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## Theorizing state recognition

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What is the purpose and criteria of state recognition? Despite its regular occurrence in world affairs of the last 250 years, there is no scholarly agreement on this question. Yet the question remains as urgent as ever. Even a cursory glance at the very latest cases involving the phenomenon – whether Kosovo, South Ossetia, Abkhazia, South Sudan, or Palestine – suggests that recognition of a new state represents a crucial aspect of conflicts over statehood, many of which are prone to generate major and protracted international crises.

For many decades now, academic study of this thorny and multifaceted subject has been dominated by international lawyers. That scholarship has been driven by an explicit theoretical interest in its nature and effects. Entire library shelves can be filled with a long-standing debate revolving around two seemingly irreconcilable theories of recognition. Yet non-lawyers have been generally unimpressed by this debate and even some lawyers (O'Brien and Goebel 1965; Brownlie 1983; Grant 1999) have voiced doubts about its elucidatory value. Eva Erman and Jens Bartelson rightly maintain that it is time to rethink the existing legal literature and bring it into a conversation with non-legal disciplines.

Erman and Bartelson provide an insightful critique of the declaratory and constitutive theories. At the same time, they both accept the central tenet of the latter theory: that recognition is constitutive of statehood. An entity has the status of a 'state' internationally not only because it asserts so internally, but also because it is acknowledged as such externally. If this position, held today by only a small minority of lawyers, is correct – and I believe it is – then the question is how to theorize, in both explanatory and normative terms, recognition's criteria?

Erman is persuasive in contending that both internal and external criteria are important in recognition and that at least some of these criteria have

been constant requirements of statehood, including a government, a permanent population, a territory and a claim of collective self-determination. But she is less convincing when she insists that statehood necessarily entails sufficient internal capacity for autonomous exercise of collective self-determination (pp. 49–52). One cannot infer such capacity from the formal existence of a governmental apparatus in the midst of a territorially bounded populace. Nor can one infer that foreign states regard such capacity as a criterion of their recognition.

To ascertain which criteria ‘best explain the international recognition of statehood’ (Erman 2013, 48) scholars must painstakingly analyze its *practice*. The legal approach to that practice, the goal of which is typically to confirm, refute or refine the two dominant theories, is often narrow: there is a disproportionate focus on legal or quasi-legal texts, be they treaties, rulings of judicial and quasi-judicial bodies, legal opinions of government advisory bodies, or resolutions, reports and draft articles of international governmental and non-governmental organizations. Recognition, however, is a prerogative of central governments and a competence of their executive branch. Acts of recognition are neither formal nor fixed; they entail discretionary judgment that includes legal, political, moral, economic, security, and other considerations. For this reason it is necessary to probe not only executive decisions, but also executive decisionmaking: not only outcomes, but also the domestic and international processes that brought about those outcomes. The criteria of recognition can be fully ascertained only from the entire context and terms of its exercise. Legal or quasi-legal texts are pertinent to this endeavor only to the extent they inform or mirror executive decisions and decisionmaking.

Traditionally, sufficient internal capacity undeniably constituted a necessary criterion of recognition, at least, as Bartelson points out (pp. 29–30), in the ‘civilized’ world to which the institution of statehood was confined. The criterion was embedded in the requirement that the government of an entity asserting statehood have effective or *de facto* control over the claimed population and territory. Since there was no general international agreement on the categories of entities eligible for statehood or on the valid procedure by which they can establish it and since there was usually no agreement on either matter among the local parties directly linked to particular claims of statehood, recognizing states, in fact, came to regard effectiveness as the only reasonably objective institutional standard of collective self-determination available to third parties. The formation of an actually independent, stable entity in which the population habitually obeys the new rulers was presumed to render authoritative evidence of that population’s will to constitute a new state

as neither its founding nor its continued existence could come to pass without at least tacit approval by its inhabitants.

As a number of studies of recognition practice (Myers 1961; O'Brien and Goebel 1965; Jackson and Rosberg 1982; Jackson 1990; Kreijen 2004; Fabry 2010) make clear, the effectiveness criterion was essentially abandoned with decolonization. This does not mean that the countries recognized since then necessarily lacked effectiveness, only that it was not a condition of their recognition. Since the late 1950s the determining factor in foreign acknowledgment of new states has been whether an entity is deemed to have a pre-existing right to be a state rather than whether it has the capacity to be one. The understanding of collective self-determination shifted from the actual establishment of independence by a self-identified political community to the entitlement of independence allotted by international society to particular categories of territorial entities in their existing borders. If an entity has been considered to have a right to independence, a nominal rather than effective government has been all that is required as a condition of recognition. The notions that the attainment of effective statehood qualifies one for foreign acknowledgment as well as its flipside – that falling short of it excludes one from such acknowledgment – have been largely cast off.

It is evident that the emergence of self-determination as a positive international entitlement has not brought an end to claims of statehood that stand outside of its confines. Groups that feel deeply dissatisfied within the recognized states they are part of have continued to make demands for independence – just as they had prior to decolonization – in disregard of the fact that they may not have any positive international right to it. The insistence on the territorial integrity of existing internationally legitimate states even if they manifestly lost or never really possessed the loyalty of, and therefore effective control over, a part of their claimed citizenry and territory, has made contests over statehood more difficult to resolve. It has either left them in a perpetual condition of active or frozen conflict, with a variety of harmful consequences for the local or displaced populations (e.g. Nagorno-Karabakh), or required external intervention and even administration to keep them unified, with attending practical difficulties of having outsiders sustain onerous long-term obligations (e.g. Bosnia and Herzegovina). Apart from the possibility that attempts to resolve these unsettled situations may engender serious international disputes (e.g. Kosovo, South Ossetia, and Abkhazia), either option is at odds with the traditional purpose of independent statehood: self-government.

As both Erman and Bartelson make clear, it is vital that scholars ask critical questions about who gets recognized. In contrast to explanatory

theorizing in academic international law, explicit normative theorizing on state recognition has been quite neglected. Recent studies with this purpose range from those highlighting the merits of the pre-decolonization criterion of effectiveness (Kreijen 2004; Fabry 2010; Roth 2011: Ch. 6) to those calling for recognition on pragmatic consequentialist grounds of promoting peace and justice (Naticchia 2005), to those arguing for extending recognition to only at least minimally just, human-rights respecting entities (Buchanan 2004: Ch. 6). Given the persistence and gravity of conflicts over statehood, there is a need for a wider normative debate.

My reaction to Erman's and Bartelson's discussion is to stress that normative theorizing about political phenomena requires contending with actual politics. Any prescription with respect to recognition needs to be scrutinized against the normative underpinnings of its practice. Otherwise it is bound to give us not only little practical but also limited moral guidance for confronting the often complex dilemmas disclosed by that practice. This general point applies also to arguments, such as Bartelson's, that peaceful reform of the international system is unlikely without transcending its division into multiple separate states altogether. Bartelson is certainly correct to suggest that there is nothing natural or inevitable about that division. The sovereign state and state recognition are entirely historical, socially constructed institutions. These institutions are products of European-based modernity, which over time became universalized and globalized. Human beings can opt to replace them with different political and legal arrangements. But if such reforms of the international system are heralded as desirable, it is incumbent upon advocates to suggest, at least in the broadest outline, their institutional shape. What should the changes consist of and by what political process can they be expected to be implemented?

However, the reason for considering actual politics is not merely that it is only from the existing world that we can reach a better one. It is also that in the absence of such an endeavor there is little basis for embracing Bartelson's contention that, *contra* Carl Schmitt, there is plenty to suggest that there is a world impervious to the logic of Self and Other (pp. 32–33). While there has been no shortage of ideas and theories about superseding this logic, there has been a striking dearth of actual polities that managed to supersede it. This inability was already a feature of the pre-Westphalian, pre-global period containing no modern nations or international boundaries: polities espousing a vision of universal community ended up as empires that were established and maintained at least partly by subjugating non-conforming communities. It is noteworthy that the sovereign state as an international institution emerged following the degeneration of one of these empires into permanent warfare among its constituent parts.

Yet irrespective of whether one believes that opposition between Self and Other is ineradicable, it is evident that the relationship does not inescapably yield *violent* conflict. Indeed, the modern states system has become overall more peaceful. As shown in a noted study exploring the links between the sovereign state and war (Holsti 1996), the period since 1945 has been marked by a precipitous decline in interstate wars, a lack of great power war, an emergence of zones of peace in several world regions, and an effective eradication of the right of territorial conquest. Today the overwhelming majority of violent conflicts – also those over statehood – are civil wars. Although external responses to such wars, including those involving questions of recognition, continue to generate serious interstate crises, their disruptive impact on international peace is less pronounced than in the past. If it has proved possible to progressively reduce violent conflict between Self and Other in the interstate context, there is no reason to think it is impossible in the intrastate context. As Bartelson himself admits (p. 32), by separating fighting parties into independent entities, recognition can act as an instrument of resolution of contests over statehood. As long as most people around the globe want to organize their political lives collectively in territorially bounded homelands that have the status of a sovereign state, the challenge will likely remain how to enhance state recognition as a tool for peace rather than how to transcend it.

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## Recognition: organized hypocrisy once again

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In this comment, I will focus on only one of the many issues raised by the contributions and commentaries in this collection: the relationship between recognition, external sovereignty, or international legal sovereignty and the two other attributes of ideal typical sovereign states: Westphalian/Vattelien sovereignty and domestic sovereignty. Westphalian/Vattelien sovereignty refers to state autonomy: the domestic authority structures of the state are not subject to decisions taken by external actors. Domestic sovereignty refers to the ability of the state's political structures to effectively regulate activities within and across its borders.

The ideal typical sovereign state possesses all three attributes of sovereignty. The political structures within the state exercise effective control (domestic sovereignty). These political structures are domestically determined and are not subject to external authority (Westphalian/Vattelien sovereignty). And the state is internationally recognized (international legal sovereignty).

If the political entities in, and practices of, the contemporary world matched this ideal-typical characterization of sovereign statehood, then there would be no puzzles associated with recognition. There would be no tension between the declaratory and constitutive theories found in international law. All authority structures that effectively and independently governed a defined territory and population, and could therefore freely enter into and honor international obligations, would be recognized.

Consistent with international political sociology, statehood, and recognition would be unproblematic. All entities that were recognized would be