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***The criteria for statehood in international law are based on
the principle of effectiveness not legitimacy.'***

Do you agree? Discuss with reference to contemporary developments in international law theory and practice.

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Table of Contents

I. Introduction.....	1
II. Two approaches to define Statehood.....	2
1. Principle of effectiveness	3
2. Political legitimacy.....	5
a. Legitimation of states through recognition.....	6
b. Article 4.1 UN of the Charter: the new collective recognition?.....	7
III. The influence of self-determination on the theory of statehood.....	9
1. Self-determination: state practice during decolonization – selected cases.....	10
a. The Congo	11
b. Southern Rhodesia.....	11
2. Self-determination: state practice beyond decolonization? The example of Bosnia	12
IV. The procedural problem of collective recognition by the UN: What about Palestine?	14
V. Conclusion	15
VI. References.....	17
1. Primary Law Documents.....	17
2. Secondary Literature	18
3. Cases.....	19

I. Introduction

While in the last centuries the criteria of statehood were mainly based on legitimacy of states, which was expressed through recognition, it is assumed that the criteria for statehood today are based on the principle of effectiveness. This seems likely, because modern international law is rather based on effectiveness,¹ in other words on situations which de facto exist. Recognition always implies that subjective criteria are involved.

This paper tries to explore whether the criteria of statehood are really based on effectiveness. It consists of a strong theoretical part dealing with effectiveness and legitimacy in view of the dynamic development these approaches had while the world could witness the rapid birth of many new states as a result of decolonization. Indeed, since the UN Charter was adopted, a legal basis of decolonization existed with a profound influence on the criteria of statehood. In the next step, the validity of the gathered results will be checked at the examples of some cases in order to find out the practice recently used by states.

I am aware that James Crawford with his amazing study on the criteria for statehood has set the standards for this subject. But this is the challenging point. Crawford doubtless helped to get an overview, but his book is from 1979 and hence does not contain most recent developments. Here, it can already be pointed out that the statehood criteria had deciding modifications thereafter, especially after the collapse of the Soviet Union and the following second big wave of state birth in the former so-called communist countries.

¹ See Cassese (2003), pp. 12-3

II. Two approaches to define Statehood

Is recognition only a declaratory and symbolic act of other existing states, who want to express their goodwill and except the personality of the state to have good relations with the new state (*declaratory theory*), which does not affect the legal criteria of statehood? Or is the act of recognition rather a constitutive element which is based on certain standards the new states have to fulfill before they are entitled a legal status (*constitutive theory*)?

At first, it is indispensable to give an introduction about The *Montevideo Convention on Right and Duty of States 1933 (MC)*, which defines four elements as requirement in order to claim statehood. It is alleged that this formerly regional treaty has meanwhile become customary international law and hence is a proper source for defining statehood in the contemporary context in accordance with Article 38.1(b) *ICJ Statute*.²

Article 1 of the MC says:

The state as a person of international law should possess the following qualifications:

- (a) a permanent population;*
- (b) a defined territory;*
- (c) government; and*
- (d) capacity to enter into relations with the other states.*

There is a wide consensus how to understand the criterion *(a) permanent population*. Permanent does not mean that the population has to rest a minimum amount of time at one place. Regions inhabited by wandering nomads are understood to having a permanent population and therefore are not terra nullius (a territory belonging to no one), which itself can be legally acquired by existing states.³ Additionally, the *size of the population* is not essential. Hence, even territories like Nauru with a population less than 10,000 qualify for this criterion.⁴

² See Harris (1998), p. 102 and Warbrick (2003), p. 221.

³ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 39, paras. 79-81.*

⁴ See Harris (1998), p. 103.

Similar consent exists regarding the issue that a state needs *(b) a territory*. Neither is the size of the territory itself important⁵ nor do the boundaries have to be defined precisely.⁶ Thus a border dispute with another country does not cast doubt on the territorial status of a country. It is only important that a country has a clear core territory in order to be a state.⁷ As the example Israel shows, even the denial of certain groups and states about its existence and the resulting conflict do not terminate Israel's status as a state.

While *(a)* and *(b)* of the *MC* do not cause any problems among international lawyers and are accepted criteria of statehood, the perception of *(c)* and *(d)* is subject to many controversies. Supporters of the declaratory theory deduce the principle of effectiveness from these points.

1. Principle of effectiveness

Literally interpreted, *(c)* gives no further preconditions on how the government should be constituted and how it has to act. But in view of *(d)*, which says that there is a need for the government to be capable to begin and pursue international relations, the sense of *(c)* is modified. By combining these both clauses in accordance with *Article 31.1 VCLT*, the need for the government to be sovereign over its territory and its people in order to be able to commence international relations can be constructed. One can divide this vital sovereignty in internal and external sovereignty, which are closely connected⁸ and refer it to *(c)* and *(d)* of the *MC*. The former guarantees that the government is the highest authority of making the law within the state, while the latter assures that a state is independent in governing its external affairs.⁹

⁵ See Harris (1998), p. 103.

⁶ *North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, I.C.J. Reports 1969, p. 32, para. 46.

⁷ *Deutsche Continental Gas-Gesellschaft v. Polish State (1929)*, 5 A.D. 11. at 15. The relevant passage can also be found in Harris (1998), p. 103 and Crawford (1979), p. 38.

⁸ See Fassbender (1995), p. 70.

⁹ See Fassbender (1995), p. 70.

In order to possess external sovereignty, which is essential to establish international relations, the government needs to exercise effective power over its territory and citizens. Indeed, the ICJ has spoken about the link of effectiveness and sovereignty in its advisory opinion about the *Western Sahara case*.¹⁰ Hence, under the principle of effectiveness, which has been deduced from the *MC*, states have to be able to employ effective power on the territory and the people and be able to enter international relations. Yet, it could be argued that *(d) capacity to enter into relations with the other states* means that states have to be recognized as such by other states so that they have the capacity start relations. But here, it has to be strictly adhered to the text of the treaty. Capacity means the theoretical ability to enter international relations, in other words, the effective power. If one reinterprets these wordings, we would include the necessity of recognition by other states as another precondition to be a state. And this is a clear contradiction to the *Articles 3 and 6* of the *MC*, which distinguish between the de facto existence of states and recognition. As support for this opinion, it can be referred to Cassese. He asserts that the principle of effectiveness is the core of all international relations. Existing effective circumstances produce legal consequences, which have to be accepted. At the same time, he claims that the community of states was thus far incapable to define binding legitimate criteria for prospective new states. Hence, he implies that solely the existence of effectiveness and not legitimacy is the relevant criterion for statehood.¹¹ There have to be doubts expressed about this assertion. In the next step, political legitimacy and its recent modifications will be introduced.

¹⁰ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 49, paras. 107.*

¹¹ See Cassese (2003), pp. 12-13; 48-49. Cassese's statement regarding the inability of states in terms of creating legally binding principles for legitimating new states is on p. 13. However, he later mentions that state practice has changed, but partly invalidates this observation by referring to such cases of state practice as "extreme situations". See Cassese (2003), pp. 50-51.

2. Political legitimacy

Has there been a shift in customary international law, which has put the principle of effectiveness of *Article 1 (c) and (d) of the MC* literally out of effect? At this point, the principle of legitimacy, its current development in international law and influence on statehood will be introduced.

According to the supporters of the constitutive theory, an entity has to be “legitimized” as such by other states in order to satisfy the statehood criteria and become a state. This was the leading principle in the 19th century.¹² It depended on the will of each individual state to or not recognize a new state.

Does legitimacy provide another additional or substitute criteria to the aforementioned *MC*? Do extraordinary conditions and circumstances of states affect the criteria of statehood? Will any moral standards have to be fulfilled before the “admission in the international community takes place”?

Crawford asserts that in modern practice, statehood and recognition are two distinct categories.¹³ In the context of the *MC of 1933*, this might be true. But it has to be emphasized that from then onwards, there have been at least two extremely dramatic changes in the world order. The end of the Second World War meant more than solely Germany’s defeat. The UN was born and created as a subject of international law, and the *UN Charter (UNCH)* redefined international law significantly. Colonialism was coming to an end, resulting in the creation of many new states in Africa, Asia and South America. The Cold War started. Finally, in 1989, the breakdown of the GDR government intensified the collapse of the so-called communist regime in the Soviet Union, which has led to another wave of state creation.

To summarize the relevance of these events for the purpose of this paper: the world could witness the emergence of many new states. In the post colonialism era, westernized

¹² See Crawford (1979), pp. 12-15.

¹³ See Crawford (1979), p. 31.

concepts were more or less imposed on these regions. Statehood, certainly a western idea, was a concept many of these new states had never experienced before. Quite understandable, proof of effective power is not always possible in the infant stage of new states.

a. Legitimation of states through recognition

Has recognition re-emerged as an important legitimizing criterion for statehood? If yes, how has it been modified through the changes in world order?

Without great debate, the concept of unilateral recognition can be discarded. It is outdated to believe that the recognition of one or a few more states can be constitutive. Unjustified political reasons and preferences can affect the decision of a state to or not recognize a state.¹⁴ Moreover, unilateral recognition is incompatible with international law since the implementation of the *UNCH*. If other states were to decide alone who should be a state and who not, the crucial principle of sovereign equality of states will be shunned.¹⁵

Indeed, it is the *UNCH*, which has a great impact on the definition of statehood. Admittance of new members in the UN is more than a symbolic act, because it is connected with a new understanding of collective recognition. The importance of *Article 4 UNCH* will be discussed now.

¹⁴ See especially Claude Jr. (1966), pp. 367-370, for a critical discourse about the connection of law and morality and its influence on the decision of legitimizing other states in the system as a function of power. See also Warbrick (2003), p. 237, for general comments about recognition in terms of political decisions.

¹⁵ *Article 2.1 UNCH*. See also Cassese (2003), p. 49.

b. Article 4.1 UN of the Charter: the new collective recognition?

Article 4.1 UNCH:

Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

This article has major significance on the modern statehood criteria. It can be deduced that only states can be members of the UN. Hence, every member of the UN is a state according to the *UNCH*. This does not mean, that membership in the UN is a precondition in order to be a state. For instance, Switzerland only joined the UN in 2002.¹⁶ But it was never denied that Switzerland had been a state before. Referring to *Article 2.1 UNCH*, every state is sovereign to decide to join international treaties like the *UNCH*. But it cannot be denied that membership in the UN is a good indicator to determine whether a country is a state or not, because according to *Article 4.1 UNCH*, it is a matter of fact that only states can become members in the UN.¹⁷ If one turns this assumption around, one can claim that the non-admission of entities willing to join the UN means that they do not fulfill the statehood criteria and hence are solely “entities with people without legal status”.

It is interesting to see that the notion of a state in the context of the *UNCH* seems to be similar to the *MC*. Ginther points out that it is unmistakable that a state needed to prove “*a [(a)] defined territory, [(b)] a permanent population and [(c)] an independent government*”.¹⁸ However, he points out that the criteria of statehood, in particular the principle of effectiveness, has undergone a dynamic change in the following time due to the swift change of the political situation in the world and describes the shift from effectiveness to legitimacy

¹⁶ However it was a member of the *ICJ Statute* before.

¹⁷ See also Hillgruber (1998), p. 492, as supporting opinion. He indeed emphasizes that the admission of new states to the UN is a proof that the modern statehood criteria is fulfilled.

¹⁸ Ginther (1995), pp. 180-1.

and consequently international recognition.¹⁹ He implicitly links the criteria for statehood to *Article 4.1 UNCH*.

Now, a very interesting point was identified and needs to be discussed. There seems to be a shift away from the principle of effectiveness towards legitimacy, expressed through international recognition. Is the *UNCH* a move back to legitimacy through the possibility that new countries willing to enter the UN are recognized collectively as states through the admission to the UN? If yes, upon what kind of obligations, in the context of *Article 4.1 UNCH*, does this act of collective recognition depend?

A closer look at *Article 4.1 UNCH* reveals that there are certain other criteria to be complied with before admission in the UN is granted. The applicant has to be (a) *peace-loving*, (b) *accept the obligations of the present Charter* and (c) *must be able and willing to carry out these obligations*.

Here, (b) is of overwhelming interest. It says that a UN member state must adhere to the obligations of the present charter. In other words, the state has to agree to surrender some of its sovereignty in order to be able to stick to universal obligations and main principles of the *UNCH*. Further underlining this point, the compliance with the *UNCH* has to be without any reservation.²⁰ Hence, signatories of the Charter agree to adhere to the entire *UNCH* without exception and are ready to relinquish some of its external sovereignty. The question now is whether under the *UNCH*, a government has to also agree to surrender some of its internal sovereignty in order to comply with these main principles. One of the main obligations of states, namely the principle of self-determination of people will be discussed next.²¹

¹⁹ See Ginther (1995), pp. 181-2.

²⁰ See Ginther (1995), p. 183.

²¹ *Articles 1.2 and 55 UNCH*, respectively.

III. The influence of self-determination on the theory of statehood

“While the traditional criteria for statehood are still invoked, it appears that strict compliance with the requirements of independence and effective government [sic] have on occasions been overlooked in the interest of self-determination”²²

Dugard claims that the right for self-determination has occasionally put the principle of effectiveness out of order. After a short introduction to the idea of self-determination, it should be examined at the example of state practice, whether abandoning the principle of effectiveness has only taken place occasionally or whether it has become a permanent element of state practice.

Already now, it can be said that this principle, now expressed in international law, has a profound influence on the criteria of statehood. Doehring indeed asserts that self-determination is more than a principle but a right of all people.²³ Hence, it can be concluded that it challenges the internal sovereignty of governments and consequently also on the principle of effectiveness.

In the early stage, self-determination crucially affected the legal nature of decolonization.²⁴ The idea behind self-determination was the support of the UN for decolonization and the approach that the former colonies should be able to define themselves,²⁵ as long as this is in accordance with human rights. It is interesting to note that both *Article 1 of the International Covenant on Civil and Political Rights (ICCPR)* and *Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)* express the right of self-determination as the main principle. These two treaties are the main human rights treaties. Hence, self-determination is not only connected to human rights, it itself is a human

²² Dugard (1987), p. 78.

²³ See Doehring (1995), p. 52.

²⁴ See Doehring (1995), p. 53.

²⁵ See also *GA Res. 1514 (XV)*.

right. However, the principle of *uti posseditis* (borders of the former colonies remain valid after independence) narrows the human right of self-determination.²⁶

In order to support the process of decolonization, the admission to the UN was eased for former colonies. On the one hand, they had to be states in accordance with *Article 4.1 UNCH* in order to be admitted, but on the other hand state practice implies that the criteria for statehood were probably not solely based on the principle of effectiveness but rather on the legitimacy of governments. Indeed, it seems that other factors beyond the principle of effectiveness were considered more important, namely the compliance with the principles of the *UNCH* and international law, in particular with the principle of self-determination and thus, as shown above, with human rights.

Doering points out that it is extremely important to discuss the principle of self-determination with regard to state practice.²⁷ Now, some examples should be given in order to examine if statehood also relies on the new connotation of legitimacy in practice.

1. Self-determination: state practice during decolonisation – selected cases

How have the UN member states reacted to membership applications from newborn states as result of docolonization? Were the applicants able to enter the UN despite lack of effectiveness and hence states in accordance with *Article 4.1 UNCH*? If state practice implies that the new entities were admitted to the UN without proof of effectiveness, evidence for the assumption that the criteria of statehood are rather based on legitimacy is given. However, the following conclusion of this question is first strictly limited to the practice during colonial time.

²⁶ See Harris (1998), p. 113. The ICJ points out that *uti possidetis* and self-determination are contrary principles, but both need to be respected at the same time (*Frontier dispute (Burkina Faso v. Republic of Mali), Judgment, I.C.J. Reports 1986, pp. 566-7, paras. 23/25*). But it will be refrained from discussing the principle of *uti possidetis*.

²⁷ See Doehring (1995), p. 49.

a. The Congo

The Congo became independent in 1960. Belgium, the former colonial power, left the country behind in big disarray, without making sure that their power is transferred to the successor government. Crawford summarizes that the new government of Congo did not have at all effective control over the country.²⁸ Yet, Congo entered the UN in 1960. As said repeatedly before, only states can enter the UN. The act of collective recognition through the UN is evidence that Congo is a state (*Article 4.1 UNCH*), because the ineffectiveness of Congo's Government was not taken into consideration. Rather, the right of self-determination was placed above the principle of effectiveness. Hence, in the eyes of the UN members, Congo had a legitimate government, which was the deciding criterion accept it as new UN member state.

The Congo case shows that although Congo had an ineffective government, the criteria for statehood were satisfied, because independence was in accordance with the self-determination of the people and thus the government was legitimate.

b. Southern Rhodesia

In 1965, Ian Smith and his rebels declared their independence from Great Britain and built a minority government in Southern Rhodesia.²⁹ It is to be noted that it was a unilateral declaration. Referring to the discussion above, such acts are not in accordance with the right of self-determination, because it is a (human) right of the people and not the right of a minority group. Harris says that nonetheless Southern Rhodesia could claim to be a state in accordance to the *MC*.³⁰

As consequence to the violation of the right of self-determination, the UN expressed grave concern about the incidents in Southern Rhodesia. The acrimonious language used by

²⁸ See Crawford (1979), pp. 42-3.

²⁹ See Harris (1998), p. 111.

³⁰ See Harris (1998), p. 111.

the UN Security Council, calling the self-declared government of Rhodesia an “illegal minority racist regime”³¹, confirms that the effectiveness the Smith government could prove was not taken into consideration as appropriate statehood criteria. Rather, it should be referred to operative clause 3 of the corresponding resolution. It is said very clearly that the self-declared minority government has no legal basis.³² Hence, the Smith Regime could not prove to be the new legitimate authority of Southern Rhodesia, because the self-determination of the people was denied. Rather, the British Government remained the legitimate power.³³ Rhodesia (now Zimbabwe) only became an independent state in 1980, after the UN had admitted it as new member and therewith declared its legitimate status.

The Rhodesia case shows that although Smith’s regime was an effective government, it lacked legitimacy. That is why statehood was denied as long as the right of self-determination could not be granted. This is a reversal to the Congo case, but the same result was accomplished.

2. Self-determination: state practice beyond decolonization? The example of Bosnia

Since in January 1994 the colonial period was formally declared to be over with the suspension of the *UN Trusteeship Council*,³⁴ it is questionable whether the right of self-determination is also applicable beyond the decolonization process, or whether Dugard’s earlier mentioned claim, that only occasionally the principle of effectiveness is discarded, is correct.

Article 1 ICCPR and *Article 1 ICESCR* express the right of self-determination for **all** people. With the grammatical interpretation, no restriction of the right of self-determination can be found. Doering supports this opinion while asserting that decolonization is a special

³¹ *SC Res. 216 (1965)*

³² *SC Res. 217 (1965)*

³³ See also Nkala (1985), pp. 54-58.

³⁴ *Article 7 UNCH*. It was (still is) one of the main organs of the UN with the task to assist the new territories in their process to attain their preferred status according to their right of self-determination.

case of self-determination. However, according to him, many writers argue that self-determination is only applicable in the process of decolonization, which he does not support.³⁵ One example should be given. Agarwal argues that the right of self-determination does only apply to colonial people, because otherwise it would be a legal basis for secession.³⁶ This would indeed be a contradiction to the guaranteed territorial integrity of *Article 2.4 UNCH*.

That is why one has to find out whether there is a restricted interpretation of the right of self-determination, which could be applied as a universal right without justifying secession. Once again, it has to be referred to current state practice to find out which opinion is followed by the international community. The independence of Bosnia will be used as example to see whether self-determination is a restricted or a universal principle.

Bosnia became a UN member on 22 May 1992, when it was unanimously accepted by the General Assembly.³⁷ Rich says at that time it was a matter of fact that Bosnia “could hardly be described as a state”³⁸, obviously meaning that it could by no means prove effectiveness. Before, the EU had issued its *Declaration on Yugoslavia*, demanding that every state willing to be accepted as such has to be able to grant (minority) human rights.³⁹ The *Badinter (Arbitrary) Commission* defined this demand more precisely by saying that it expected a referendum for Bosnia, in other words the possibility of all people of Bosnia to self-define themselves.⁴⁰

Bosnia had proven to comply with the right of self-determination, after holding a referendum from 29 March to 1 April 1992. Although it is criticized that the Serb minority boycotted the referendum, its validity cannot be questioned. It may be right that a boycott does not fulfill the demand the EU imposed on Bosnia, namely the protection of minorities,

³⁵ See Doebling (1995), pp. 59-60.

³⁶ See . Agarwal (1992), pp. 483-4.

³⁷ *GA RES. 46/237 (XLVII)*.

³⁸ Rich (1993), p. 49.

³⁹ *EC Declaration on Yugoslavia (1992)*, 31 *ILM* 1486. Also available in (1992): *European Journal of International Law* 4(1): 73.

⁴⁰ The statement is available in: Badinter Commission (1992). “Opinion No. 4, 11 February 1992.” *European Journal of International Law* 4(1): 74-75.

because particularly these minorities did not take part, most probably due to their prediction of their likely defeat. But it has to be said that the minorities had the opportunity to express their vote. Inevitably, one can criticize that minorities can be overrun with the principle of self-determination, but to make a point here: it has to be adhered to international law and not to moral!

Hence, Bosnia complied with international law and the principle of self-determination and was admitted according to that criterion to the UN and hence a state in accordance to *Article 4.1 UNCH*. The ineffectiveness of the Bosnian government did not matter. Self-determination as human right has proved to be valid beyond colonialism.

The recognition of states today seems to be based on the collective recognition of the international community, assembled in the UN. Really?

IV. The procedural problem of collective recognition by the UN: What about Palestine?

Is self-determination such an overwhelming principle that can discard the principle of effectiveness with the acknowledgement of the UN member states? Why has the UN never recognized Palestine as a state?

114 states (!) have recognized Palestine unilaterally.⁴¹ Before, it has been shown that unilateral recognition is not relevant for the criteria of statehood. Reviewing this tremendous number, the main question is: why did these states, in view of their majority, never use the UN to admit Palestine as a member and thus define it as state? Difficult question, quite simple answer.

Article 4.2 UNCH says:

The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

⁴¹ See Boyle (1990), p. 302.

It is true that the General Assembly, consisting of all member states, is the final instance to decide about membership, but the real selection takes place in the Security Council. And specifically, decisions who will be considered for membership will be taken by the Security Council. It requires nine votes within the Security Council including those of the five permanent members (P5).⁴² In other words: the arbitrary composition of the Security Council can affect the vote without the influence of the General Assembly,⁴³ but even more dramatically is the fact that the P5 have to affirm their readiness. Since the USA is a close ally of Israel, it is able to block any recognition of Palestine as state, although the big majority of states would avow a collective recognition.

What can one conclude from this? Collective recognition, based on human rights principles like self-recognition may be the deciding criteria for statehood, but these principles must also be recognized and expressed by the P5.

V. Conclusion

Is it really the principle of effectiveness, which defines statehood? Recalling the expression of this principle in the *MC* and the assumption of some authors that the *MC* has become international customary law and thus is a valid source of law in accordance with *Article 38.1(b) ICJ Statute*, the answer is yes.

But reviewing the arguments provided in this paper, especially the change of international law since the UN was created, the new principle of self-determination and the corresponding state practice, it is very doubtful to assume that the *MC* of 1933 is still

⁴² *Article 26.3* and *Article 23.1 UNCH*, respectively. China, France, Russia, United Kingdom and the USA are the permanent members.

⁴³ *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950.*

customary international law. The ICJ has denied this claim already in 1950.⁴⁴ If the *MC* had ever been customary international law, then it has diminished quite quickly.

There has been a major shift towards legitimacy through recognition in the post-war era. Self-determination as measure for legitimacy has substituted the plea for an effective government and is the main criterion. Recognition through the UN expresses that self-determination to the people was granted, not only during colonialism, but also today, as the Bosnia case shows. It may be only a matter of time when this right becomes a criterion of statehood in customary international law.

Yet the non-recognition of Palestine shows the ability of the P5 to deny the status of statehood, if they have any objections, no matter if legal, political or moral objections. *“The crucial point is that, for better or worse, the development of the United Nations as custodian of collective legitimacy is an important political phenomenon of our time”*⁴⁵. In other words, it seems true that collective recognition as expression for legitimacy is the criterion for statehood. But it has to be acknowledged by the P5. They have the deciding vote and hence can build states, which is contrary to the right of self-determination and the principle of sovereign equality of states.

⁴⁴ *Colombian-Peruvian asylum case, Judgement of November 20th, 1950, I.C.J. Reports 1950: 266.* Crawford ascertains this case with his opinion saying there is no modern definition of statehood. See Crawford (1979), p. 31.

⁴⁵ Claude Jr. (1966), p. 379.

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