

**Urs Saxer, Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung**

## Summary and Synthesis

### Self-Determination, Changes of Statehood and the Self-Organization of the International System

#### I. Subject and Main Theses of the Study

This study explores the international rules regulating self-determination conflicts, claims for independence and the creation of states. It views these phenomena as comprehensive and complex dynamic processes that must be analyzed in their entirety in order to understand them adequately from an international legal perspective.

##### *1. Processes Steered and Regulated by the International System*

The main thesis of the study is that these processes are very often internationally monitored, steered and regulated, usually under the auspices of the UN Security Council and/or regional organizations and bodies, but sometimes outside the system of collective security established by the UN Charter. This involvement is the consequence of profound changes in the international system, which include not only the end of the Cold War, but also ever growing interdependencies, a globalization by no means limited to economics, a massively increased need to regulate and cooperate in the framework of international institutions, the greater impact of international legal norms (such as human and minority rights or democratic standards) in national law and politics and conversely, rapidly shrinking national sovereignty. In this contemporary context, self-determination conflicts and claims for statehood are of considerable international concern and often necessitate an international response. Examples of international steering and regulating activities are to be found regarding all aspects of the processes analyzed in this study. The activities have concerned not only the interpretation and application of the right to self-determination and, of course, the treatment of specific conflicts by international institutions, but also recognition, admission to international organizations and state succession.

This thesis has methodological consequences. To understand adequately socio-political processes and the contributions of the actors to them, the analysis cannot be confined to the rules and norms applicable to

self-determination assertions, claims for independence and newly established statehood. The way that international law determines the scope of action of international organizations, states and the conflict parties, i.e. of all involved in these processes, must also be analyzed. This implies a shift from a classic, status-oriented approach to a more dynamic and process-oriented approach that sees the role of international law more broadly.

### *2. Institutionalized Framework: UN and Other International Organizations*

A second, closely related thesis is that the impact of international law on self-determination and independence claims cannot be adequately understood without considering the crucial contribution of international institutions, above all the UN, and more generally, the internationally institutionalized context in which these claims arise. The steering and regulating of national conflicts by international institutions is primarily a political activity. It is, however, also a *modus operandi* of international law, which is applied by the institutions' political organs. This institutional umpiring must be taken into account in order to understand how international law affects self-determination and statehood claims. The law does not apply *proprio motu*: at least as important is the question, who is the authoritative interpreter and developer of the relevant rules?

### *3. Existence of an International System*

Finally, it is submitted here that the international responses to self-determination and statehood claims must be examined against the background of an evolving international system with its own structures, institutions, norms and values. The conflict management as well as the steering and regulating activities reflect these structures and norms and point to the evolution and self-constitutionalization of the international system as it seeks to control its still largely state-centered basis. Steering activities and interventions, which originate usually in international organizations such as the UN or in regional organizations, states, groups of states and NGOs are intended to protect and promote the values, norms and interests of the international system. The system's responses to self-determination and statehood claims tend to be self-referential: international norms and values are relevant, not the interest of particu-

lar states or other actors. As such, the conflict management is to a large extent self-assertion and self-confirmation of the international system.

## II. Relevant Principles, Rules and Norms

### *1. International Peace, Self-Determination and Other Norms*

International involvement in processes of self-determination and state creation implies activities that are not merely legal in nature but very often highly political as well. There is thus an obvious tension between law and politics. Nonetheless, the activities are also determined by international legal norms. The determination is twofold in nature: it sets limits as well as goals. However, it is often only fragmentary and tends to allow the actors broad discretion as to the course to be followed.

Which international principles, rules and norms are determinative? There is an entire set of norms applicable to international activities in independence conflicts. Crucial are the right to self-determination and the international guarantees of peace and stability. An important role is also played by national sovereignty, the principle of non-intervention, the prohibition of the use of force, human and minority rights, democratic standards as well as the continuity and stability of international legal relations.

### *2. Overstated Role of Self-Determination in the Post-Colonial Context*

The recent practice of states and international organizations reveals that self-determination is far from the most important principle applicable to self-rule or independence claims. Other norms and values such as international and/or regional stability, humanitarian concerns or the protection of human and minority rights are at least as important and may even predominate. Clearly predominant are concerns for the preservation of international peace and security.

There is thus a clear difference in the international approaches to decolonization and post- or non-colonial self-determination claims. The process of decolonization was unique in many respects. The legal guarantees of self-determination were the starting point for the creation of new states from a particular class of territories, which were clearly identified in General Assembly resolutions as holders of the right to self-determination. The applicable rules were enacted by the UN and the entire process was politically monitored by its main bodies. The so-

called law of decolonization, a set of norms derived from self-determination, was intended to legitimize and facilitate the creation of new states. As laid down in foundational legal documents such as the Friendly Relations Declaration, self-determination was a legal entitlement and gave a territory the right to decide on its own international status. This meant in most cases independence from the colonial power and the creation of a new state. The law of decolonization was also intended to regulate the main consequences of the process. This meant the modification of some aspects of international law for this class of territories, including the use of force, recognition of states and state succession.

None of the preceding applies in a post- or non-colonial context. If doubtful during the Cold War, the rich international practice that followed made very clear that the law of decolonization had no effect on the legitimacy of the use of force, the practice of state recognition or the settlement of state succession issues in this context. As a result, “normal”, i.e. non-colonial, claims for self-determination and aspirations to statehood are far from being as clearly regulated as colonial. There is no analogous set of norms that would enable representatives of the international community to give consistent answers to such claims and aspirations. The recent practice of the international system is characterized instead by an approach which is politicized, *ad hoc* and crisis-management-oriented. These cases might be the core of and the trigger for an evolution of some important aspects of international law as decolonization was, but if so in a different context and different way, as this study shows.

### III. Internationalization of Intra-State Situations

#### 1. *International Concern*

One of the most striking features of recent practice is how often, how early and how broadly situations within states become an international concern. Intra-state situations are the subject of many international norms, of increasing general regulation by international and/or regional institutions and of concrete decisions by international institutions, above all as part of a conflict management by the UN Security Council. These different answers to claims for self-determination and aspirations to statehood from the international system, i.e. conflict management on one hand and norms and/or structures to prevent secessionist and simi-

lar situations on the other, constitute an assertion by it that it has the power to steer and regulate self-determination and statehood processes.

## 2. *Conflict Management: Reliance on Consent*

Conflict management activities are *ad hoc* answers of the international system to conflicts that are intended to canalize them toward outcomes compatible with the system's needs and interests. The activities are basically political in nature and often developed by and coordinated within the political organs of international and regional organizations. Their normative basis consists of the rules, principles and values of the international system in general and of the organizations' charters in particular. Following the Cold War, the UN has frequently been involved in internal conflicts, many of which concerned self-determination and autonomy. The practice of the political bodies of the UN demonstrates that national sovereignty and *domaine réservé* are of negligible importance and no impediment to international involvement. The international system can, if necessary, deal with such conflicts in their entirety. Two principles of international law, which are also fundamental values of the international system, serve as the normative basis for this wide-ranging power, namely self-determination and maintenance of peace, security and stability.

The UN Security Council possesses, based on a generous interpretation of a threat to the peace and its powers to enforce collective security, a great range of options that includes binding measures like military and other sanctions. The Council also has enough power to concretize self-determination and settle cases of self-determination and statehood. It exercised this power during decolonization when it stated that particular territories were entitled to independence. Today, the Council tends not to rule on the status of territories and/or peoples but rather to seek to bring the conflict parties together by ordering a ceasefire, by mediating and by proposing outcomes. Self-determination plays a minor role in its activities. It is inconceivable that the Council would simply apply the right to self-determination in a given case and then decree which party has an entitlement to it and with what consequences. Non-colonial self-determination and statehood claims are usually resolved on the basis of the conflict parties' consent and as such their resolution is primarily political and not legal in nature. Reliance on consent preserves the autonomy and other core rights of states as well as the self-determination of peoples claiming statehood.

### *3. Self-Determination: An Umbrella Norm for Internationalization and Standard-Setting*

As explained, the impact of self-determination on the UN involvement in concrete conflicts is less decisive than often believed. Self-determination is, however, important as a basis for an internationalization of intra-state political and constitutional structures. It is the main source of inspiration and, as the common Article 1 of the UN Human Rights Covenants testifies, an umbrella norm for most international standards applicable to these national structures (e.g. human and/or minority rights, autonomy schemes, federal arrangements and entitlement to democratic participation). Self-determination is, as a guarantee of individual and collective autonomy, behind arrangements of self-rule and self-administration for particular groups within existing states, as recent attempts to improve the status of indigenous peoples show.

In the post-colonial practice of states and international organizations, this impact of self-determination is confined to an intra-state, internal dimension and does not include the so-called external dimension, with independence as an option. Herein lies another clear distinction with the law of decolonization. Self-determination as a contemporary legal norm does not necessarily legitimize the creation of states; rather it permanently internationalizes intra-state situations. It also constitutes the starting point for a process of increasing international law-making that has created an ever closer web of norms relating to the internal dimension. Enhanced protection of human rights, improvement of the position of minorities, special rules and arrangements for particular groups and minimum requirements of democratic governance are all structural attempts to give an adequate answer to self-determination and independence claims. This ongoing concretization of the internal dimension and as a result, the growing body of international norms and rules to be observed by states serves to protect states from secessionism and thus to stabilize them and the largely state-centered international system.

#### **IV. Normative Framework of International Conflict Management Activities, particularly by the UN Security Council**

##### *1. General*

The main legal basis for UN conflict management activities is the organization's and in particular the Security Council's responsibility to preserve international peace and security. These activities are usually undertaken in the framework of the UN's system of collective security. When the Council issues binding resolutions in a self-determination conflict, all the actors – the government and its opponents in the state affected, third states, groups of states and regional organizations – are obligated to follow their provisions. One of the most important of these is that the actors avoid doing anything that could undermine the UN conflict management. Actors in self-determination conflicts are in effect bound by two sets of rules, namely by the long-standing rules of coexistence such as the prohibitions on using force and intervening in a state's internal affairs and by specific provisions issued in the context of UN conflict management that reinforce, but often also modify, the rules of coexistence.

##### *2. Analogous Application of Coexistence Rules: Use of Force and Dispute Settlement*

UN conflict management is usually focused on halting the particular armed conflict and bringing the conflict parties together so that they may find a negotiated and internationally coordinated solution. Since internal conflicts can in a world of ever growing interdependencies also endanger international peace and stability, the Security Council regularly extends the prohibition of the use of force in its conflict management activities to them. This extension has its legal basis in particular Council resolutions and not in the general prohibition of the use of force. The international system is structurally not prepared to support a ban on the resort to arms at large: that would require the system to be in a state-like configuration and the Council to have a general monopoly of power – preconditions that are obviously still lacking.

The obligation to first seek a solution to any dispute by peaceful means is another principle of international relations applied by the Security Council in self-determination conflicts. The conflict parties, whether international legal subjects or not, are politically and legally obligated to negotiate in good faith. Among the means available negotiation, me-

diation, conciliation, resort to regional arrangements and other political means prevail over arbitration, judicial settlement and other legal means. There are various reasons for this tendency, including that many non-state actors lack standing in international courts and that many of the issues arising from self-determination and/or statehood claims are more political than legal in nature or are not comprehensively regulated by international law. The most important means are direct negotiations between the parties, which are often preceded and/or accompanied by mediation and conciliation by third parties (e.g. the UN Secretary General or his personal envoys, regional organizations and *ad hoc* or standing groups of states like the G8). Generally, the search for a settlement to a self-determination conflict is internationally coordinated and involves many actors beyond the conflict parties.

### *3. Consent and Outcome-Neutral International Involvement*

What is the impact on conflict management and settlement of basic norms of international law such as minority rights, self-determination, human rights, the rules concerning indigenous peoples and the principle of territorial integrity?

As noted, the conflict parties' consent plays a very important role: it is, together with the UN's responsibility to preserve international peace and security, fundamental to international efforts toward a negotiated, mutually agreed and internationally acceptable solution. Accordingly, the creation of a new state, an autonomy arrangement or any other outcome of the negotiations is usually consent-based, and the international system remains neutral beyond ensuring that the particular outcome satisfies international security requirements. International political interventions are normally not designed to break up states or force them to rearrange their political systems completely. That there are no international dictates and thus no direct collisions between the international conflict management activities and the guarantees of basic states' rights derives from the UN Charter's respect for state sovereignty. Specifically, these guarantees, the principle of proportionality and self-determination require certain neutrality when the organization intervenes in conflicts within states. Fundamental political decisions must be made by the body politic affected and there should be no dictates from outside parties. Therefore the Security Council normally supports neither governments nor self-determination and independence movements in the non- and post-colonial context.



#### 4. *Limits to Neutrality*

There are, however, exceptions to this rule of “neutrality”. Remaining neutral when basic norms, values and interests of the international system, such as obligations *erga omnes* or rules of *ius cogens*, are adversely affected, would amount to non- or arbitrarily selective enforcement and neglect of international responsibilities prescribed in the UN Charter or other documents constituting the international system. In addition, remaining neutral when a conflict party persistently refuses to seek a negotiated solution is not permissible. Instead, an international dictate, i.e. a resolution of the Security Council as the most legitimate organ of the international community, may be necessary to safeguard this community’s norms and interests. On occasion, the Council has set out pre-conditions and minimum requirements that are to be implemented as part of a negotiated solution. These may refer to human rights, to the situation of particular groups, to humanitarian needs, to the immediate cessation of hostilities, to the right of refugees to return home, to the prosecution of particular crimes etc.

Usually the Security Council does not deal in substance with the cause or resolution of a self-determination conflict but confines its contribution to the framework and procedural aspects of the negotiations. Occasionally does the Council mark out the parameters of an internationally acceptable outcome. The Council may be inclined to do so if it is doubtful, e.g. due to differences in the parties’ negotiating power, whether the negotiations will sufficiently take into account the international system’s norms and interests, particularly the need for sustainable regional stability and peace. The Council has sometimes required that an autonomy arrangement be established to meet legitimate self-determination claims of particular groups within a state and that negotiations be conducted about the arrangement’s details. In other cases, the Council has gone so far as to explicitly delegitimize unilateral attempts to create a new state and has called on the international community to follow a policy of non-recognition.

#### 5. *Creation of New States by the UN Security Council?*

In the process of decolonization, the UN commonly supported colonial peoples seeking their own state. It was not impeded by the principles of territorial integrity and non-intervention, because decolonization was not considered an internal affair.

Here again, a manifest difference exists between the international treatment of colonial and non- or post-colonial claims for self-determination and statehood. Colonial self-determination claims were clearly regulated with a definite purpose, namely to give a particular class of territories independence, whereas non- or post-colonial self-determination claims have been dealt with on an *ad hoc* basis without such a purpose. Even on an *ad hoc* basis, however, the Security Council could under the Charter decide that a people in a state should be given independence or another freely determined status if this were the sole way to ensure the end of the conflict and the mid- and long-term stabilization of the region. Such a decision would depend on the conduct of the state affected by the independence claim, on that state's treatment of the people making the claim and on its willingness to grant this people meaningful autonomy, human rights and democratic participation. It is an option when a state has forfeited its rights to rule a people and/or a territory through its own conduct, as Serbia did in Kosovo. The Council was unable then to take such a decision due to the veto expected from Russia and possibly China. As a general rule, however, the Council could in particular circumstances create or at least contribute to the creation of a new state through a Chapter VII resolution, because the Charter guarantees of the territorial integrity and political unity of existing states are not absolute, as decolonization demonstrated.

## V. Principles (De-)Legitimizing the Establishment of a New State

### *1. Legitimizing Principles, Conflict Management and Weighing of Interests*

What are the principles legitimizing the establishment of a new state? These principles and their role may be adequately understood only in conjunction with the conflict management activities of international institutions.

The international system, acting through organs such as the UN bodies and regional organizations, often decides on the legitimacy and/or legality of self-determination claims and attempts to create a new state. Self-determination is only one among many norms, values and interests that may be affected and thus taken into consideration in this context; usually it cannot by itself determine the establishment of a new state. These important and complex political processes are not just a matter of international decision-makers analyzing whether there is a people that

holds the right to self-determination and if there is one, of declaring it entitled to independence and statehood. Such an approach would completely neglect to consider the other norms, values and interests of the international system that are often affected. At least as important are peace, security, territorial integrity and stability. It is only in the rare cases when the legitimizing principles coincide with and are reinforced by these that claims for independent statehood are backed by international institutions. Instead, the principles legitimizing the creation of a state tend to be balanced against the other more stability- and status-quo-oriented norms and interests of the international system.

The major exception to the rule that the international standards supporting statehood claims are standards of legitimacy, not legality, is decolonization: as noted, an international legal entitlement for a particular class of territories to create their own states was established. In other exceptional cases, the creation of a state can be clearly illegal. In general, there are legality as well as legitimacy standards legitimizing or de-legitimizing claims for independent statehood, as the following considerations show.

## 2. *Illegality, Non-Recognition and Conflict Management*

A well-known standard of illegality is encapsulated in the doctrine of non-recognition. As confirmed on several occasions by international practice, there is an obligation not to recognize any body politic as a new state if its creation was the result of a violation of international legal norms such as the prohibition of the use of force or the principle of non-intervention. But otherwise, these rules of *ius cogens* with effect *erga omnes* are the basis of a *de iure* duty to deny a socio-political reality, namely the *de facto* existence of a state. A state is also illegal if its creation is not supported by the large majority of its inhabitants. The creation of the state in such circumstances is not a fulfillment of a legitimate claim but a violation of the right to self-determination. In both circumstances, the political will of the population to self-government and independence is deemed insufficiently clear.

The doctrine of non-recognition applies independently of any conflict management activities by the UN, other organizations or groups of states. The international isolation of an illegal state tends, however, to be the result of political coordination within international institutions, which often combine non-recognition with measures such as sanctions.

The doctrine of non-recognition is a standard of (il)legality. This is less true for non-recognition of states unilaterally created during an ongoing international conflict management. Such creation is usually a clear violation of decisions and resolutions of the Security Council, as these favor a consent-based resolution of the conflict; it also denies the supremacy, powers and priority of the steering activities of the UN and its main bodies, particularly the Council; lastly, it is not, as it should be, the result of an overall settlement between all the relevant parties involved. For these reasons, unilateral attempts to create states out of former Soviet and Yugoslavian republics were generally not recognized. In sum, the creation of new states in such circumstances is usually delegitimized by the international system.

### 3. *Concept of Reconstruction of States*

The concept of reconstruction of states is based on a combination of the doctrines of non-recognition and self-determination. Like the doctrine of non-recognition, the doctrine of state reconstruction applies the rule *ex iniuria ius non oritur*. This means that the *de-facto*-disappearance of a state by force is usually, at least *de iure*, not recognized by the international community, so as not to legalize *ex post* an act that violated basic norms of international law. Despite a compulsory policy of the *de iure* non-recognition of a state that has disappeared illegally, a pragmatic policy that takes into consideration the *de facto* situation is, however, sometimes unavoidable.

Like the doctrine of self-determination as regards a particular class of colonial territories, the doctrine of state reconstruction entitles the illegally incorporated territory to resurrect the disappeared state. It turns an illegality standard into a complementary legality standard, comparable to the law of decolonization. Of course, the concept of state reconstruction grants this legal entitlement to perpetuate a state's legal existence only when the state disappeared after the establishment of a general prohibition of the threat or the use of force in international relations. It neither invites an infinite regress to redraw boundaries nor attempts to revise history at large.

### 4. *Consent as Legitimizing Principle*

Consent has been and is still the most important principle of legality as well as legitimacy. Originally, consent meant the consent of the sover-

eign subject to the attempts to secede: once the sovereign, i.e. the metropolitan state, gave its consent, the legality or legitimacy of the creation of a new state was beyond doubt. States created in this way were internationally recognized without hesitation, as decolonization evidenced. This still holds true today for uncontested cases in which states are created. Just because consent has been given by the metropolitan state, the new state is welcomed in the international community as an international legal subject.

The consent of the metropolitan state does not, however, always suffice, as the example of South Africa's homelands shows. Depending on the circumstances, reliance on its consent may not reflect the values, interests and norms of the international system. For the sake of these and for structural reasons, this system and not one single state must have the last say. The international consent expressed in UN Security Council or General Assembly resolutions and other international statements is ultimately determinative of the recognition of a new state.

##### *5. Peace, Stability and Self-Determination*

Apart from the law of decolonization, the doctrines of non-recognition and state reconstruction and the principle of consent, international law does not regulate the legality or legitimacy of the establishment of a new state. The aforementioned interests are weighed and thus legitimacy assessed against the background of two basic norms and/or values of the international system: self-determination in its internal dimension and the preservation of international peace and stability.

In self-determination conflicts, peace and stability usually take priority over any competing claims and interests. The international system is to a large extent stability-oriented and thus generally reluctant to legitimize attempts to create new states if the metropolitan state objects. Claims for self-determination and statehood rarely prevail over the preservation of international peace and stability or the protection of the territorial integrity of states. The international system favors the status quo.

In cases of their grave violation, standards of internal self-determination may, however, serve as a measure for the legitimacy of a self-determination and statehood claim. States are internationally obligated to comply with and implement the rules and norms derived from internal self-determination. The more a state infringes these and the more it treats groups of people arbitrarily, the more a claim for external self-determi-

nation may be legitimized. The natural and usual reaction of the international system in such cases is, of course, to demand from the state in question improved compliance and implementation of the standards of internal self-determination. When the metropolitan state is plainly unwilling to respect fundamental standards of internal self-determination, however, desire for more internal self-determination may turn into a legitimate claim for external self-determination and consequently for independent statehood. In such a case, the creation of a new state is considered by the international system to be more likely to contribute to international peace and long-term stability than an internal conflict that would be endless due to the government's unwillingness to address the conflict's roots.

There are thus situations beyond decolonization in which a statehood claim may be legitimate internationally. Even under such particular circumstances, however, the international system still decides on the legitimacy of claims for external self-determination and independent statehood. It would contradict the needs of an increasingly self-constituting international system if groups of people in a state could alone decide on the creation of a new state. This decision is a matter for institutionalized multilateralism, above all in the UN Security Council. The Council has the power to interpret and apply self-determination in concrete cases as part of its steering activities. Therefore self-determination is not an absolute right conveying absolute autonomy and/or sovereignty; it is limited by the rights and interests of third parties and the norms, interests and principles of the international system.

## **VI. Conflict Management and the Role of Regional Organizations, Third States and the Conflict Parties**

### *1. Limited Impact of the Law of Coexistence*

Self-determination conflicts usually involve many actors. In addition to the conflict parties (i.e. the metropolitan state and the group seeking independence), regional organizations and third states are often drawn in. These actors' options are, however, limited by principles of international law, particularly the rules of coexistence (prohibition of the use of force; principle of non-intervention; respect for state sovereignty and territorial integrity), as interpreted by the Security Council decisions in a particular conflict.

Although the traditional rules of coexistence still play a role in international relations, they have undergone important changes following the Cold War. As noted, sovereignty and particularly respect for the *domaine réservé* have lost much of their impact. Self-determination conflicts constitute *qua definitione* an international concern. They involve transnational *spill-over*, rules of *ius cogens* with effect *erga omnes* and possibly structural consequences for the international system. Therefore other states may contribute to the resolution of concrete self-determination conflicts and speak out on how they could and should be resolved. Whether such involvement by third parties constitutes improper pressure and undue interference as regards the metropolitan state's affairs and thus infringes the rules of coexistence depends on its nature and proportionality.

## 2. Preference for Institutionalized Multilateralism

In the last two decades, unilateral and autonomous acts by particular states or groups of states have lost much significance. An institutionalized multilateral approach, i.e. a course of action decided by the UN Security Council or regional organizations under their responsibility for the preservation of international peace and security, has become the favored way to address self-determination conflicts. International practice prefers multilateralism based on coordination and cooperation within the UN framework to unilateral and autonomous acts by solitary actors.

The legal reasons for this preference lie in the fact that important options are only available to states and regional organizations through authorization by the Security Council. This is particularly true as regards all the measures based on Chapter VII, i.e. measures involving the use of military force, non-military sanctions such as economic embargoes and peace-making and -building. Council resolutions may even broaden the scope of action of these actors by legitimizing measures that would otherwise be illegal under the international law of coexistence.

Efficient conflict management requires close cooperation between the UN, specially concerned or interested states and regional organizations. The UN alone possesses neither the infrastructure nor all the means necessary to address the intricate implications that self-determination conflicts frequently have. Regional conflict management activities usually involve the Security Council because some measures require a Chapter VII authorization. However, the Council may – and in fact often does – defer largely to the relevant regional organization, as Chap-

ter VIII does not prioritize either regional or global action for the preservation of peace and security.

Having said this, unilateral and autonomous acts of states, groups of states or regional organizations are not wholly insignificant. They regularly play a role at the beginning of the internationalization of a self-determination conflict. Neighboring states and regional organizations' opinions as to the legitimacy of self-determination and statehood claims are often crucial to the claims' international success or failure. Regional actors can also convince the metropolitan state to enhance internal self-determination and/or develop particular rules and standards for those groups seeking greater self-determination or even statehood. An international conflict management ends in the region, just as it often begins there, with the implementation of an internationally steered or monitored outcome.

### 3. (Multilateral) Unilateralism and the Use of Force

In light of the circumstances described, what role and impact do the theories and state practice legitimizing the unilateral use of force have on international legal doctrine and practice?

Selective unilateralism denying the supremacy of the UN Security Council has occurred several times recently, particularly in Kosovo in 1999, Afghanistan 2001 and Iraq 2003. In each case, the USA and other countries intervened with military force but without explicit Security Council authorization for its use, and they largely determined the outcome of the conflicts. While only one of these interventions was in a self-determination conflict (Kosovo), it suffices to show that unauthorized unilateralism may still play a considerable role in conflicts arising out of self-determination and/or independence claims, as it did in the Indian intervention in Bangladesh in 1971 and the Turkish intervention in northern Cyprus in 1974.

Can such interventions ever be justified under international law? Among others the theory of the justifiability of wars of national liberation seeks to legitimize the use of force in self-determination conflicts. According to it, independence movements base their claims on a core principle of international law. Denial of their claims violates self-determination as a norm of *ius cogens* and justifies not only armed resistance by but also foreign military assistance to the people seeking to liberate themselves from foreign rule and/or occupation. This theory was quite popular during decolonization, especially in the Third World, but failed



to gain acceptance in the First. It was therefore unable to modify as new customary law the principles in the UN Charter and other international legal instruments concerning the use of force. According at least to traditional doctrine, international law is not concerned with the legitimacy or otherwise of the internal use of force beyond the rules of humanitarian law applicable in non-international armed conflicts. Military intervention by other states is to be qualified as a violation of Article 2(4) of the Charter.

If the preceding was true in the colonial context, it is even more so in the non- or post-colonial context. The theory of the justifiability of wars of national liberation and the legitimacy of foreign military assistance was an offspring of the Cold War and the failure of the UN system of collective security. It was developed to justify extended self-help at a time when the Security Council was unable to get involved in conflicts due to the vetoes of the USSR and the USA. Circumstances today are different. The Council has both the powers and the instruments to address self-determination conflicts through an internationally coordinated conflict management (i.e. multilateral and institutionalized) and to resolve the conflicts, usually based on the consent of the parties involved. The unilateral use of force, be it internal or external force, would only infringe and undermine the Council's powers to preserve international peace and security. Therefore, the theory of the justifiability of wars of national liberation has become untenable, as it contradicts the principles and rules of multilateral, institutionalized conflict management.

The same essentially holds true for the doctrine of humanitarian intervention, another would-be exception to the general prohibition of the use of force in international relations. According to this doctrine, an unauthorized use of military force by third parties in a country may be legitimate in the case of a crisis characterized by widespread and severe violations of basic human rights that can be ended only by force. The development of the doctrine was in part spurred by the inability of the Security Council to manage internal conflicts meaningfully during the Cold War. It confers a steering power on states when the Council cannot fulfill its role as the world's principal organ responsible for the preservation of peace and security, including in internal conflicts. The development of the doctrine was also strongly influenced by human rights considerations, which led to the human rights situation in a state ceasing to be part of the *domaine réservé* protected by its sovereignty and becoming nowadays an international concern. Such considerations alone cannot, however, legitimize unauthorized military intervention.

As a customary law-based exception, evidence of a general practice accepted as law would be necessary for a deviation from the otherwise all-embracing prohibition of the use of force in international relations. Such evidence is not to be found – to the contrary. Not only are consistent state practice and a pertinent *opinio iuris* lacking, but humanitarian interventions involving the use of force by third parties have usually been authorized by the Council at their request. These states clearly consider Council authorization to be required under the Charter and such interventions – as a matter of law and not only convenience – to be embedded in the system of collective security, i.e. that they also should be part of multilateral, institutionalized conflict management.

#### *4. Failure of the Security Council as Legitimization of Unilateralism?*

According to its promoters the main rationale of the doctrine of humanitarian intervention is the protection of human beings when the Security Council fails to address a human rights crisis adequately. The assessment as to whether there is such a failure on the Council's part is, however, usually made by the intervening states themselves. Sometimes, the mere fact that the Council is not yet willing to authorize the use of force is deemed sufficient proof. Such self-assessment opens the door wide for abuse by self-interested states. It is therefore not a reliable exception to the general prohibition of the use of force in international relations. Under very particular circumstances, such use of force may be legitimate, as NATO's intervention in Kosovo in 1999 shows, but it is still not legal in the strict sense of the word. Even more delicate are unauthorized, allegedly humanitarian interventions on behalf of a people seeking independence from the metropolitan state. In such cases, the doctrine of non-recognition could apply. All in all, the doctrine of humanitarian intervention, though still hotly debated, is of steadily shrinking legitimacy. The fact that the Council usually authorizes the use of force when it is indispensable to end a human rights crisis leaves no room for such a doctrine.

Beyond the doctrine of humanitarian intervention, the prohibition of the use of force applies not only when the Security Council is able to fulfill its responsibility for an adequate conflict management. The prohibition applies also as a rule of *ius cogens* with effect *erga omnes* when the Council is unable to do so. This is the main objection to other theories that seek to legitimize unauthorized, unilateral use of force on the basis of the Council's alleged inability to address some conflicts. These theories often express a general skepticism about the UN system of col-

lective security. Participation in institutionalized multilateralism is accordingly viewed not as legally binding under the Charter but as basically voluntary, a course of action that is dictated, if at all, by political or military necessity, as determined on a case-by-case basis. These theories, which also include the doctrine of pre-emptive and/or anticipatory (self-)defense, are particularly popular, if not mainstream, in the USA. All are untenable, however, from an objective perspective on international law.

### *5. Self-Defense and Self-Enforcement vs. Conflict Management*

Self-defense is an established justification for the use of force. In recent years, there have been increasing attempts to broaden the extent of the right, often in a way incompatible with the letter and the spirit of the relevant UN Charter provisions. It is sometimes asserted in self-determination and independence conflicts that peoples have the right of individual self-defense, which implies a justified use of force against a state suppressing their claims and denying their rights. Holders of the right of self-defense are, however, basically states and not non-state actors like peoples. The right is also only exercisable against an armed attack and until the Security Council has taken the measures necessary to maintain international peace and security, conditions typically not fulfilled in self-determination and independence conflicts since these tend to involve an internal, not a transnational use of force and are not subject to a general prohibition on resorting to military force. It has also been asserted that a right of collective self-defense exists that would permit foreign military assistance to such peoples. For its part, this understanding would modify the self-determination-based doctrine of the wars of national liberation and is therefore open to similar objections.

Accordingly, the legitimacy of a particular claim for self-determination or independence does not imply an entitlement of a people to enforce that claim unilaterally. States and international organizations have lately been very reluctant to support secessionist or national liberation movements. Such unilateralism would be illegitimate, contrary to the functioning and needs of the international system, which has to rely primarily on international communication, cooperation and consent due to structural weaknesses like the lack of a real power centre. The international answer to it could be non-recognition. If, however, no conflict management takes place despite a widespread, systematic and grave violation of internal self-determination, a unilateral attempt to create a new

state by force has a certain residual legitimacy as a right to resistance and a measure of self-help.

#### *6. Overall Primacy of Security Council Resolutions*

The main conclusion of the preceding is that the UN Charter and Security Council resolutions in a conflict management should take precedence in general and that all parties involved are obligated to follow their provisions in particular cases. The focus of recent international practice has been on multilateral, institutionalized processes of peaceful conflict resolution based on the consent of the parties, including the Council. This steering primacy of the Council usually precludes unilateral acts contravening the law of coexistence or Council resolutions (e.g. attempts to resort to force and secessions) from having any legitimacy.

### **VII. International Integration of a New State**

#### *1. Collectivization and Conditionality of the Recognition of New States*

The way that claims for self-determination and independence are internationally monitored, steered and regulated also affects the way that the international system deals with issues of statehood and international legal status. In this context, recognition is crucial: it is the main interface between the international steering of national conflicts and the establishment of a new state. During the many conflicts of the last decades, recognition has been politicized and become embedded in multilateral conflict management. More recently, two new features have characterized recognition policy: increasing collectivization and increasing conditionality of recognition.

Collectivization means that recognition is usually no longer a unilateral, autonomous act of single states. Recognition is more often the result of international coordination in regional or international organizations with the purpose of deciding whether a state shall be created and/or accepted by the international community as a new member. This is particularly the case when a conflict management takes place. International coordination of conflict management activities precludes single states from unilaterally recognizing a situation, a status or an entity in a way that undermines the multilateral conflict management. Collectivization of recognition is the logical result.

Recognition is conditional when it depends on the fulfillment by the prospective state of certain conditions set by the international community, often as part of a conflict management or at least internationally coordinated diplomatic activities. Conditionality of recognition is a means to promote basic international norms, values and interests also vis-à-vis a new state. It makes clear that this state has to accept these norms and values in order to join the community of states. The conditions may, for example, refer to internal self-determination, in particular to human and minority rights, to international peace and security or to territorial issues such as acceptance of the principle of *uti possidetis*.

Collectivization and conditionality of recognition are not reconcilable with the declaratory theory of recognition, which holds that the existence of a state is a question of pure fact and that recognition is nothing more than an acknowledgement of the facts. The basis of the opposing constitutive theory is the idea of a community of states with common norms and values, not a loose society of states sharing little more than a concern for the preservation of autonomy and sovereignty. The more the former self-conception dominates the international system, the more recognition of a new state becomes constitutive in nature. Accordingly, states are increasingly viewed by international law not as self-created but as established by the community of states, based on a collective act of recognition and dependent on the fulfillment of material prerequisites.

The traditional declaratory theory of recognition still has its merits and continues to be applied when the creation of a new state is uncontested, such as when its creation is consented to by the metropolitan state. Recognition is then just an acknowledgement of an established fact. Such cases are, however, ever rarer, and effectiveness is no longer the accepted principle of recognition. The doctrine of non-recognition is not reconcilable with the declaratory theory, because this doctrine requires states not to recognize an existing entity as a new state because the creation of the state violates basic norms of international law. The creation of states during a conflict management is even harder to reconcile with the declaratory theory. As collectivization and conditionality show, recognition may be used by the international system to steer processes of state-creation.

## 2. Admission to International Organizations

The trend toward collectivization of recognition affects the rules regulating the admission of a new state to international organizations as well.

Indeed, the two are increasingly functionally equivalent, as some writers have observed. Admission to the UN indicates that a new state is internationally recognized and that there are no doubts about its legal personality and legitimacy, whereas non-admission to the UN is often equivalent to international non-recognition. The legal act of deciding on admission to international organizations, above all the UN, also has an eminently political nature. It may – at least in contested cases – be instrumentalized by the international system to render an explicit or implicit judgment on the legality and/or legitimacy of a new state. Accordingly, the issue of the admission of a new state to international organizations is typically not subject to the rules on state succession. A new state must make a request for membership admission so that the organization's organs and existing members can control whether it meets the statutory criteria for membership.

Generally speaking, admission of new states to international and regional organizations is the most important way of integrating new states into the international system. It has also recently become a way of enforcing important norms, values and interests of the international system. By being subject to the fulfillment of certain conditions, it can help ensure that a new state conforms to them. Like collective conditional recognition, admission procedures are another steering tool in the hands of the international system acting through its institutions. Admission procedures may be further used to steer issues regarding the identity and continuity of states, particularly when it is controversial whether an apparently new state is really new or is identical to an existing state or when it is controversial upon the dissolution of a federation whether a formerly federated state is not just a continuation of the federation. International organizations, particularly the UN, can steer state succession issues, as recent practice, above all regarding the Socialist Federal Republic of Yugoslavia and the USSR, shows. In short, the power of international organizations to decide on the admission of a new state is remarkable in view of the fact that the power to decide on the legal personality of states comes with it, which in turn has important implications for issues such as international recognition, membership in international organizations and state succession.

### *3. Territorial Issues; uti possidetis*

The regulation of territorial issues in cases of changes of statehood is crucial for the international system. As territorial disputes may endan-

ger international peace and stability for decades, it is in the general interest to establish territorial stability as quickly as possible.

Clear and rational criteria for the fixing of boundaries are, however, difficult to define. So-called natural borders often do not exist or are contested. Historical titles to territories may be unreliable; how far back in history the really relevant, valid and reliable title should be traced may be controversial; and relying on the past is not the most rational way to resolve current issues for the future. For its part, regulation by way of an agreement between the states concerned, while undoubtedly the most effective way to fix boundaries, may be hard to reach, particularly in contested cases of state creation.

The principle of *uti possidetis* was developed to help regulate territorial issues. Its main function is to demarcate, upon the creation of a new state, the boundaries between the new state and its neighbors, including the metropolitan state, clearly if not definitively. Intra-state boundaries between provinces or other sub-state entities become international boundaries at the moment of independence of a territory. The application of *uti possidetis* is not dependent on the consent and/or the recognition of the parties involved. It is in the general interest, as it may contribute considerably to stability and the preservation of peace. *Uti possidetis* gained acceptance at the beginning of the 19<sup>th</sup> century as the South American colonies achieved independence. It was revived during decolonization and was confirmed outside the colonial context in the 1990s. *Uti possidetis* can nowadays be applied as part of an international conflict management. The Security Council has on several occasions declared that the acquisition of territory by force in internal conflicts shall not be recognized, which gives the principle an impact even before a territory has achieved independence. In the non-colonial context, its importance lies in its freezing boundaries until they are fixed by consent (i.e. by recognition or agreement).

#### *4. Legal Types of the International Integration of New States*

Changes of statehood are socio-political and at the same time legally highly relevant processes. International law has had to develop criteria with which to assess whether profound political changes occurring in one or more states have meant the creation of a new state, the continuation of an existing state despite structural changes or the end of a state's existence. The outcome of this assessment largely determines the international status of states affected by a profound change in their political

systems: a new state must first be integrated into the international system whereas an existing state simply continues to be.

The rules of international law concerning the identity and/or continuity of states do not only determine the legal fate of states. They also regulate the implications for international legal relations such as membership in international organizations and the validity of agreements with other states. The rules of identity include the criteria used to decide whether or not a body politic, despite considerable socio-political changes, has remained the same. The issue of the continuity of international legal relations is logically related to that of identity. The international system usually tries to avoid cases of a complete break in the legal personality of a state, as it is stability-oriented. The relevant international rules are accordingly intended to confirm identity and thus continuity.

Based on these rules concerning identity and continuity of states, a typology of the creation and the break-up of states has been developed, such as secession, separation, dismemberment, the unification of states as well as the categories of reconstructed and divided states. Some of these types have been taken up in the 1978 Vienna Convention on Succession of States in Respect of Treaties. The types of state creation reflect divergent modes of integration into the international system. Whether the relevant criteria allow a good assessment as to the type of state creation and thus the mode of integration depends on the underlying socio-political processes and developments. These processes are in many – but by no means all – cases clear: for example, the date on which the legal implication of a particular socio-political development is assessed (i.e. the critical date) may determine whether the creation of a state is the result of separation or dismemberment. In addition, some developments to be assessed may be subject to a discretionary construction according to the identity criteria.

State identity issues and the mode of integration of a new state are for these reasons sometimes steered by the UN and other international organizations. Particularly in controversial cases, these representatives of the international system seek to achieve an integration mode of a new entity that corresponds to the system's values and interests. The most striking examples were undoubtedly the dissolution of the USSR and the dismemberment of Socialist Federal Republic of Yugoslavia. The USSR's dissolution was turned from dismemberment into a series of separations from Russia, as continuation of the USSR secured a minimum of stability as well as legal and political continuity. In contrast, the series of separations from the former Yugoslavia was turned into dis-



memberment so as to internationally isolate the rump, the Federal Republic of Yugoslavia consisting of Serbia and Montenegro. As these examples show, identity issues can be politicized and steered by means of the admission procedures to international organizations in the interest of the international system. Another steering tool is foreign policy coordination among states.

##### *5. State Succession: Continuity in Spite of Change; Equity*

The law on state succession also determines the international status and integration of states when a change of statehood occurs. It makes this determination against the background of the legal bonds of the existing state affected by identity change issues, and it regulates the crucial issue of extent to which these bonds are transferred to another or a new state. As recent state practice demonstrates, continuity of these legal bonds despite changes of state identity is becoming increasingly important. The so-called *clean slate* doctrine, once considered the embodiment and likely outcome of self-determination, has become less important, since it does not adequately reflect the international system's needs and interests. International legal bonds are to a large extent an expression of the ever growing manifold interdependencies that affect not only the relations between states and/or international organizations but also individuals, groups of individuals, corporations and other cooperative enterprises, as well as the diversity of individual or collective human activities. Treaties in particular contribute to resolving common trans- and international issues based on the international system's norms, values and interests. Therefore the entire international system, including individuals and other non-fully-fledged subjects of international law, has an interest in avoiding a legal vacuum and securing, as a matter of principle, legal continuity when the identity of states changes and/or new states are created.

Continuity extends international legal bonds to new actors. By guaranteeing the abiding validity and primacy of international law during changes of statehood, it contributes to the reproduction of the international system's normative basis. Although the principle underlies the 1978 Vienna Convention on Succession of States in Respect of Treaties and to a lesser extent the 1978 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, it has not yet attained in international legal practice the status of an automatically applicable, general legal rule. There are exceptions to it, and its precise effect depends on the areas of application. In general, there is a presump-

tion of continuity that is to be observed by all the actors involved in a case of state succession until this presumption has been rebutted either by consent or individual state practice. As a result, the states and other international legal subjects involved are under a *bona fide* obligation to cooperate in resolving state succession issues. Continuity is more relevant as regards multilateral/regional agreements with global/regional authority and less relevant as regards bilateral agreements. Human rights treaties should continue to apply because their purpose is to protect basic rights of individuals, a consideration that holds for international humanitarian law as well. Treaties regulating issues of international peace and security usually continue to apply despite changes of statehood, as do those concerning territorial and border regimes. These rules reflect the needs of the international system, particularly its need for stability and continuity of legal bonds despite a discontinuity in the legal personality of a state.

In recent international practice, continuity has been promoted by steering activities intended to resolve succession issues in a way that conforms to the interests of the international system. Among the policy tools that have been used are internationally or regionally coordinated requirements that are to be fulfilled by new states prior to recognition and/or admission procedures to international organizations that demand a specific resolution of succession issues.

The clearest exception to continuity despite a change of statehood is fundamentally changed circumstances in the sense of *clausula rebus sic stantibus* and the normal termination of an agreement. Discontinuity in such cases should usually suffice to take account of the self-determination of a new state. It reflects the interests of the international system much better than *clean slate*, which is often also disadvantageous for a new state.

Succession as regards non-treaty matters is more dependent on agreed solutions between the states involved than succession as regards treaty matters, which in turn makes the obligation to negotiate *bona fide* even more important. The greater dependence on agreed solutions is largely attributable to the fact that fewer clear principles regulate succession as regards non-treaty matters, the main being equity. International steering activities play a considerable role, being intended to compensate for the lack of reliable rules as well as to promote the international system's own interest. The activities of the IMF and World Bank have, for example, been decisive as regards succession in property and debts.

### VIII. Conclusion: Self-Organization of the International System

The developments described and analyzed in this study show a close relationship between the international monitoring and steering of self-determination and statehood claims on one hand and the political and structural self-organization of the international system on the other.

International steering activities are more than merely an external involvement in internal conflicts; they are a self-steering of the international system with the purpose of its own stabilization. The international system seeks to control its own structure as part of a more comprehensive effort at self-constitution as a socio-political reality. The international system is becoming increasingly independent and powerful vis-à-vis the states that still largely constitute its basis. There are many contemporary indications of this process of self-constitution: the fact that sovereignty and *domaine réservé* have lost most of their impact; the growing power of international institutions; the extensive conflict-management activities designed to preserve peace and stability not only between but also within states; the establishment of international standards for national political systems; the emergence of a core constitution consisting of basic norms, most of them peremptory in nature and a concern of all states; and attempts to control the creation of new states. In the words of Mohammed Bedjaoui, Judge and former President of the ICJ:

*“Despite the still limited emergence of ‘supranationalism’, the progress made in terms of the institutionalization, not to say integration or ‘globalization’, of international society cannot be denied. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of ‘international community’ and its sometimes successful attempts at subjectivization. A testimony to all these developments is provided by the place which international law now accords to concepts such as obligations *erga omnes*, rules of *ius cogens* or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law which still held sway at the beginning of this century [...] has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community. Added to the evolution of international society itself, there is also the progress made in the technological sphere, thanks to*

*which the total and virtually instantaneous eradication of the human race is now possible.*<sup>1</sup>

These developments indicate that the international system is developing into the most complicated social system imaginable, namely the world or world society. More specifically, its steering activities in self-determination and independence conflicts raise issues of the self-regulation, self-steering and self-stabilization of the world. The fact that the international system is becoming increasingly autonomous also implies that it is based ever more on interests, norms and values that are not state dependent. As its institutions and organs pursue these, they will further the socio-political self-constitution and normative constitutionalization of an international system that already comprises much more than just a community of states. Accordingly, an understanding of international law as the normative foundation of an international system that embraces the world is called for.

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<sup>1</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Declaration of President BEDJAOUI, ICJ Reports 1996 N 13.