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## **The Legitimacy Dilemma in Government Recognition**

*Andreea VOVEC*

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# The Legitimacy Dilemma in Government Recognition

Andreea VOVEC\*

University of Bucharest, Faculty of Law

**Abstract:** *Government recognition in international law is a complex and evolving issue, shaped by legal principles and political realities. This paper examines the key criteria for recognition, including constitutionality, effective control, democratic legitimacy and international recognition, while highlighting their inconsistencies in State practice. By analyzing diverse doctrinal theories, together with the practice of States, a comprehensive overview of recognition frameworks is provided. Comparative case studies of contested governments illustrate the interaction between law and politics in determining legitimacy. The paper offers valuable insights for legal scholars, policymakers, and international organizations navigating the complexities of diplomatic recognition and State legitimacy.*

**Keywords:** *Government Recognition, Effective Control, Constitutional Legitimacy, Democratic Legitimacy.*

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\*Student at the Faculty of Law, University of Bucharest (3rd year) and at the Collège juridique franco-roumain d'études européennes. E-mail address: andreea.vovec@drept.unibuc.ro.

The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

## 1. Introduction

In international law, "recognition" refers to the formal acknowledgment of the existence of an entity or situation, signifying that the legal consequences associated with that recognition will be upheld<sup>1</sup>. It is most commonly applied to States, governments, and groups involved in conflicts or insurgencies within States. Key scenarios requiring recognition include war, foreign occupation, neutrality, and territorial or jurisdictional disputes. While recognition plays an important role in various contexts, it is the recognition of new States and governments within existing States that has attracted the most attention, driving efforts to establish and clarify international legal frameworks.<sup>2</sup>

In order to recognize a government as legitimate, there is an customary international legal framework that is applied, but it does not mean that there is no actual possibility that sometimes the identity of a State's government is unclear or still disputed. There may exist evidential or other difficulties in the application of one or more aspects of this objective framework.<sup>3</sup>

Consequently, various criteria have been applied over time, mostly depending on the situation at hand. It is still questionable whether today there really exists a certain basis regarding governments' legitimacy. The International Law Association affirmed that it is hard to identify a certain basis for recognition.<sup>4</sup> There are several factors that are to be taken into account when making any affirmation with regard to the recognition of a government. In general, these factors include constitutionality, effectiveness, recognition by other States, the will of a government to perform the rights and obligations of the State internationally and the popular support that a government receives through democratic elections or other manifestations of such consent.

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<sup>1</sup> Carmen-Gina Achimescu (Puscasu), Ion Galea, *Drept international public*, Hamangiu, Bucharest, 2023, pp 95-97

<sup>2</sup> M.J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice*, 1815-1995 (Princeton University Press 1995), p.1.

<sup>3</sup> *Official Records, 900th Meeting*  
'Official Records, 66th Session, 2nd Plenary Meeting' (16 September 2011) UN Doc A/ 66/ PV.2 ,para. 14.

<sup>4</sup> International Law Association, Resolution no. 3/2018 of the Committee on Recognition and Non-Recognition in International Law, adopted within the 78th Conference of the International Law Association, held in Sydney, Australia, 19-24 August 2018, pct. 6; International Law Association, Sydney Conference (2018), Recognition/Non-recognition in International Law, Fourth (Final) Report, p. 18.

UNSC,

(14 September 1960) UN Doc S/PV.900, para. 67; UNGA,

## **2. The General Framework for Governmental Status - The Question of Constitutionality**

On one hand, established governments are presumed legitimate under international law.<sup>5</sup> A government retains its status even without actively exercising state functions, whilst it does not resign.<sup>6</sup>

A government is not legitimate merely because it exists, nor because it has independent rulers.<sup>7</sup> International law supports constitutional claimants over insurgents, even if they control most of a State's territory,<sup>8</sup> as shown in Haiti from 1991 to 1994.<sup>9</sup> Similarly, in 2009, the Honduran military, with legislative and judicial support, removed President Zelaya, violating the constitution.<sup>10</sup>

Furthermore, the UNGA unanimously demanded Zelaya's reinstatement and urged States to recognize only the government of the constitutional President.<sup>11</sup> Accordingly, UN bodies rejected representatives of insurrectional movements, emphasizing the primacy of constitutional legitimacy.<sup>12</sup> In this regard, Eritrea was recognized internationally only after Ethiopia officially gave up its claim, even though Eritrea had previously established control.<sup>13</sup>

If control is lost, the government in question would not be immediately deprived of its status<sup>14</sup> and this would not grant the unconstitutional

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<sup>5</sup> Brad Roth, *Governmental Illegitimacy in International Law*, (2000), [Roth, *Illegitimacy*], pp. 258-9.

<sup>6</sup> Niko Pavlopoulos, *The Identity of Governments in International Law*, (2024), [Pavlopoulos] p. 99.

<sup>7</sup> Hersch Lauterpacht, *Recognition in International Law* (1947), [Lauterpacht], p.154, 348.

<sup>8</sup> Roth, *Illegitimacy*, p.132.

<sup>9</sup> UNGA Resolution 46/7 UN Doc A/RES/46/7, p. 1-2; UNSC Resolution 841, UN Document S/RES/841, p. 8.

<sup>10</sup> UNGA Resolution 63/301 UN Document A/RES/ 63/301, pp. 1-3.

<sup>11</sup> *Situation in Honduras: Democracy Breakdown*, GA Res 63/301, UN Document A/RES/63/301 (1 July 2009).

<sup>12</sup> Brad Roth, *Secessions, coups and the International rule of law: assessing the decline of the effective control doctrine*, (2010), p.9.

<sup>13</sup> James Crawford, *State Practice and International Law in Relation to Secession* (1998), p. 69; *The British YearBook of International Law*, pp. 85, 92.

<sup>14</sup> *Republic of Somalia v. Woodhouse Drake & Carey (Suisse) SA and Others* [1993], p. 67.

<sup>15</sup> Roth, *Illegitimacy*, p. 147.

government the legitimacy to represent its State internationally.<sup>15</sup> However, it is important to consider the circumstance in which the constitutional government could be actually achieved by illegitimate means. Therefore, a claimant to power under a State's existing constitution is not necessarily deemed "constitutional", especially if this legitimacy is contested. Even in the absence of such contestation, an ostensibly "constitutional" claimant may still be considered 'unconstitutional.' A notable example is the stance taken by the States of the "Lima Group" which deemed Venezuela's May 20, 2018, electoral process illegitimate and refused to recognize Nicolás Maduro's new presidential term.<sup>16</sup> Subsequently, the Venezuelan National Assembly declared that Maduro had "usurped" power, leading to Juan Guaidó's claim to the presidency.<sup>17</sup>

On the other hand, the constitution of a State, although reflecting the identity of a State's government, can be insufficient for the identification of its government<sup>18</sup> and "irrelevant" from the point of view of international law if no other criterion is met.<sup>19</sup>

There are several examples which prove the fact that constitutionality is not necessarily a requirement for the enjoyment of governmental status under customary international law.<sup>20</sup> The changes of the governmental identity of Libya in 2011, of Egypt in 2013, and of Sudan in 2019<sup>21</sup> provide State practice in this regard. This respective practice highlights that national legal order will cease to be valid as soon as it loses its efficiency.<sup>22</sup>

### *The Case of Libya in 2011: The Recognition of the Transitional Council*

Libya's 2011 civil war created a power struggle between Muammar Qadhafi's

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<sup>16</sup> *Lima Group Declaration* (4 January 2019), available at <https://www.canada.ca/en/global-affairs/news/2019/02/lima-group-declaration-february-04-2019.html>.

<sup>17</sup> National Assembly of Venezuela, *Acuerdo sobre la declaratoria de usurpación de la presidencia de la república por parte de Nicolas Maduro Moros y el restablecimiento de la vigencia de la constitución* (15 January 2019).

<sup>18</sup> Pavlopoulos, p. 94.

<sup>19</sup> Josef L. Kunz, *Critical Remarks on Lauterpacht's Recognition in International Law*, p. 715.

<sup>20</sup> UNSC, *Official Records, 899th Meeting* (14 September 1960) UN Doc S/PV.899, para. 37 (Argentina); UNGA, *Official Records, 20th Session, 877th Meeting of the Sixth Committee* (17 November 1965) UN Doc A/C.6/SR.877, para. 10 (Spain).

<sup>21</sup> Pavlopoulos, p. 108.

<sup>22</sup> Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (1961) p. 220.

regime and the National Transitional Council (NTC), a revolutionary body formed to oppose his rule.<sup>23</sup> While Qadhafi maintained military control and refused to relinquish power, the NTC gradually expanded its territorial influence, eventually securing international recognition as Libya's legitimate authority.

The governmental status was initially contested—Qadhafi retained power despite officially renouncing formal government roles, while the NTC asserted its authority as the revolutionary opposition. Qadhafi's government operated independently, while the NTC relied on international military and political support, raising concerns about its self-sufficiency.

As such, the NTC's legitimacy was not based on existing legal structures but rather on its revolutionary success. Effective control shifted over time, with Qadhafi's forces initially holding key areas before the NTC gradually took control of institutions and territory. Moreover, the recognition by other States played a decisive role—while Qadhafi's regime was initially acknowledged as Libya's government, international support eventually shifted to the NTC, reinforcing its governmental claim. As such, the NTC was widely recognized as Libya's government even at a time when “a number of cities remained outside of the control of the NTC, and military action continued”.<sup>24</sup>

As a consequence, while the NTC lacked constitutional grounding, its growing territorial control and global diplomatic support cemented its status as Libya's new governing authority.<sup>25</sup>

### *The Case of Sudan in 2019*

Following the ousting of President Omar al-Bashir in 2019, Sudan entered a turbulent political transition. The Transitional Military Council (TMC) initially assumed power, but sustained civilian protests, led by the Forces for Freedom and Change (FFC), pressured the military into negotiations. This resulted in a power-sharing agreement and the formation of a transitional government. The governmental dispute was initially between the TMC and

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<sup>23</sup> UNGA, *Official Records, 66th Session, 2nd Plenary Meeting*, 15.

<sup>24</sup> UNGA, *Official Records, 66th Session, 2nd Plenary Meeting*, 14.

<sup>25</sup> Angus McDowall, *How Libya's Years of Crisis Unfolded After 2011 Uprising* (Reuters, 28 August 2024) <https://www.reuters.com/world/africa/how-libyas-years-crisis-unfolded-after-2011-uprising-2024-08-28/>.

the FFC, but the eventual power-sharing agreement provided a unified transitional structure.<sup>26</sup>

Constitutionality was addressed through the 2019 Draft Constitutional Charter, which provided a legal framework for governance, although being named a *de facto* constitution.<sup>27</sup> The transitional authority established itself in Sudan, even after overthrowing a democratically-elected government, including the prior constitutional framework.<sup>28</sup>

### *The Case of Egypt in 2013*

Following the ousting of President Mohamed Morsi, the Egyptian military assumed control, establishing an interim government. The military's control over state institutions and security apparatuses was central to its governance.<sup>29</sup> The removal of Morsi, who was democratically elected, raised questions about the constitutional legitimacy of the new government.<sup>30</sup> The suspension of the constitution and the dissolution of the parliament further complicated the constitutional narrative.

Despite its unconstitutional nature, the legitimacy of the 2013 government was widely recognized by certain segments of Egypt's population, particularly those who opposed Morsi's rule. The interim government was supported by the military and other political forces, including secular and liberal groups, who viewed it as a necessary response to what they saw as Morsi's failure to govern effectively and fairly.<sup>31</sup>

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<sup>26</sup> Mai Hassan and Ahmed Kodouda, *Sudan's Uprising: The Fall of a Dictator* (2019) 30 *Journal of Democracy*, <https://www.journalofdemocracy.org/articles/sudans-uprising-the-fall-of-a-dictator/>.

<sup>27</sup> *Sudan's 2019 Constitutional Declaration: Its Impact on the Transition*, <https://www.idea.int/sites/default/files/publications/sudans-2019-constitutional-declaration-its-impact-on-the-transition-en.pdf>

<sup>28</sup> *Sudanese de facto govt working on new constitutional framework*, <https://www.dabangasudan.org/en/all-news/article/sudanese-de-facto-govt-working-on-new->

<sup>29</sup> David D. Kirkpatrick, *Egypt's President Morsi is Ousted in Military Coup*, *The New York Times* (4 July 2013) <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

<sup>30</sup> Ray Bush and Elisa Greco, *Egypt under Military Rule* (2019) 46, *Review of African Political Economy*, pp. 529- 534.

<sup>31</sup> Michael R. L. Deeb, *Egypt After the Arab Spring: A Legacy of No Advancement* (GIGA Focus, 2015) <https://www.giga-hamburg.de/en/publications/giga-focus/egypt-after-the-arab-spring-a-legacy-of-no-advancement>.

### 3. The Exercise of Effective Control

The exercise of effective control over a territory represents a solid criterion when it comes to the recognition of a government.<sup>32</sup> This criterion is usually considered in those circumstances where there is more than one claimant to governmental status, as there are situations where a government which is autonomous does not need to possess complete control in order to be considered the rightful authority. However, concerns rise when there is a rival, unconstitutional claimant to governmental status.

According to the principle of “effectiveness”, an “unconstitutional” claimant enjoys governmental status insofar as it exercises effective control over the state’s territory and population.<sup>33</sup> This control must extend over a substantial majority of the territory and population of that State.<sup>34</sup> Moreover, it must enjoy the habitual obedience of the population, with a reasonable expectation of permanence in order to be deserving of recognition.<sup>35</sup> As a *de facto* government, it completely takes the place of the regularly constituted authorities in the State, binding the nation.<sup>36</sup>

Therefore, a State cannot be exonerated from responsibility for the conduct of its government based on considerations of legitimacy or illegitimacy of its origin.<sup>37</sup> It was also noted in the *South West Africa Advisory Opinion* that “physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”.<sup>38</sup>

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<sup>32</sup> Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica) (1923) I UNRIAA 37 [Tinoco], p. 381.

<sup>33</sup> Federal Department of Foreign Affairs of Switzerland, *The recognition of states and governments under international law*, p. 3.

<sup>34</sup> Pavlopoulos, p. 122.  
<sup>35</sup> L. Oppenheim, *International Law* (9th edn, 1992), [Oppenheim] p. 150.

<sup>36</sup> Tinoco, p. 378.

<sup>37</sup> Report of the ILC on the Work of Its 53rd Session (2001), p. 51.

<sup>38</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports [1971], para. 118.



#### 4. Recognition by Other States

International recognition of the government does not confer legitimacy to represent the State internationally.<sup>39</sup> It is a political act<sup>40</sup> reflecting a State's willingness to engage in foreign relations with another State.<sup>41</sup> As such, non-recognition by other States does not affect the established government's capacity to represent the State in question,<sup>42</sup> but it is still crucial to emphasize, as it was found by the sole-arbitrator Taft CJ in the *Tinoco Arbitration*,<sup>43</sup> that recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations.<sup>44</sup>

Regardless, international recognition is justified by policy considerations, not legal ones, making it insufficient to confer legitimacy to represent a State internationally or to deny a constitutional legitimate government the right to represent the State.<sup>45</sup>

#### 5. The Importance of Popular Consent<sup>46</sup>

The "legitimacy" test requires that, for an entity to be recognised as a government, it should have come to power through a due process and that it is generally accepted by the population.<sup>47</sup> In order for this criterion to be met, a democratic election needs to be held and its results respected. As such, a new government must be supported by the will of the nation, substantially declared.<sup>48</sup> Moreover, the public should view the entity as the government, including by habitually obeying its laws and orders.<sup>49</sup>

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<sup>39</sup> *Oppenheim*, p. 769.

<sup>40</sup> *Lauterpacht*, p. 385-458; Rüdiger Wolfrum and Christiane Philipp, *The Status of the Taliban: Their Obligations and Rights under International Law*, (2002), p. 569.

<sup>41</sup> Stefan Talmon, *Recognition of Governments in International Law* (Oxford University Press 2001), p. 25.

<sup>42</sup> *Shaw*, p. 337-341.

<sup>43</sup> *Tinoco*, p. 369.

<sup>44</sup> *Ibid*, p. 380.

<sup>45</sup> *Republic of Somalia v. Woodhouse Drake & Carey (Suisse) SA and Others* [1993], p. 67.

<sup>46</sup> *Oppenheim*, p. 151; The statement of the Secretary of State Stimson made in 1931: *Latin-American Series, No 4* (1931) p. 8.

<sup>47</sup> *SAC-M Briefing Paper: Recognition of Government (Myanmar)*, p. 4, Special Advisory Council for Myanmar, 2021.

<sup>48</sup> Thomas Jefferson to Gouverneur Morris, 7 November 1792, in *Moore* (i) p. 120; *Oppenheim*, p. 151.

<sup>49</sup> H. Lauterpacht, *Recognition in International Law* (1947), p. 88.

This specific basis can also be interpreted and thus, considered together with the exercise of effective control. Consequently, the will of the nation is also reflected and exercised through administrative institutions, such as government ministries and departments. Additionally, its exercise through security institutions, typically police and armed forces,<sup>50</sup> can be an essential factor.

However, in terms of State practice, there have been instances where a democratically representative government has gained widespread recognition over an autonomous rival claimant, even when the latter had effective control over the State's territory and population. Examples include Alassane Ouattara's claim in Côte d'Ivoire in 2010, Adama Barrow's claim in The Gambia in 2016, Jean-Bertrand Aristide's claim in Haiti between 1991 and 1994, and Manuel Zelaya's claim in Honduras in 2009.<sup>51</sup> At the same time, there have been several claimants to governmental authority who, while lacking a credible democratic mandate, were generally recognized by States as legitimate governments—sometimes after overthrowing an elected government. Notable examples include the government of The Gambia in 1994, the government of the Republic of the Congo in 1997, and the transitional authority in Sudan in 2019.<sup>52</sup>

## **6. The Validity of Acts Under *De Facto* Governments**

Another important aspect that is worth analysing is whether the acts concluded under a *de facto* government can actually be treated as valid. Moreover, if the government in question has been recognised only after certain acts have been already made at the time when this government was functioning.

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<sup>50</sup> SAC-M Briefing Paper: *Recognition of Government (Myanmar)*, p. 4, Special Advisory Council for Myanmar, 2021.

<sup>51</sup> UNGA, *Credentials of Representatives to the Sixty-Fifth Session of the General Assembly: Report of the Credentials Committee* (22 December 2010) UN Doc A/65 / 583/ Rev.1, p. 7 , which was approved by the UNGA res 65/237 (23 December 2010) UN Doc A/RES/ 65/ 237; UNSC res 2337 (19 January 2017) UN Doc S/RES/ 2337, p. 2; UNGA res 63/301 (30 June 2009) UN Doc A/RES/ 63 / 301, pp. 1–3; UNGA res 46/ 7 (11 October 1991) UN Doc A/RES/ 46/ 7, pp. 1– 2; UNGA res 47/ 20 A (24 November 1992) UN Doc A/RES/ 47/20 , pp. 1– 2; UNGA res 48/ 27 A (6 December 1993) UN Doc A/ RES/ 48/ 27, pp. 1-3. See also UNSC res 841 (16 June 1993) UN Doc S/RES/ 841, p. 8.

<sup>52</sup> Talmon, *Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, p. 534.

In this regard, *de facto* governments are capable of concluding lawful acts, as recognition *de facto* is indistinguishable from *de jure* recognition.<sup>53</sup> Thus, the acts made by the *de facto* government in question are recognized as valid under international law.<sup>54</sup>

In *South West Africa*, the ICJ noted that the official acts can be rendered invalid only if causing the detriment of the inhabitants of the territory.<sup>55</sup> *Per a contrario*, the acts necessary to maintain the public order among citizens must be regarded as valid when proceeding from an actual, although possibly unlawful government.<sup>56</sup> Moreover, it would constitute a valid act if enacted by a lawful government.<sup>57</sup> Otherwise, justice would be interrupted, and the state thereby exposed to all the disorders of anarchy.<sup>58</sup>

Furthermore, the validity of these acts will stem from the time when the government installed itself, acquiring effective control, the criterion treated *supra* (section 3). As such, by virtue of the principle of retroactivity, recognition, whether *de facto* or *de jure*, is retroactive in the sense that courts will treat as valid the acts of the newly recognised government dating back to when this authority established itself.<sup>59</sup> Therefore, the acts of the recognised government, as a result of the retroactive effect of recognition, will be still considered valid.<sup>60</sup>

However, there are several doctrinal opinions, as well as State practice, that do not acquiesce to this theory and therefore will consider the acts of simply *de facto* governments as nullities.<sup>61</sup> For example, France,<sup>62</sup> Italy,<sup>63</sup> Sweden<sup>64</sup>

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<sup>53</sup> Oppenheim, p. 156; *Luther v. Sagor* [1921] 3 KB, p. 532.

<sup>54</sup> *Tinoco*, p. 378.

<sup>55</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports [1971], para. 125.; see also Bogdan Aurescu, Ion Galea, Lazar Elena, Ioana Oltean, Drept international public, *Scurta culegere de jurisprudenta pentru seminar*, Editura Hamagiu 2018, pp. 71-77

<sup>56</sup> *Texas v. White* 74 US (7 Wall) 700, (1868), para. 733.

<sup>57</sup> *Texas v. White* (n 225), para. 733.

<sup>58</sup> *Madzimbamuto v. Lardner-Burke* [1969] 1 AC 645, pp. 728, 729 (PC).

<sup>59</sup> *Luther v. Sagor* [1921] 3 KB, p. 432; *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] 53 TLR, p. 751.

<sup>60</sup> *Luther v. Sagor* (n 186) p. 532; *Williams v Bruffy* (1877) 96 US, p. 176.

<sup>61</sup> *Lauterpacht*, p. 144.

<sup>62</sup> *Héritiers Bouniatian v. Société Optorg*, Gazette du Palais, 1924, pp. 96.

<sup>63</sup> *Nonis v. Federation of Seamen*, Court of Appeal of Genoa, 1930.

<sup>64</sup> *Soviet Government v. Ericsson* (Annual Digest, Case. No. 30).

and Belgium<sup>65</sup> refused to acknowledge acts of the Soviet government due to their lack of recognition. Similarly, English courts have consistently denied unrecognised governments' rights, including jurisdictional immunities.<sup>66</sup> It remains at the discretion of every State to consider whether it recognizes the ability of a certain government to conclude valid acts.

## 7. Conclusions

This research, far from being exhaustive, points us to some conclusions. Certainly, an objective framework exists within customary international law for determining the government of a State, which respects the sovereign right of each State to decide its political system, constitution, and form of government. Customary international law does not impose clear limitations on these sovereign freedoms when establishing governmental status.

However, the criteria for recognizing States and governments, though established since at least 1950, are not universally fixed or consistently applied, it rather depends on the situation at hand. While certain key elements are often considered, their application can be subjective and varies depending on the context. Recognition decisions are frequently influenced by the political and foreign policy interests of States and organizations, meaning that some entities are recognized while others, even if meeting similar criteria, are not. Moreover, the rationality behind these recognition decisions can sometimes lack transparency, especially when made without democratic oversight. As a result, the recognition process is often shaped more by political considerations than by objective legal standards, undermining its legitimacy and accountability.

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<sup>65</sup> *Krimtschansky v. Officier de l'État civil de Liège* (Annual Digest, 1929-1930, No. 26).

<sup>66</sup> *Taylor v. Barclay* (1828), English Reports 769, pp. 213, 221; (1823), *Turner v. Russell* [2007] England and Wales Court of Appeal, Civ 79, 297.

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