it must use all possible options to settle the dispute peacefully.²⁸⁵

According to article 35, reparations may take the form of restitution, compensation, and satisfaction. Cassese highlights the hierarchy between these three modes, starting with restitution.²⁸⁶ If the injury takes the form of material damage, then the responsible State must provide restitution in kind.²⁸⁷ But Cassese says that if restitution is not possible, then the responsible State must make compensation.²⁸⁸ This alternative is codified by Draft Article 36 and must cover “any financially assessable damage including loss of profits.”²⁸⁹ And finally, Cassese claims that the moral damage may be redeemed only by satisfaction. Satisfaction is governed by Draft Article 37 and means formal regret or apologies²⁹⁰ coupled with measures aimed at

280. *See id.* This phenomenon will be thoroughly examined Chapter III.

281. *Factory at Chorzow (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 6 (Sept. 13).

282. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 244, at 117.

283. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 244, at 51.

284. DIXON, *supra* note 37, at 263.

285. U.N. Charter art. 2, ¶ 3.

286. CASSESE, *supra* note 31, at 259.

287. For example, in *Spanish Zone of Morocco*, arbiter Huber held that the respondent State was obliged to give Britain the residence which would be as convenient as the house previously destroyed by Spanish troops. *Spanish Zone of Morocco Claims (Gr. Brit. v. Spain)*, 2 R.I.A.A. 615, 641 (1925).

288. CASSESE, *supra* note 31, at 260.

289. Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 98 (2001).

290. Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 105 (2001).

bringing wrongdoers to justice and a promise that the wrongful acts will not be repeated in the future.²⁹¹ Normally, satisfaction is independent of any claim for damages,²⁹² but in the *Carthage* and *Mahouba* cases²⁹³ satisfaction took the form of payments for damages and material losses.²⁹⁴ By referring to this fact, Cassese concludes that the symbolic payment may be the other instance of satisfaction.²⁹⁵

Quasi-States are obliged to compensate injuries as well as recognized States. But in the case of quasi-States, this obligation depends on the efficient control test. It is generally believed that the State—which provides military, financial, or any other support—is most likely to be obliged to compensate damages. For example, Alessandro Chechi²⁹⁶ says that Turkey bears responsibility for acts against cultural property exercised by the authorities of the TRNC,²⁹⁷ and Dr Heiko Krüger²⁹⁸ believes that Armenia will be responsible for reparation for internationally wrongful acts that happened in the NKR.²⁹⁹ It proves that quasi-States are subject to the same obligations as recognized States, but the responsibility is shifted to the State which exercised effective control over the quasi-State.³⁰⁰ But as it will be seen in the next paragraph, quasi-States are significantly limited in terms of the options available for dispute settlement.

B. DISPUTE SETTLEMENT

The question of dispute settlement takes the central place among all other issues relating to quasi-States. As *terrae nullius* is no longer relevant in the modern world, the seceding entities face the problem of territorial disputes with the States they secede from.³⁰¹ And while there are established rules of dispute settlement for recognized States, there is no clear procedure for

291. 10 LINDA J. PIKE, *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 384 (Elsevier Science Pubs. 1987).

292. See *Nuclear Tests (Austl. v. Fr.; N.Z. v. Fr.)*, Judgment, 1974 I.C.J. Rep. 253, ¶ 27 (Dec. 20).

293. *The Carthage (Fr. v. It.)*, 11 R.I.A.A. 460, 475 (Perm. Ct. Arb. 1913).

294. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS* 159 (Oxford University Press 3rd ed. 2015).

295. CASSESE, *supra* note 31, at 260.

296. Alessandro Chechi is a senior researcher at the Faculty of Law of the University of Geneva and the reporter for Oxford University Press.

297. *BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE: LEGAL AND RELIGIOUS PERSPECTIVES ON THE SACRED PLACES OF THE MEDITERRANEAN* 313 (Silvia Ferrari and Andrea Benzo eds., Routledge 2015).

298. Dr Heiko Krüger is an attorney at law and commentator on international and European legal affairs. The subjects of his research are secession conflicts (particularly in the Caucasus region and Kosovo case).

299. HEIKO KRÜGER, *THE NAGORNO-KARABAKH CONFLICT: A LEGAL ANALYSIS* 112 (Springer 2010).

300. See *Between Cultural Diversity and Common Heritage*, *supra* note 297, at 313.

301. KRISTA WIEGAND, *ENDURING TERRITORIAL DISPUTES: STRATEGIES OF BARGAINING, COERCIVE DIPLOMACY AND SETTLEMENT* 6 (University of Georgia Press 2011).

quasi-States. Moreover, as it will be discussed below, non-recognition plays an important role of making dispute settlement even more difficult.

1. *The Ways of Dispute Settlement*

Traditionally, there are two ways of dispute settlement.³⁰² The first is by various diplomatic procedures (such as negotiation, inquiry, mediation, or conciliation), and the second relates to adjudication.³⁰³ These options are codified in article 33(1) of the U.N. Charter apart from other peaceful means of the parties' own choice.³⁰⁴

But the number of options is rather limited in the case of quasi-States. For instance, quasi-States are less likely to use negotiations as an option of dispute settlement for two reasons.³⁰⁵ First, as was seen with the examples of the TMR and the TRNC, secessionist movements often start with protests against the politics of the existing governments, but such protests cannot be regarded as negotiations. The ICJ has decided that mere protests and disputations are distinct from negotiations, and a genuine attempt to engage in discussions is needed.³⁰⁶ Secondly, Professor John G. Merrills from the University of Sheffield says that negotiations are impossible if the parties refuse to have any dealings with each other.³⁰⁷ Professor Merrills explains that in many cases a party may use non-recognition as a reason for denying standing to the other party to a dispute.³⁰⁸ Such non-recognition is demonstrated by the Arab-Israeli situation, where the refusal of the Arab States to recognize Israel, and Israel's refusal to recognize Palestine Liberation Organization, prevented direct negotiations.³⁰⁹

On the other hand, mediators coming from international organizations have little opportunity to engage in an entirely partial process because the U.N. Charter prohibits its involvement in the internal affairs of U.N. member States.³¹⁰ Another problem of mediation relates to its nature: Dixon says that mediation is a continuation of "good offices" and negotiation.³¹¹ According to Dixon, a mediator is a person taking part in the negotiations whose main purpose is to help find a compromise.³¹² But the parties may not recognize each other, which makes negotiations impossible. Nevertheless, in some cases mediation proved to be effective. For example, the Russian

302. *Id.*

303. SHAW, *supra* note 20, at 764.

304. U.N. Charter art. 33, ¶ 1.

305. SHAW, *supra* note 20, at 764.

306. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Geor. v. Russ.*), 2011 I.C.J. Rep. 70, ¶ 157 (April 1).

307. JOHN G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 23 (Cambridge University, 4th ed. 2005).

308. *Id.*

309. *Id.* at 24.

310. *UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM* 168 (Nina Caspersen and Gareth R.V. Stansfield eds., Routledge 2011).

311. DIXON, *supra* note 37, at 288.

312. *Id.*

Federation as a mediator managed to secure a cease-fire in Nagorno-Karabakh in 1994 and to “freeze” the conflict.³¹³ This means that despite some narrowness, mediation can be an effective option of dispute settlement.

But a more powerful way to settle disputes is to apply for either international adjudication or arbitration. This option was particularly popular with developing countries and the former socialist bloc.³¹⁴ Arbitration helped to substantially widen the law of State responsibility by considering the *Island of Palmas*³¹⁵ and *AAPL v. Sri Lanka* cases.³¹⁶ Further, another advantage of arbitration is that, in contrast to the ICJ, arbitration can settle disputes between any other bodies having international personality apart from States.³¹⁷

The International Court of Justice, however, is considered the primary institution for international dispute resolution.³¹⁸ The ICJ considered the conflicts in former Yugoslavia,³¹⁹ and the decisions made by the ICJ are greatly respected and have enormous political and legal influence.³²⁰ Nevertheless, only internationally recognized States which are parties to the Statute of the ICJ can apply to the Court,³²¹ and this fact causes difficulties to quasi-States which may wish to consider their disputes at the ICJ. There is, however, a reservation stating that other States (which are not parties to the Statute) may apply if they are subject to special provisions of treaties or with the approval of the Security Council.³²² But Article 35(2) does not explain what treaties can confer access. The uncertainty of this reservation was highly criticized by judges in the *Legality of the Use of Force* case.³²³ The judges stated that article 35(2) should be interpreted widely and all treaties containing a jurisdictional clause shall fall under its provisions.³²⁴ Dixon also highlights another problem with the ICJ judgements. As it was said above, the State normally needs to be a party to the ICJ Statute.³²⁵ Serbia was suspended from the rights of this membership from 1992 until 2000 and therefore Serbia argued that it was not subject to the ICJ’s decisions in this

313. Charles King, *The Benefits of Ethnic War: Understanding Eurasia’s Unrecognized States*, 53 *WORLD POL.* 524, 532 (2001).

314. CASSESE, *supra* note 31, at 285.

315. See generally *Island of Palmas* (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

316. See generally *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (June 27, 1990).

317. DIXON, *supra* note 37, at 292 – 93.

318. *Id.* at 294.

319. See generally *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 47 (Feb. 26).

320. DIXON, *supra* note 37, at 294.

321. I.C.J. Charter arts. 34 – 35.

322. I.C.J. Charter art. 35, ¶ 2.

323. See Sienho Yee, *The Interpretation of “Treaties in Force” in Article 35 (2) of the Statute of the ICJ*, 47 *I.C.L.Q.* 884, 903 (1998).

324. DIXON, *supra* note 37, at 297.

325. I.C.J. Charter art. 34, ¶ 1.

period.³²⁶ The position of the judges was not clear: in 1993 they decided that the suspension did not prevent Serbia from being treated as a party, but in 2004 they decided otherwise.³²⁷ Finally, in 2007 the judges returned to the decision they made in 1993.³²⁸ Dixon says that this ambiguity, taken together with unclarity on article 35(2), affected the ICJ's credibility and damaged its integrity.³²⁹

2. *The Role of International Organizations in Dispute Settlement*

There are approximately 600 different international organizations that are involved in a wide array of activities.³³⁰ These organizations may intervene in peacekeeping operations and military actions, take governmental duties over the territories, and promote human rights.³³¹ Among the existing organizations, the U.N. remains the only legal resort for coercive action.³³²

The primary responsibility of the U.N. is "authorizing the use of force and maintaining international peace and security."³³³ Subsequently, the U.N. plays the most important role in settling the conflict with quasi-States. The U.N. sanctioned the NATO military operations in Bosnia³³⁴ and Kosovo.³³⁵ U.N. Resolution 884 called for a cease-fire in the Nagorno-Karabakh region in 1993,³³⁶ and the U.N. greatly contributed to defuse the situation in the Northern Cyprus.³³⁷ But the highest influence of the U.N. was demonstrated by the situation in Kosovo, where its recognition by the U.N. and admission to become a member State has led to *sui generis* recognition of Kosovo by the majority of other States.³³⁸

But the U.N. was often highly criticized for its legal weakness.³³⁹ Jasvir Singh from the University of Birmingham says that many consider it as an increasingly irrelevant entity for its inability to perform its collective security functions.³⁴⁰ But Singh disagrees with this position and claims that the

326. DIXON, *supra* note 37, at 297.

327. *Id.*

328. *Id.*

329. *Id.*

330. PIERRE SCHMITT, ACCESS TO JUSTICE AND INTERNATIONAL ORGANIZATIONS: THE CASE OF INDIVIDUAL VICTIMS OF HUMAN RIGHTS VIOLATIONS 1 (Edward Elgar Publishing 2017).

331. *Id.*

332. THE UNITED NATIONS AND REGIONAL SECURITY: EUROPE AND BEYOND 76 (Michael Charles Pugh and Waheguru Pal Singh Sidhu eds., Lynne Rienner Publishers 2003).

333. *Id.*

334. S.C. Res. 816, ¶ 4 (Oct. 9, 1992).

335. S.C. Res. 1199, ¶ 4(b) (Sept. 23, 1998).

336. S.C. Res. 884, ¶ 1 (Nov. 12, 1993).

337. S.C. Res. 550, ¶ 2 (May 11, 1984).

338. STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 175 (Duncan French ed., Cambridge University Press 2013).

339. JASVIR SINGH, PROBLEM OF ETHNICITY: ROLE OF UNITED NATIONS IN KOSOVO CRISIS 198 (Unistar Books 2008).

340. *Id.*

failure of the U.N. Security Council in terms of its collective security functions is not a failure of the organization, but rather a failure of its permanent member States.³⁴¹ Besides, Singh says that the functions of the U.N. are not limited to collective security, but also to assisting shattered States and providing shelter to refugees—which was clearly illustrated by the example of Kosovo.³⁴²

The facts given above, and especially the recognition of Kosovo and its consequences, indicate a particular power of the U.N. and proves that it is an effective peace-making organization. But the case of Bangladesh with its premature recognition and admission to U.N. membership also shows some prejudice and a selective character of its principles.

C. RESPONSIBILITY OF QUASI-STATES

In the previous paragraphs of parts I and II, much was said about the importance of recognition, its legal effects, and its consequences. Professor Raič has made a great contribution to the analysis of recognition in accordance with the Montevideo Convention, but the examples of modern quasi-States³⁴³ show that meeting these criteria alone is not sufficient for getting international recognition.³⁴⁴ At the same time, non-recognition highly affects and limits the available modes of dispute settlement.³⁴⁵ In this paragraph, I shall discuss the cases where quasi-States were involved in internationally wrongful acts and analyze the exceptional case of Kosovo.

1. *Responsibility of Quasi-States and Effective Control Test*

According to Alessandro Chechi and Dr. Heiko Krüger, if a recognized State supports or assists a quasi-State, then the recognized State may be held liable for the legal consequences of any wrongful act.³⁴⁶ Indeed, cases relating to property left behind by former owners in Northern Cyprus were brought against Turkish authorities and not against the TRNC. In this sense, *Loizidou v. Turkey*³⁴⁷ was the most illustrative case. Turkey argued that the TRNC was justified in expropriating the houses of displaced Greek Cypriots, but the court decided that such expropriation was not proportionate.³⁴⁸ Secondly, the court found that the presence of a large number of Turkish troops indicated the “effective overall control exercised

341. *Id.*

342. *Id.*

343. For example, Turkey bears responsibility of the actions taken by the TRNC. See INTERNATIONAL LAW, *supra* note 58, at 259.

344. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. OF TRANSN'L L. 403, 453 (1999).

345. *See id.* at 442.

346. *See BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, supra* note 297, at 313; KRÜGER, *supra* note 299, at 112.

347. *Loizidou v. Turkey*, App. No. 15318/89, 23 Eur. H.R. Rep. 513 (1997).

348. JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 384 (Cambridge University Press 2013).

by Turkish army.”³⁴⁹ Subsequently, the court decided that Turkey was responsible for the policies and actions of the TRNC and ordered Turkey to pay \$1,000,000 as a compensation.³⁵⁰ Despite this, Turkey argued that the region in Northern Cyprus belongs to the TRNC and does not belong to Turkey; but the Council of Europe continued to regard Turkey as a responsible party and ordered it to pay Mrs. Loizidou £800,000 in compensation.³⁵¹ The compensation was finally paid in 2003.³⁵²

Loizidou v. Turkey outlines two important issues. First, it serves as a precedent for other cases regarding the Cyprus dispute.³⁵³ Indeed, the decision in *Loizidou v. Turkey* was later adopted by the court in *Cyprus v. Turkey*.³⁵⁴ Secondly, it clearly recalls the “effective overall control” and dependency test as a starting point of identifying the liability of self-proclaimed entities.³⁵⁵ Commenting on the court’s decision in *Loizidou*, Stefan Talmon explains that in order to establish the responsibility of an outside power, it must be proved that the actions in question are attributable to the outside power and not to the self-proclaimed entity.³⁵⁶ The problem with such attribution is that the authorities of secessionist entities usually do not qualify themselves as *de jure* organs of outside power and are not officially empowered by the law of the outside power to exercise governmental authority of that power.³⁵⁷ This is exactly what Turkey tried to prove in *Loizidou* in order to avoid responsibility, and that is why there is a particular need for effective control tests to consider the liability of quasi-States.

The effective control test also proved its efficiency in cases relating to the NKR. Similar to *Loizidou*, *Chiragov v. Armenia*³⁵⁸ involved a dispute regarding the property rights of Azerbaijani Kurds for their homes that were abandoned after the proclamation of independence.³⁵⁹ Reflecting the cases in Northern Cyprus, ECHR assessed whether the NKR was under effective

349. STAFF OF DEPARTMENT OF THE STATE, 112TH CONG., COUNTRY REP. ON HUMAN RIGHTS PRACTICES 1389 (J. Comm. Print 2010).

350. *Id.*

351. INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE 111 (Susan M. Akram et al., eds., Routledge 2010).

352. Michael Theodoulou, *Payout for Cypriot Refugee Brings Turkey Closer to Europe*, THE TIMES (Dec. 4, 2003), <https://www.thetimes.co.uk/article/payout-for-cypriot-refugee-brings-turkey-closer-to-europe-7jrsvknk6b6>.

353. SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 248 (Cambridge University Press 2014).

354. See generally *Cyprus v. Turk.*, App. No. 25781/94, Eur. Ct. H.R., ¶ 23 – 30 (2001).

355. See APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS 269 (Derek Jinks et al. eds., Springer 2014).

356. Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT’L & COMP. L. Q. 493 (2009).

357. *Id.* at 499.

358. *Chiragov v Armenia*, App. No. 13216/05, Eur. Ct. H.R. (2015).

359. AEWAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 111 (Cambridge University Press 2017).

control of Armenia.³⁶⁰ The Court applied article 42 of the Hague Regulations and stated that the NKR was occupied by the Armenian army because of the Armenian troops on its territory.³⁶¹ Then the Court established the link between military occupation and effective control and, as a result, found that Armenia had significant control over the NKR and was responsible for the acts of the NKR.³⁶² This indicates that the effective control test is the starting point for considering responsibility in cases involving quasi-States.

2. *The Republic of Kosovo as Sui Generis*

The Republic of Kosovo has been briefly discussed in part II. It was indicated that its recognition was *sui generis* (exceptional), and now it is necessary to examine why it was so regarded.

According to Professor Algimantas Prazauskas from the University of Vytautas Magnus (Kaunas, Lithuania), the instability of a multi-ethnic society (and Yugoslavia used to be such a society) increases dramatically when there is a change of political regime.³⁶³ Commenting on the situation with Yugoslavia, Professor Prazauskas explains that ethno-nationalism “may, and often does, become one of the main factors determining sociopolitical processes in multiethnic countries.”³⁶⁴ And Kosovo clearly illustrates his statement.

The ethnic conflict in Kosovo emerged long before the dissolution of Yugoslavia. The first signs of conflict occurred in 1981 when the region faced ethnic unrest between the Albanian and Serb parts of the population.³⁶⁵ Such unrest led to an unofficial referendum followed by a unilateral proclamation of independence in 1991³⁶⁶ and a civil conflict that started in February 1996 and escalated into a full-scale war.³⁶⁷ By early 1998, the conflict called for international attention: in March 1998, the U.N. instituted an arms embargo and economic sanctions on the Federal Republic of Yugoslavia.³⁶⁸ But, as the sanctions did not prove to be effective, in 1999 NATO intervened in the conflict by bombing Yugoslavia in order to withdraw forces from the Kosovo region and make Slobodan Milošević stop

360. SHAW, *supra* note 20, at 189.

361. GROSS, *supra* note 359, at 111.

362. *Id.*

363. Algis Prazauskas, *Ethnic Conflicts in the Context of Democratizing Political Systems*, 20 THEORY AND SOC'Y 581, 600 – 02 (1991).

364. Algimantas Prazauskas, *The Influence of Ethnicity on the Foreign Policies of the Western Littoral States*, in NATIONAL IDENTITY AND ETHNICITY IN RUSSIA AND THE NEW STATES OF EURASIA 150 – 51 (Roman Szporluk ed., 1994).

365. RICHARD J CRAMPTON, *THE BALKANS SINCE THE SECOND WORLD WAR* 148 (Routledge 2014).

366. *THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974 – 1999*, at 222 (Heike Krieger ed., Cambridge University Press 2001).

367. See JAMES KER-LINDSAY, *KOSOVO: THE PATH TO CONTESTED STATEHOOD IN THE BALKANS* 11 (I.B. Taurus 2009).

368. S.C. Res. 1160, ¶ 1 (Mar. 31, 1998).

the bloodshed of civilians.³⁶⁹ Finally, on June 10, 1999, the U.N. passed Resolution 1244,³⁷⁰ which brought Kosovo under international control.

The question of the legitimacy of the unilateral secession of Kosovo was brought to the ICJ by the U.N. in 2008.³⁷¹ The countries that supported Kosovo's independence based their decision on different reasons, but they all (as well as the opposers of Kosovo independence) agreed that the situation with Kosovo was unique.³⁷² For instance, Bulgaria explained the uniqueness of the situation by the facts: the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) was violent, violations of human rights had taken place, the administration of the region was under Security Council Resolution, and the international community had made efforts to sustain the situation.³⁷³ The *sui generis* nature of the Kosovo situation was also explained by U.S. Secretary of State Condoleezza Rice, who said that "[t]he unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of [U.N.] administration—are not found elsewhere and therefore make Kosovo a special case."³⁷⁴

D. CONCLUSION TO PART III

The central problem of modern quasi-States is that in most cases they are the subject of territorial disputes with the State from which they secede. An analysis of modern self-proclaimed entities shows that they may meet the Montevideo criteria but often highly depend on the outer powers because of limited capacity to enter into international relations.³⁷⁵ Therefore, they cannot be recognized as independent States.³⁷⁶ Nevertheless, the case of the Republic of Somalia shows that non-recognition is not only a legal consequence, but rather a political decision that may be outside the scope of legal analysis.³⁷⁷

The situation with Kosovo is exceptional and therefore the States who objected to the recognition of Kosovo claim that its recognition will not establish a precedent.³⁷⁸ But it clearly shows that, in exceptional situations, a self-proclaimed entity can gain recognition even if it does not meet the Montevideo criteria.

The general principles of liability of States clearly show that any State may be held liable if it commits an internationally wrongful act. The same

369. JOHN NORRIS, COLLISION COURSE: NATO, RUSSIA AND KOSOVO 1 (Greenwood Publishing Group 2005).

370. S.C. Res. 1244, ¶ 9 (June 10, 1999).

371. Eileen Denza, *European Practice on the Recognition of States*, 36 E. L. REV. 321, 330 (2011).

372. *Id.* at 332.

373. *Id.*

374. STATEHOOD AND SELF-DETERMINATION, *supra* note 319, at 175.

375. *See, e.g.*, Grant, *supra* note 344, at 453.

376. *Id.*

377. *Id.* at 435.

378. Denza, *supra* note 371.

principles apply to quasi-States as well. However, if a quasi-State is under the overall control of an outer power, then responsibility is likely to be shifted to that power (as demonstrated in *Loizidou v. Turkey* and *Chigarov v. Armenia*). In that situation, the attributability of the wrongful act to the outer power must be proved.

IV. Conclusion

Contemporary State practice clearly shows the declaratory character of recognition. But in practice, recognition remains to be a powerful political tool and in many cases plays a clearly constitutive role. Non-recognition limits a State's abilities and options in dispute settlement on international level and affects individuals and businesses on a national level as well. All these facts taken together highlight the practical difficulties and consequences of non-recognition.

The 1933 Montevideo Convention gives the basic explanation of what the State is and the criteria that it must meet in order to be recognized. But law scholars believe that the Montevideo criteria are too abstract and cannot respond to claims of modern self-proclaimed entities seeking Statehood. Many scholars have made much effort to explain and concretize the Montevideo criteria and found the terms "government" and "independence" to be controversial. The general principle regarding the government is that it must be capable of exercising effective control over its territory and population without the interference of outer powers, but all governments may depend on each other to some extent.

The "capacity to enter into legal relations" (or "independence") seems to be contradictory because it is effectively a consequence of recognition, rather than a pre-requisite, and is based on other States' willingness to have diplomatic relations with the new entity, thus contradicting the declaratory theory.

It must also be noted that the Montevideo Convention was designed before the active phase of decolonization and was not supposed to cope with such a massive number of seceding entities as appeared in the second half of the 20th century. Many scholars believe that in the modern times one of the most important criteria of Statehood is recognition by the United Nations. Rosalyn Higgins says that if the U.N. recognizes an entity then it meets all other criteria of Statehood, and this fact brings the question of whether the Montevideo criteria are sufficient in the modern world.

But it cannot be said that the Montevideo criteria are irrelevant. The analysis of modern unrecognized and partly recognized entities shows that the entities claiming to become States in most cases meet the Montevideo criteria in all senses except effective government. They are often supported by outer military or financial powers and, therefore, cannot themselves exercise effective control over their territories. On the other hand, they may depend on outer powers because of collective non-recognition, which means

that such entities are in a vicious cycle. This fact indicates that the criterion of independence is ambiguous.

But whatever the reasons for lack of effective control, this factor becomes vital when the situation concerns the responsibility of self-proclaimed entities. The common rules of dispute settlement involve peaceful talks as a first aid, but this may be impossible if one party does not recognize the other and has no diplomatic relations with it. The rules also state that the wrongful act must be attributable to the State in question. And if the quasi-State is under the effective control of any other State, then that controlling State must bear responsibility. This was clearly demonstrated by *Loizidou v. Turkey* and *Chiragov v. Armenia*: the TRNC and the NKR were practically meeting the Montevideo criteria, but nevertheless the ECHR decided that these quasi-States were incapable of bearing responsibility and held Turkey and Armenia (the supporting outer powers) liable.

The famous scholar Thomas D. Grant—who paid much effort into analyzing the compatibility of the Montevideo criteria with contemporary issues—said that “[t]he [Montevideo] Convention includes elements that are not clearly prerequisite to Statehood, and it excludes elements that writers now widely regard as indispensable to a definition of the [S]tate.”³⁷⁹ Grant stresses that the Montevideo criteria were relevant for the situation from a particular epoch and explains that in accordance with the Montevideo criteria such States as Bosnia and Herzegovina or Kosovo would never be granted Statehood.³⁸⁰

We would not be so strict as Thomas D. Grant, and, having analyzed the Montevideo criteria and modern quasi-States, we believe that the Montevideo Convention can be improved by adding new articles containing additional criteria.

Firstly, if the entity is recognized as a State by the United Nations then the other four criteria can be considered met. Subsequently, article 2 of the Montevideo Convention may implement the rules under article 4(1) of the U.N. Charter or simply state that “the entity will be regarded as an independent State if its recognition is confirmed by [a] Resolution of the United Nations”.³⁸¹ Such amendment would explain the legality of Kosovo and Bangladesh as independent States and may help to decide the fate of many seceding entities in the future. While deciding whether an entity should be granted recognition as a State, the U.N. must consider the historical background of the region, analyze the reasons of secession, and assess whether human rights violations took place.

Secondly, the Montevideo Convention should contain a term for unrecognized entities and de facto regimes that may not meet one of the criteria of Statehood under article 1 or are not recognized by the U.N. as independent States. Having discussed the definition in part II of this article,

379. Grant, *supra* note 344, at 453.

380. *Id.* at 453, 456.

381. U.N. Charter art. 4, ¶ 1.

we assume that the best term to describe such entities is Dijkhoorn's term "quasi-State." This term may be based on Pål Kolstø's definition and should define a quasi-State as a State that has not developed the necessary State structures or a region seceding from another State that has control over its territory and population, but lacks international recognition. The implementation of an article containing this term and its definition would enable the Montevideo Convention to give a clear legal status to such entities as the TMR, the NKR, the TRNC and others analyzed in part II.

Thirdly, the Montevideo Convention needs an Article clarifying the responsibility of quasi-States. In some cases, the responsibility can be attributable to the government of the quasi-State under article 10 of the ILC, such as in *Bolivar Railway* case. But if the self-proclaimed entity is highly dependent on an outer power, then we would evoke the concept of a "delegated sovereignty" based on *Carl Zeiss*. Under this concept, a recognized State would bear the responsibility for the actions taken by a quasi-State if a recognized State has overall effective control over a quasi-State.³⁸² Such a concept clearly recalls the *Loizidou v. Turkey* and *Chiragov v. Armenia* cases and is similar to the principle governing article 45 of the Vienna Convention on Diplomatic Relations.³⁸³ We believe that implementation of this concept into the Montevideo Convention would clearly determine the responsibility of quasi-States. Moreover, such implementation may help to establish diplomatic relations with them through the States-intermediaries and will give quasi-States access to all possible methods of dispute settlement that recognized States enjoy.

The introduction of the three amendments described above is based on existing State practice and is not creating any new law. It is just an attempt to codify the modern State practice and customary law in order to resolve regional conflicts in a more predictable and smooth way and to address the existing shortcomings of the Montevideo Convention.

382. See INTERNATIONAL LAW, *supra* note 58, at 259.

383. Under article 45(c), the State may entrust the protection of its interests to a third State acceptable to receiving State in case of a diplomatic rupture. This concept may be applicable to Quasi-States in the following way. For instance, Greece does not recognize the TRNC, but recognizes Turkey. Hence, to establish the diplomatic relations between the TRNC and Greece, the TRNC should delegate diplomatic relations to Turkey. In this situation, Turkey would act as intermediary. See Vienna Convention on Diplomatic Relations art. 46, Apr. 18, 1961, 500 U.N.T.S. 95.

