

INTERNATIONAL LAW AND THE CRITERIA FOR STATEHOOD

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*The Sustainability
of the Declaratory
and Constitutive
Theories as the
Method for
Assessing the
Creation and
Continued Existence
of States*

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Abbreviations

AU	African Union
CSRC	Crisis States Research Centre
DDR	Deutsche Demokratische Republik
EC	European Community
EPC	European Political Co-operation
EU	European Union
FSI	Failed State Index
FFP	Fund for Peace
GA	General Assembly
ICJ	International Court of Justice
ILC	International Law Commission
NGO	Non-Governmental Organization
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
TFG	Transitional Federal Government
UN	United Nations
US	United States
USSR	Union of Soviet Socialist Republics

Introduction

When looking at the map of the world it appears as if almost the whole world is neatly divided into separate parts, with each part representing a defined territorial entity, known as a State. But under this neatly divided surface, a closer examination reveals that the concept of ‘statehood’ is shrouded in many ambiguities. For example, what makes a State, a State?



For over a century there has been a great debate between the ‘declarative’ and ‘constitutive’ schools of thought on statehood.¹ According to the ‘declaratory’ theory a State should possess the following qualifications: (a) a defined territory; (b) a permanent population and (c) a government. These criteria are provided by art. 1 of the Montevideo Convention on the Rights and Duties of States of 1933 (Montevideo Convention). Art. 3 of the Montevideo Convention declares that statehood is independent of recognition by other states. The declaratory theory prescribes that recognition of a State by existing States is nothing more than expressing the willingness to enter into relations with that State: in other words, accepting the existing conditions of statehood. The declaratory theory appears to be consistent with the current practice of

¹ Talmon, 2004, p. 101.

recognition, which is primarily used as a political tool by States.²

In contrast, according to the ‘constitutive’ theory, a State only becomes a State by virtue of recognition by the other States. Once the three factual criteria of the declaratory theory have been met, this ‘factuality’ must then be confirmed by the existing States. This doctrine has proved untenable in practice, as there is no international body with the authority to acknowledge the existence of States on behalf of the entire community of States. Therefore, each State may individually decide whether a new State has come into being (and recognize it). If the constitutive theory would serve as the basis for statehood, it would lead to the strange consequence that an entity would be considered a State by some States (those that have recognized it) and not a State by other States (those that have not recognized it).³⁴ Consequently, the question arises what the status of such a territorial entity is under international law, and – by extension - how it should be treated by the other members of the international community: is such an entity entitled to any form of sovereignty for example? In addition, there is no international obligation for States to recognize a territorial entity as a State once it fulfills the factual criteria for statehood: recognition often relies on many other considerations besides legal ones.

Apart from recognition, there are other issues relating to the factual criteria for statehood. As mentioned above, a government is an essential (factual) requirement for statehood. This government must be capable of exercising effective authority over the territory and its population.⁵ However, as it currently stands under international law,

2 The DDR for example, was established in 1949, but it would take until the 1970s before it was recognized by Western States. This does not mean however that the DDR lacked the properties for statehood before it was recognised. It would otherwise not be possible for a non-recognized State to violate any international obligations towards the non-recognizing States. However, state practice demonstrates that an unrecognised State is also bound by international law: for example most Arab States do not recognize Israel, but they regularly blame Israel for non-compliance with its international obligations. Another example is when the US ship, the *Pueblo*, was attacked by North Korea in 1968, the United States claimed that North Korea was liable, without recognizing it. For more information, see: Kooijmans 2002, p. 24-25.

3 Kooijmans 2002, p. 2.

4 Also, in practice, States rely on many other considerations than mere factual ones when it comes to State recognition.

5 Crawford 1977, p. 116-119.

once a State has been formed, there are very few rules governing its end (short of dissolution, or merger with another State).⁶ Even if internal unrest or civil war leads to lasting anarchy and the *de facto* collapse of a State - arguably as in the case of Somalia or Sierra Leone - State practice has not resulted in the 'denial' or the 'de-recognition' of statehood.⁷

Somalia for example, was ranked number one for a third consecutive year by the Failed State Index (FSI):⁸ scoring 114.3 points out of a total of 120 points.⁹ Somalia's officially recognized government, the Transitional Federal Government (TFG), which is backed by the United Nations (UN), the United States (US) and the African Union (AU) controls only a relatively small percentage of Somalia. Within Somalia several *de facto* independent territories can be found, with the most notable being Somaliland, located in the north of Somalia.

Based on the criteria for statehood, Somaliland may be regarded as a State: there is a territory (albeit with disputed borders), with a population and a government exercising effective control over its territory. Whether or not Somaliland is recognized by any other State is irrelevant: an entity's statehood is independent of its recognition by other States, according to the declaratory theory of statehood. A State - in this case Somaliland - must therefore first exist before other States may decide to establish ties with it. As

6 Hobach, Lefeber & Ribbelink 2007, p. 161.

7 Kooijmans 2002, p. 21.

8 The Failed State Index (FSI) is an annual index published since 2005 by the United States think-tank Fund for Peace and the magazine Foreign Policy. The FSI only includes recognized sovereign States determined by membership in the United Nations (UN). Consequently, a number of territories whose status is not final are excluded until their political status and UN membership is ratified. These include Taiwan, the Palestinian Territories, Northern Cyprus, Kosovo, and Western Sahara (even though some territories may be recognized as sovereign States by existing States). Excluded are also some States for which there is insufficient data.

The ranking of the States is based on the total scores of the 12 indicators. For each indicator, the ratings are placed on a scale of 0 to 10, with 0 being the lowest intensity (most stable) and 10 being the highest intensity (least stable). The total score is the sum of the 12 indicators and is on a scale of 0-120. For more information – such as the methodology used to calculate the scores– can be found on the Fund for Peace website: <http://www.fundforpeace.org/global/?q=fsi-faq>

9 The Fund for Peace, 'Failed States Index', The Fund For Peace 2010.

<http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=99&Itemid=140>

mentioned earlier however, there is no obligation under international law for States to recognize an entity as a State, once it meets the factual criteria for statehood. At the same time however, it seems that a State cannot exercise its *full* legal rights under international law without recognition by other States. An example of this is membership of the UN. Art. 4 of the United Nations Charter (UN Charter) prescribes:

1. Membership in the United Nations is open to **all** (...) **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.
2. **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**. [emphasis added]

Yet, it is Somalia that is a member of the UN and not Somaliland. In addition, Somaliland may not become a member of the United Nations while it is unrecognized by other States. In contrast, Somalia remains to be recognized as a sovereign State by the international community of States, despite failing to meet the factual requirement of effective control: it exists *de jure* as it were.

This raises questions about the nature of statehood and how it is achieved. Some authors have contended that the violation of fundamental norms of international law, such as the annexation of existing States, or the creation of States by military force, might prevent the creation of a State.¹⁰ Or that the right to territorial integrity of an existing State might have priority over the right to external self-determination of peoples (possibly after the period of decolonization).¹¹ Assuming that these norms are applicable within the context of statehood, the above arguments reach beyond the generally accepted criteria of the declaratory and constitutive theories. In addition, they only address the situation of the ‘new’ State and not that of the parent State Somalia, which remains *de facto* collapsed. Rather than meeting the factual criteria for statehood, Somalia's continued existence seems to depend on its recognition by other States.

Although the case of Somalia and Somaliland is merely one example among many,¹²

¹⁰ Dugard 1987, p. 135.

¹¹ Kooijmans 2002, p. 20-24.

¹² Other examples include Kosovo (Serbia), Northern – Cyprus (Cyprus), South – Abkhazia (Georgia),

the above suggests that the generally accepted criteria for statehood are an incomplete system of law, as neither the declaratory, nor constitutive theory of recognition seems to satisfactorily explain the objective legal situation of States in international law.

Research Goal

I want to examine the criteria for statehood according the declaratory and constitutive theories of statehood, because I want to find out to what extent these theories are sustainable as the method for determining whether a territorial entity has become a State under international law, in order to determine whether these theories satisfactorily explain the objective legal situation of States in international law. The scientific and social relevance of the research will be discussed in the last paragraph.

Central Research Question

To what extent are the declaratory and constitutive theories of statehood sustainable as the method for determining whether a territorial entity has reached statehood under international law?

Sub-questions

- What are the generally accepted criteria for statehood according to the constitutive and declaratory theories?
- What issues arise when these criteria are applied in practice?
- How do the constitutive and declaratory theories attempt to address these issues?
- Based on the above, do the declaratory, or constitutive theories of statehood satisfactorily explain the objective legal situation of States in international law?

In order to answer the main research question, the research will be divided into four Sections. The first Section is a general introduction to the concept of ‘statehood’ and is

Taiwan (China), Moldova (Transnistria), Katanga (Congo), Biafra (Nigeria), Anjouan (Comors) and numerous others. For more information see: Caspersen & Stansfield 2011.

meant to provide background information on issues that are necessary for a thorough understanding of the thesis. The main purpose will be to describe the general legal framework and underlying theoretical premises regarding statehood. This Section addresses the historical development of the State, the distinction between State and government and the way in which international law regards the relationship between the State on the one hand and its territory and its population on the other hand. The three traditional elements of the State, as generally accepted in contemporary international law (territory, population and government) will be discussed in the second Section, whereby special attention will be given to the requirement of effective authority, also known as the ‘principle of effectiveness.’ The third Section addresses the notion of State recognition and how it relates to statehood, according to the declaratory and constitutive theories. The fourth and final Section examines the issues that arise when the theory of statehood is applied in practice and how the criteria for statehood attempt to address these issues. In this part the relationship between the factual criteria for statehood and recognition will be examined closely. A comparison will be made between ‘*de facto* States’ (territorial entities that fulfill the factual criteria for statehood, but remain unrecognized by other States) and ‘*de jure* States’ (territorial entities that are recognized as States by the international community, but who do not fulfill the criteria for statehood). Special emphasis will be given to the factual requirement of effective control and the interplay between recognition and statehood. This Section will also evaluate whether the declaratory and constitutive theories can satisfactorily explain the objective legal situation of States in international law.

Theoretical Framework

The theoretical framework for the research consists of several ‘layers’. The primary focus will be on positive law (for example, cases dealt with by the International Court of Justice) and legal doctrine. This will be essential during every part of the research. The positive law will be particularly important when dealing with established law and the interpretation of legal concepts, while the legal doctrine can help provide the necessary definitions and legal framework. In addition, by analyzing the arguments of scholars and international courts, the contemporary status of the debate on the criteria

for statehood can be determined.

General principles of law and legal theory will be most valuable as a guideline when dealing with issues that are not well worked out, or normative issues, such as the evaluation of legal concepts related to the criteria for statehood.

Theories from other academic disciplines might be used in limited quantity, namely in relation to international relations, due to the inherent interplay between international law (particularly statehood) and politics.

Methods of Research

This thesis will be based on doctrinal research, whereby the following research methods will be used:

- Literature review is used throughout the research.
- Theoretical research is used to analyze, extrapolate, (re)construct, and compare the information gathered from the literature review.
- (Limited) empirical research methods (from secondary sources) are used to help clarify the factual circumstances surrounding (putative) States and other territorial entities.

Scientific and Social Relevance of the Research Topic

Although the notion of statehood occupies a central place in international law, it is in many regards shrouded in ambiguities. At the same time, it is likely that the subject of statehood will gain increasing importance under the influence of globalization and the changing nature of threats (the so called “new threats” such as terrorism, and its associated factors). What is for example the status of these unrecognized territorial entities and do they interact with the international system of sovereign States? Ambiguities in the theory of statehood can be exploited to deny States their rights or serve as justifications for intervention. Where States are involved, no member of the international community is guaranteed to remain ‘untouched’ (be it for better, or for worse).

From a scientific perspective this thesis is relevant because the research focuses on a

legal concept that poses many outstanding questions. Research can shed some light on many of these unanswered questions and add knowledge to the body of legal doctrine. This in turn can be used by lawyers and scholars who have to deal with this subject.

1. The Notion of Statehood in International Law

1.1 General Observations

Some writers have suggested that the concept of statehood does not have a separate place in international law, or have even come close to denying the existence of statehood as a legal concept altogether. While these views might contribute to view the State in non-absolutist terms, they are difficult to match with the extensive reliance on the concept in international 'constitutional' documents such as the United Nations Charter (UN Charter), or State practice.¹³ The separate position of the State is further underscored by the recognition of the existence of certain fundamental rights and obligations of States in international law. Werner notes that many of these fundamental rights and duties may be summarized in three principles closely related to the principles of liberty, equality and fraternity as those developed in the domestic sphere: the independence of States, the (sovereign) equality of States and the obligation of States to peacefully coexist.¹⁴ The independence and equality of States includes for example, the right of States to choose their own constitution, to exercise (exclusive) jurisdiction over their territory and if necessary, to defend the State against an armed attack. The obligation of peaceful coexistence implies, among other things, that States have the duty to refrain from intervention in the (internal or external) affairs of other States, from using their territory (or allowing it to be used) for activities that violate the rights of other States, or form a threat to international peace and security, and to comply with obligations imposed on them by international law in accordance with the principle of good faith. The last requirement implies, for example, that States are obliged to respect human rights on their territory.¹⁵

Similarly, Crawford observes that States possess certain exclusive and general legal characteristics, which he divides into five principles that '[c]onstitute in legal terms the hard core of the concept of statehood, the essence of the special position in customary international law of States.'¹⁶

13 Crawford 1977, p. 94-95.

14 Hobach, Lefeber & Ribbelink 2007, p. 160.

15 Hobach, Lefeber & Ribbelink 2007, p. 160.

16 Crawford 1977, p. 108 - 109.

1. In principle States have full competence to perform acts in the international sphere, such as entering into treaties. This is one meaning of the term 'sovereign' as applied to states, which will be discussed in more detail in the next paragraph.
2. In principle States are exclusively competent with regard to their internal affairs: a principle that is underscored by art. 2, paragraph 7 of the UN Charter. While this does mean that States have the authority or legal capacity to act in *all* matters, in international law, regarding those affairs, it does mean that their jurisdiction is *prima facie* both complete and not subject to the control of other States.
3. In principle States cannot be compelled to take part in international processes, settlements, or jurisdiction unless they consent to such exercise (either in general cases or specifically).
4. States are considered 'equal' in international law. A principle also recognized by art. 2 paragraph 1 of the UN Charter. This is to some extent a confirmation of the above-mentioned principles, but it may have certain other consequences. Crawford states that '[i]t is a formal, not a moral or political, principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations, merely that, in any international organization not based on equality, the consent of all the members to the derogation from equality is required.'
5. Finally, it is only possible to derogate from these principles if it has been clearly established. In case of doubt or disagreement an international tribunal or court will have to resolve disputes relating to the (external or internal) freedom of action of States, or as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality.

1.2 The Emergence of the State as a Defined Territorial Entity

One of the defining characteristics of the contemporary (sovereign) State is its territoriality. The State is the highest authority within a given territory: outside that territory the State, is obliged to respect the principle of non-intervention in its relations

with other States.¹⁷ The concept of the State as a territorially bounded unit finds her origins in the 16th and 17th centuries¹⁸ when in Western-Europe, it replaced the dominant form of political organization of the Medieval order, known as the '*Respublica Christiana*'. The *Respublica Christiana* was the central notion of unity and universality: all members of the (Christian) community were united under the authority of the Emperor and Pope. Simultaneously, on the local level, there existed a complex feudal system wherein the rights and obligations between lord and vassal occupied a central place. The universalism of the *Respublica Christiana* and the diversity of feudalism were gradually replaced by a system of territorially defined entities, with a relatively high degree of internal centralized authority.¹⁹ The term sovereign originates from the Latin '*suprema potestas*', which translates into 'highest authority' or 'highest power' indicating that the State is the highest body of authority, not inferring its powers from other earthly bodies such as, for example the Pope or Emperor, as had been the case during the *Respublica Christiana*.²⁰

The transition from the *Respublica Christiana* to the contemporary system of States was a gradual process, but in general, 1648 is regarded as the year that the transition to the modern State system was formalized.²¹ In that year delegations from the main political powers in Europe gathered in the cities of Münster and Osnabrück to sign a series of peace treaties that would finalize the Peace of Westphalia. The treaties concluded in Münster and Osnabrück put an end to the religious wars that had swept through Europe since the Reformation and initiated a new system of political order in central Europe, based upon the concept of a sovereign State governed by a sovereign: a system which would later be referred to as 'Westphalian sovereignty'. The Peace of Westphalia formalized a number of important principles that currently underlie the basis of modern international relations and international law. In addition to the principle of the sovereignty, these include the principle of (legal) equality between States and the principle of non-intervention in the internal affairs of another State.²²

17 Hobach, Lefeber & Ribbelink 2007, p. 161.

18 Koojimans 2002, p. 2.

19 Hobach, Lefeber & Ribbelink 2007, p. 161.

20 Koojimans 2002, p. 2.

21 Koojimans 2002, p. 2.

22 Birdsall, 2009, p. 40-41.

The importance of territoriality further increased with the invention of cartography in the late 17th century.²³ With the aid of cartography States were able to establish the borders of the different territories with much greater precision. Within these borders the power of the State steadily increased. This led to, among other things, an increase in bureaucracy, an improved ability to register and monitor the population, and a rise in the number of tasks performed by the State.²⁴ One of the most striking examples of the increased power of the State is the extent to which it succeeded in centralizing the use of force. This is an important reason why many historians and sociologists have attempted to define the State in terms of centralization of (legitimate) violence.²⁵ This centralization manifested itself internally, through the creation of national police forces and a drastic increase in the number of prisons during the late 18th and early 19th centuries. Externally, it manifested itself through the definition of war as being an exclusive affair of the State, in which a (three-way) separation was made between a government which is regarded to set out the policy of the State, armies that are supposed to fight in the interest of the State and a civilian population which is expected to be spared from the horrors of war.²⁶ War became an ‘institution of international law’ and an accepted and routine method of conducting everyday international business between States.²⁷ Vattel observed for instance in his book ‘*Le droit des gens*’ (1758),²⁸ that going to war was the prerogative of rulers who act on behalf of their States and that individuals are obliged not to interfere in the wars of States.²⁹ Similarly, Neff states that ‘[w]ar was [...] forthrightly seen as an instrument for the advancement of rival national interests.’³⁰

It would be wrong however to view the State merely in terms of a centralized

23 Hobach, Lefeber & Ribbelink 2007, p. 162.

24 Hobach, Lefeber & Ribbelink 2007, p. 162.

25 Hobach, Lefeber & Ribbelink 2007, p. 162.

26 Hobach, Lefeber & Ribbelink 2007, p. 162.

27 Neff 2005, p. 85

28 Emer de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (Londres, 1758). 2 vols.

< http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1858&Itemid=27 >

29 Hobach, Lefeber & Ribbelink 2007, p. 162.

30 Neff 2005, p. 85

authority, exercised within a defined territory.³¹ As will be explained, there is another element to territoriality. Characteristic of the modern State is not only its territoriality, but also the fact that it is *itself* regarded as an abstract person or order.³² This person or order cannot be equated with either the rulers (for example the monarch or government) or the subjects or citizens of the State. The State is an abstract order which includes both the rulers and those who are ruled, but it cannot be equated with either group.³³ The idea of the State as an independent abstract individual or order was developed by the political philosophy of Thomas Hobbes (1588-1679). Hobbes, identified the State as an ‘artificial man’, which should be distinguished from the government (who is expected to speak on behalf of the state) and the people (who may expect protection from the State and in turn, owe obedience to it).³⁴

The notion of the State as an abstract person also serves as the basis for the distinction between the concepts ‘State’ and ‘government’ in international law. A single State can experience changes in its constitution or government. Even an unconstitutional or violent change of government, does not - in principle - affect the legal personality and the continuity of the State.³⁵ Examples include Chile which underwent a bloody coup by Pinochet in 1973 and the survival of Romania after the forceful expulsion of Ceausescu regime in 1989. Even revolutions, such as the Russian revolution of 1917 or the Iranian revolution of 1979, which gave rise to in an entirely different system of government and a renaming of the name of the State, left the personality of the States intact. The State as an abstract (legal) person continues to endure even if the central government has completely collapsed due to internal unrest, such as a civil war. After the fall of Barre’s regime in 1991, Somalia underwent an internal armed conflict between warring clans, which resulted to the complete collapse of Somalia’s central government. Nevertheless, the international legal personality of Somalia as a State remained intact. Likewise, Lebanon underwent a civil war that ravaged the country between 1975 and 1990, without having its statehood affected.³⁶

31 Hobach, Lefeber & Ribbelink 2007, p. 162.

32 Hobach, Lefeber & Ribbelink 2007, p. 162.

33 Hobach, Lefeber & Ribbelink 2007, p. 162.

34 Hobach, Lefeber & Ribbelink 2007, p. 162.

35 Hobach, Lefeber & Ribbelink 2007, p. 163.

36 Hobach, Lefeber & Ribbelink 2007, p. 163.

The development of the notion of the State as an abstract person or order is also reflected by the different attempts that have been made over time to express the relationship between the State and its territory.³⁷

The oldest approach, also known as the '*Eigentumstheorie*', 'or property theory' considered the territory to be an object of the State's property.³⁸ According to this theory, the State quite literally, *possesses* a territory. In other words, the property theory makes no distinction between the notions of 'property' and 'governance' (or politics): a distinction which is necessary to better understand the contemporary view on statehood.³⁹ Partly under the influence of nationalism a second approach was developed, also known as the '*Eigenschaftstheorie*', or 'attribute theory'. According to this theory, the territory is an attribute of the State.⁴⁰ In other words, the State does not *possess* a territory, but it *is* its territory.⁴¹ Any damage to the territory of the State would constitute a violation of the person of the State itself. As such, the transfer of any part of the State's territory would amount to an amputation. Given the number of (often bloody) struggles that take place between States over - what often appears to be useless - fragments of territory offers the impression that at least some individuals (implicitly) still believe in the validity of the attribute theory.⁴²

Contemporary international law approaches the relationship between the State and its elements (territory, people and government) differently however. Unlike the attribute theory, the contemporary approach makes a distinction between the State as an abstract order on the one hand and its elements on the other.⁴³ This - currently dominant - theory, also referred to as the 'Kompetenz theory', or 'competence theory', was developed by the 'Viennese School of Legal Theory', of which Hans Kelsen (1881-1973) is considered the most prominent representative. According to the Viennese School, the State should be thought of as a normative (legal) order, constrained by a territory and a

37 Hobach, Lefeber & Ribbelink 2007, p. 163-164.

38 Milano 2006, p. 67.

39 Hobach, Lefeber & Ribbelink 2007, p. 163.

40 Milano 2006, p. 67.

41 Hobach, Lefeber & Ribbelink 2007, p. 163.

42 Hobach, Lefeber & Ribbelink 2007, p. 163-164.

43 Hobach, Lefeber & Ribbelink 2007, p. 163.

population.⁴⁴ The territorial borders indicate the territory over which the State's legal order extends and thus defining the (legitimate) territorial scope of the State (excluding the possibility of extraterritorial jurisdiction as recognized in international law).⁴⁵ Similarly the population of the State represents the (legitimate) 'personal' scope of the State's legal order. Kelsen observed that the population of the State is nothing other than the group of people over which the State's legal order extends (with the exception of the option to exercise jurisdiction over non-nationals).⁴⁶

In addition to a personal and territorial scope, the State also contains a 'temporal scope': States arise (such as the numerous new States that were formed out of the decolonization process), States exist and States may cease to exist (as in the case of the United Arab Republic and Social Federal Republic of Yugoslavia).⁴⁷ Werner notes, that the temporal component of the State is essential, because the criteria used to assess the emergence of States may differ to some extent from the criteria used to determine whether a State has ceased to exist. The requirement of effective and independent authority – which will be discussed in the next Section - typically occupies an essential role in answering the question whether a new State has come into existence.⁴⁸ Nevertheless, the loss of effective and independent control in an existing State does not necessarily imply that the State has ceased to exist. The above examples of Lebanon and Somalia appear to indicate that a State without effective control is capable of maintaining its international legal personality. This is why Werner observes, that it is of great importance to separate questions relating to the creation of States from questions relating to the survival and the demise of States.⁴⁹ It must be added however, that the creation of States – at least in contemporary international law – is almost always inextricably linked to the survival, or the demise of other States. Typically, the emergence of a new State is not possible without affecting the personality of an already existing State in some way.

44 Hobach, Lefeber & Ribbelink 2007, p. 163-164.

45 Hobach, Lefeber & Ribbelink 2007, p. 163-164.

46 Also referred to as the 'nationality principle.' For more information, see: Hobach, Lefeber & Ribbelink 2007p. 163-164.

47 Hobach, Lefeber & Ribbelink 2007, p. 164.

48 Whether, and to the extent to which, this is true will be examined in the following Sections.

49 Hobach, Lefeber & Ribbelink 2007, p. 163-164.

Based on the above it is clear that the concept of statehood has a clear and separate place in international law. Moreover, this concept has undergone numerous significant developments since its (formal) conception in 1648. These developments have ultimately given shape to the concept of statehood in international law as it is known today. The following Sections will examine the contemporary notion of statehood, its requirements, and what its (legal) implications are for the creation and continued existence of States.

2. International Law and the Criteria for Statehood

2.1 Definition

Given the State's central role in international law and international relations, it would seem evident that a clear and codified definition of a State exists in international law, so to determine which entity may be considered a State. Since 1945, several attempts have been made to agree on such a definition. During the negotiations over the draft text on the Declaration on the Rights and Duties of States (1949), the Vienna Convention on the Law of Treaties (1956 and 1966) and the articles on Succession of States in respect of Treaties (1974), attempts were made to describe the concept of the State. None of these efforts succeeded however, as a codification of a definition of the State turned out to be too politically sensitive.⁵⁰ Despite the lack of a clear definition of what constitutes a State, international law does provide some guidelines on how to approach the issue of statehood. For example, the existence of effective control – which will be examined in more detail in the next Section - is widely regarded as an important, perhaps even crucial, consideration in assessing the emergence of new States.⁵¹ The so-called 'principle of effectiveness', came to replace the commonly accepted 'policy of recognition' of the 19th century, which allowed existing States to authoritatively determine whether a (new) political community possessed sufficient 'legitimacy' and 'civilization' to join the existing community of sovereign (and self-proclaimed civilized) States. This subjective policy of recognition was replaced with a more objective, factual criterion: the existence of effective control over a given territory (also known as the 'principle of effectiveness').⁵²

The importance of effective control was underscored as early as 1929 by the arbitrator in the case of the *Deutsche Continental Gas-Gesellschaft*.⁵³ The arbitrator stated that '[a] State does not exist unless it fulfills the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over

50 Hobach, Lefeber & Ribbelink 2007, p. 164.

51 Hobach, Lefeber & Ribbelink 2007, p. 165.

52 Hobach, Lefeber & Ribbelink 2007, p. 165.

53 *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929), Annual Digest, 5 (1929-30) No. 5, at p. 14-15. Grant 1999, p. 36.

the people and the territory.’⁵⁴

Likewise, the importance of the principle of effectiveness has long been recognized in legal doctrine. A brief summary of the importance of effective control for identifying a State is given by Shaw, who observes that ‘[t]he ultimate control and territory is the essence of a State.’⁵⁵ Similar formulations are found in older literature, among which special attention should be given to Jellinek's ‘*Drei Elementen Lehre*’, which affirms that a State consists of three essential elements: a government, a territory and a population. A codification of Jellinek’s doctrine of the three elements can be found in the Montevideo Convention on the Rights and Duties of States of 1933 (Montevideo Convention). Art. 1 of the Montevideo Convention provides a description of the State as a subject of international law:

‘The State as a person of international law should possess the following qualifications: (a) a permanent **population**; (b) a defined **territory**; (c) a **government**; and (d) capacity to enter into relations with the other States.’ [emphasis added]

The Montevideo Convention is a relatively old, inter-American convention, with few ratifications. Its description of the State however, is almost without exception considered the starting point for any discussion about the State as a subject of international law possessing legal personality. Art. 1 of the Montevideo Convention, is by many regarded as ‘the most widely accepted formulation of the criteria of Statehood in international law.’⁵⁶ Grant notes that citing from the Montevideo Convention in discussions about the position of the State in international law has almost become a reflex.⁵⁷

This Section is no exception in this regard. However, before the criteria for statehood are discussed in more detail, a number of points should be raised. First, the elements of the Montevideo Convention were primarily intended as criteria for assessing the *creation* of States and not as criteria for assessing the *continuation* of States.⁵⁸ As

54 Hobach, Lefeber & Ribbelink 2007, p. 165.

55 Hobach, Lefeber & Ribbelink 2007, p. 166.

56 Hobach, Lefeber & Ribbelink 2007, p. 166.

57 Shaw, 2003, p. 178.

58 Hobach, Lefeber & Ribbelink 2007, p. 166.

already mentioned in the previous Section, a State can continue to exist even if the criterion of the Montevideo Convention, the existence of an effective government, is (temporarily) lost. Secondly, it should be noted that the fourth criterion, the ability to enter into relations with other States, is generally not considered a prerequisite for the existence of a State. It is instead the other way around: if an entity meets the first three criteria (a territory, a population and a government) it can be considered a State and therefore has the ability to enter into relations with other States. In other words, the ability to enter into relations with other States, is seen as a *consequence* and not a *prerequisite* of being a State:⁵⁹ a State cannot enter into a relations with other States if it does not exist.⁶⁰

2.2 The Montevideo Criteria

2.2.1 Defined Territory

As discussed in the previous Section, the development of the State is closely linked to the ability to exercise effective control over a defined territory. This was already reflected by the principle of *cuius region, eius religio* and became more important with the increased technical capabilities of border demarcation, the increased centralization of power within the State and the rise of nationalism (which is referred to as the principle of *cuius region, national eius*).⁶¹ Given the strategic, economic and symbolic importance of territory, it is therefore not surprising that at the present time many territorial disputes and disputes over border demarcation still exist.

However, the existence of border disputes is not an obstacle to attaining statehood in international law. There is no rule stating that the boundaries of a State should be

⁵⁹ Hobach, Lefeber & Ribbelink 2007, p. 166.

⁶⁰ Whether the three generally accepted criteria of the Montevideo Convention can be regarded as sufficient and necessary conditions for statehood under all circumstances remains to be answered of course. As mentioned in the introduction, there are territorial entities that have not fully met the criteria for statehood and yet remain to be recognized as States by the international community, while entities that have met the three criteria remain unrecognized.

⁶¹ Hobach, Lefeber & Ribbelink 2007, p. 167 - 168.

undisputed or unambiguously established.⁶² Israel for example, was admitted to the United Nations on 11 May 1949, despite its ongoing territorial disputes with the (predominantly) Arab States.⁶³ When Jessup, the representative of the United States to the United Nations argued for Israel's admission, he discussed the requirement of territory in the following manner:⁶⁴

'One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers (...) The formulae in the classic treatises somewhat vary, (...) but both reason and history demonstrate that the concept of territory does not necessarily include precise delamination of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit (...) [T]here must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement (...)'⁶⁵

A German-Polish Mixed Arbitral Tribunal had previously confirmed the above rule in 1929 in the case of the *Deutsche Continental Gas Gesellschaft*.⁶⁶

'Whatever may be the importance of the delamination of boundaries, one cannot go so far as to maintain that as long as this delamination has not been legally effected the State in question cannot be considered as having any territory whatever (...) In order to say that a State exists (...) it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delaminated, and that the State actually exercises independent public authority over that territory.'⁶⁷

More recently in the *North Seas Continental Shelf* cases, the International Court of Justice (ICJ) confirmed that international law does not require that the boundaries of a

62 Hobach, Lefeber & Ribbelink 2007, p. 167 - 168.

63 Hobach, Lefeber & Ribbelink 2007, p. 168.

64 Crawford 1977, p. 112.

65 Security Council, Official Records, 383rd Meeting, 2 December 1948, p. 41.

66 Crawford 1977, p. 113.

67 *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929), Annual Digest, 5 (1929-30) No. 5, at p. 14-15.

State should be fully delaminated and defined:⁶⁸

‘The appurtenance of a given area, considered as an entity, in no way governs the precise delamination of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delaminated and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.’⁶⁹

Crawford notes that in addition to claims relating to the borders of a State, it is possible to have claims relating to the *entire* territory of a new State. Claims relating to the entire territory of a State have often been brought up in the context of admission to the United Nations. Examples include Israel, Mauritania and Kuwait. However, the proposition that a State exists despite claims to the whole of its territory have not been challenged in these cases.⁷⁰ Crawford further observes:

‘In any event, customary international law prohibits the settlement of territorial disputes between States by the threat or use of force, and a State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to or is claimed by another State.’⁷¹

Subsequently, for a territorial entity to be protected by the above rule, it would first have to be a State, as the above rule only applies to the relations between States and not territorial entities in general.

With regard to the size of the territory it can be stated that no specific requirements exist: the international community of States consists of both ‘micro-States’, such as Liechtenstein and San Marino and very large States such as Canada or Russia. This does not mean however that the existence of the so-called ‘micro-States’ is free from practical complications. An example of this is partially reflected in the United Nations, which is, in principle, open to all States capable of complying with the obligations

68 Hobach, Lefeber & Ribbelink 2007, p. 168.

69 ICJ, *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (1969), ICJ Reports 3 (Feb 20), Para. 3, p. 32.

70 Crawford 1977, p. 113.

71 Crawford 1977, p. 113.

under the UN Charter. The proliferation of small States has led to a discussion about the status and powers of the so-called micro-States within the UN, where some for example have suggested, that the voting rights of small States in the General Assembly should be limited.⁷²

2.2.2 Permanent Population

States are not only territorial entities, but they also consist of groups of individuals. Therefore, a permanent population is another necessary requirement for statehood. There are no criteria relating to the size of the population: Andorra with its 68,000 inhabitants is as much a State as India, which now has currently has well over one billion inhabitants. Neither does international law set any requirements about the nature of the population: the population may largely consist of nomads (such as in Somalia), it may be ethnically (relatively) homogeneous (such as in Iceland) or very diverse (such as in the former Soviet Union), it may be very poor (such as in Sierra Leone, where in 2000 nearly 70 percent of the population lived below the poverty line) or it may be very rich (as in many Western States).⁷³

It should also be noted that the requirement of a permanent population does not relate to the nationality of a population: it merely requires that States have a permanent population. Neither does international law prescribe which person belongs to a State: States are free to determine to whom the nationality of the State is granted.⁷⁴ In so far as relevant to this thesis, it is important to understand that nationality depends on statehood and not the reverse: that is, a State is able to give a certain nationality to a person, due to being a State.

2.2.3 Government

The existence of a permanent population on a given territory is in itself insufficient for

72 Hobach, Lefeber & Ribbelink 2007, p. 168.

73 Hobach, Lefeber & Ribbelink 2007, p. 168.

74 Hobach, Lefeber & Ribbelink 2007, p. 168.

statehood. The third - and according to many final⁷⁵ – requirement for statehood, is the existence of a government capable of exercising *independent* and *effective* authority over the population and the territory. The importance that is attached to the criteria of independence and effectiveness is understandable considering the predominantly decentralized nature of international law. Since international law lacks a central executive body, with the power to enforce compliance with international obligations, compliance with international obligations must often be guaranteed by the States themselves.⁷⁶ A State must therefore be able to the effectively and independently exercise its authority within its borders.

2.2.3.1. Effectiveness

Questions regarding the creation of a new State often revolve around the criterion of effective authority. Crawford notes that ‘[T]he requirement that a putative State have an effective government might be regarded as central to its claim for statehood.’⁷⁷ The importance of effective authority is, among others evidenced by the *Aaland Islands* case.⁷⁸ Finland had been an autonomous part of the Russian Empire from 1807. After the November Revolution of 1917 it declared its independence. During the first months after its declaration of independence, Finland’s territory was subjected to a series of military actions and interventions. In the ensuing struggle between various domestic and foreign troops, it was unclear whether and by whom effective authority was being exercised in the newly declared State. It was not until after the defeat of Germany by the Triple Entente and the removal of Soviet troops from Finnish territory by Sweden that some degree of order was restored.⁷⁹ The Commission of Jurists (the Commission), appointed by the Council of the League of Nations (the Council), was to report on certain aspects of the Aaland Islands dispute (the Aaland Islands were being claimed by both Finland and Sweden).⁸⁰ In essence the Commission of Jurists was of the opinion

75 Koojimans 2002, p. 21.

76 Hobach, Lefeber & Ribbelink 2007, p. 169.

77 Crawford 1977, p. 116.

78 Hobach, Lefeber & Ribbelink 2007, p. 168.

79 Crawford 1977, p. 117-118.

80 The Aaland Islands Question (On Jurisdiction), Report of the International Committee of Jurists,

that the legal status of Finland was unclear until the new government was able to effectively exert its authority over the territory.⁸¹

‘[f]or a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves, civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and the Russian troops, and after a time Germans also, took part in the civil war (...) **It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.** It would appear that it was in May 1918, that the civil war was ended and that the foreign troops began to leave the country, so that from the time onwards it was possible do re-establish order and normal political and social life, little by little.’⁸²
[emphasis added]

It should be noted that this position was later somewhat nuanced. After receiving the report of the Commission on the question of jurisdiction over the Islands, the Council appointed a second commission, known as the Commission of Rapporteurs (the Rapporteurs), to advise the League on the resolution of the dispute on the merits.⁸³ The Rapporteurs disagreed with the Jurists on this point. Partially because of Soviet recognition of Finland, but more importantly, because of Finland’s continuity of personality before and after 1917. Subsequently, the Rapporteurs applied rules relating to the restoration of law and order in Finland’s territory, and to the legality of foreign support for that purpose, instead of the stricter rules relating to the creation of *ab initio*

League of Nations Official Journal, Special Supplement No. 3 (1920).

81 Crawford 1977, p. 117-118.

82 League of Nations Official Journal, Special Supplement No. 4 (1920), p. 8-9.

83 The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921) (excerpted and reprinted).

of a stable government in a new State.⁸⁴

The importance of effective authority is further evidenced in the *Island of Palmas* case.⁸⁵ The arbiter, Max Huber, noted that while international law does recognize that States have exclusive jurisdiction on their territory, it does not dictate that States are entirely free in their conduct on their territory. Huber notes that the recognition of the right to exercise authority also implies that States are held to respect and effectively protect the rights of other States on their territory. This obligation can only be met if a State is truly capable of exercising effective authority on its territory:⁸⁶

‘Territorial sovereignty (...) involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to the circumstances, the State cannot fulfill this duty.’⁸⁷

Despite the above, in State practice the application of the principle of effectiveness seems to be considerably less strict. For instance, Bosnia-Herzegovina was recognized by the international community as a State and was authorized to join the United Nations during a period that large parts of its territory were not under effective control of the government. At that time, even the president had admitted that Bosnia-Herzegovina independence was not enforceable without foreign support.⁸⁸ Similarly, during the process of decolonization, numerous entities achieved statehood and were admitted to the UN, while their governments lacked effective authority over the territory. Some authors have argued that in these instances the principle of effectiveness was weighed against the right to self-determination of the colonized peoples and the widely held

84 Crawford 1977, p.118.

85 Permanent Court of Arbitration, *Netherlands v. United States of America (Island of Palmas Case)*, RIAA II, 829.

86 Hobach, Lefeber & Ribbelink 2007, p. 169.

87 Permanent Court of Arbitration, *Netherlands v. United States of America (Island of Palmas Case)*, RIAA II, 829 at 839.

88 Hobach, Lefeber & Ribbelink 2007, p. 169.

desire that former colonies could transform themselves into independent States.⁸⁹ Congo for example, gained formal independence from Belgium during a period of severe internal armed conflicts. As a result of these conflicts, at one point in 1960, two separate groups were claiming to be the (official) representatives the new State in the General Assembly. Similarly, when Guinea-Bissau was admitted to the United Nations on 17 September 1974, the requirement of effective authority was not very strictly enforced. Guinea-Bissau was recognized as a State by a large portion of the international community, even though the new government lacked control over the majority of the population and the most important cities. A year earlier in 1973, the Dutch government had even spoken out against approval of Guinea-Bissau, as it had yet to fulfill the requirement of effective authority.⁹⁰

2.2.3.2 *Independence*

In addition to the principle of effectiveness, the authority must be exercised *independent* of external interference. Independence is widely considered as one of the most important requirements for statehood. A number of authors regard independence in fact as *the* most important criterion for statehood.⁹¹

The landmark case on independence, is the *Austro-German Customs Regime* case, which involved the meaning of the term ‘independence’ as laid down in art. 88 of the Treaty of Saint-Germain.⁹² Art. 88 intended to guarantee the continuation of Austria and its separation from Germany. The Permanent Court of International Justice was asked to give its advisory opinion on whether a proposed customs union between Germany and Austria was consistent with obligations of Austria under the Treaty of Sain-Germain and the Protocol of Geneva. The following definition given by Judge Anzelotti is often used

89 Hobach, Lefeber & Ribbelink 2007, p. 171.

90 Hobach, Lefeber & Ribbelink 2007, p. 171.

91 Crawford 2006, p. 62. It must also be noted that the requirement of independence of authority is not unanimously accepted as a necessary requirement for statehood. In this regard, Talmon notes: ‘[T]here are, however, several arguments against factual independence as an additional criterion for statehood.’ One argument against factual independence as an additional criterion for Statehood for example is its vagueness. For more information see: Talmon 2004, p. 111-116.

92 Crawford 1977, p.120.

as the standard definition of independence as the criterion of statehood:⁹³

‘[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law. (...)’

It follows that the legal conception of independence has nothing to do with a State’s subordination to international law or with the numerous and constantly increasing states of de independence which characterize the relation of once country to other countries. It also follows that the restrictions upon a State’s liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.’⁹⁴

The importance of independence was also made explicit in the *Island of Palmas* case. Huber notes with regard to the importance of the independence in international law:⁹⁵

‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.’⁹⁶

93 Crawford 1977, p.122.

94 Crawford observes that while this passage is often cited as a definition of independence, it is should be assessed within its specific context. As a general definition of independence as the criterion of statehood it is much too absolute: Crawford 1977, p. 122. This is also one of the reasons why Talmon states that one of the argument against factual independence as an additional criterion for Statehood is its vagueness. For more information, see: Talmon 2004, p. 111-116.

95 Hobach, Lefeber & Ribbelink 2007, p. 170.

96 *The Island of Palmas Case (or Miangas)*, United States of America v. The Netherlands, Permanent Court of Arbitration, 4 April, 1928, p.39.

Werner notes that the criterion of independence is primarily intended to indicate that States must possess so-called ‘constitutional independence’: meaning that the State constitutes the highest legal order (excluding international law) and that it must also be able to protect this (formally independent) legal order.⁹⁷ Alan James, defined constitutional independence as follows: ‘A territorial entity claiming sovereignty must (...) show that it is territorially defined, contains people, and governs them, and also that there is no other State which claims formal authority over it and is providing effective physical backing for that claim.’⁹⁸ This is also why parts of a federal State, such as California (United States) or North Rhine-Westphalia (Germany), are not considered to be States in international law. Even though they enjoy a territory, a population and effective authority, they lack constitutional independence. In contrast, the federal States to which they belong do possess independence and can therefore operate as a State under international law.

Moreover, independence must be both ‘formal’ and ‘functional’. *Formal* independence exists in cases where the powers to govern a territory are vested in the separate authorities of the State. This authority may stem from internal legislation or can be the result of a concession by the former sovereign State.⁹⁹ *Functional* independence exists when a certain minimum level of (real) power is exercised by the authorities of the State.¹⁰⁰ The two aspects, formal and functional independence, are not unrelated, although the exact relationship between formal and functional independence may be complex.¹⁰¹ For the purpose of this thesis, it is sufficient to note that formal independence without functional independence is not sufficient to conclude that the entity is independent in its actions.

In specific cases, different legal consequences may be attached to the lack of independence. If there is a complete lack of independence, the affected entity might not be internationally considered a State, but may be regarded as an indistinguishable part

97 Hobach, Lefeber & Ribbelink 2007, p. 170.

98 Hobach, Lefeber & Ribbelink 2007, p. 170.

99 Crawford 2006, p. 76.

100 Crawford 2006, p. 78.

101 For more information on the relationship between formal and functional independence, see: Crawford 1977, p. 134-139.

of the dominant State. The granting of such ‘independence’ may under certain circumstances, be considered legally null and void, or even an act favoring the grantor, by way of so-called ‘puppet States’:¹⁰² a term that is used to describe nominal sovereigns that are *de facto* under foreign control.¹⁰³ An entity might also be independent in some basic form, but ‘act in a specific matter under the control of another State so that the relationship becomes one of agency, and the responsibility of the latter State is attracted for illegal acts of the former.’¹⁰⁴

Nevertheless, even an extensive lack of independence may coexist with statehood as demonstrated by the case of Iran under Allied occupation from 1941 to 1946. In August 1941, Iran was occupied by British and Soviet forces to prevent fears of looming German control. Both parties underscored that the occupation of the country would be temporary and that they had no plans on Iranian sovereignty or territorial integrity. The occupation was followed by a change of government, in which Reza Shah Phalevi succeeded his father. The former was not considered a puppet government, and the change in government was widely recognized. The United States viewed the British and Russian occupation as necessary and justified, even though it expressed fears regarding the future independence of Iran. At the Teheran Conference, the three Allies reiterated ‘their desire for the maintenance of the independence, sovereignty and territorial integrity of Iran.’¹⁰⁵ Despite the inability of the Iranian government to actually control events in parts of its territory during the war, there was little justification for any view that Iran had in some way ceased to exist, under those circumstances.¹⁰⁶

Crawford further notes that ‘the criterion of independence as the basic element of statehood in international law may operate differently in different qualifications for statehood, and as a criterion for its continued existence.’¹⁰⁷ For example, if a new State is formed through secession from an existing State, it will have to demonstrate considerable independence, both formal and functional, before it is considered to be

102 Crawford 1977, p.120.

103 Crawford 1977, p.130.

104 Crawford 1977, p.120.

105 Crawford 1977, p. 134.

106 For an extensive examination of situations that might derogate from actual or functional independence, see: Crawford 1977, p. 123-134.

107 Crawford 1977, p.120.

definitively created. In contrast, international law protects the independence of an existing State against illegal invasion and annexation, so that it may continue to exist as a legal entity despite the lack of effectiveness. But in case a new State is formed through devolution (through a grant of power from the previous sovereign), considerations of pre-existing rights are less relevant and the independence is dealt with as a mostly formal requirement.¹⁰⁸

It must be emphasized that the requirement of independence does not mean that governments are obliged to act completely independent from of *all* forms of foreign influence. States largely rely for their decisions on the actions and decisions of other States and international organizations. This does not mean however, that the State's sovereignty is in question.¹⁰⁹ International law also permits States to freely handover a (considerable) portion of their formal powers to other States or international organizations (for example, the European Union). This was confirmed in the *Wimbledon* case¹¹⁰ in which the Permanent Court of International Justice declared that '[t]he right of entering international engagements is an attribute of State sovereignty.'¹¹¹ Also, whether the authority is exercised independently or with the help of others is immaterial, provided that the formal authority is exercised on behalf of the government.

In summary it may be said that the test of effective and independent authority is not always strictly applied and that the importance of effective authority seems to be sometimes weighed against other interests and values of the international community. Nevertheless, the absence of a coherent form of government in a given territory is to the detriment of that territory being a State: at least in the absence of other factors, such as the granting of independence to that territory by a former sovereign.¹¹² Continuity of government in a territory is one factor determining the continuity of the affected State and prolonged absence of government will incline to the dissolution of the State.¹¹³

108 Crawford 1977, p.120.

109 Hobach, Lefeber & Ribbelink 2007, p. 170.

110 S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17)

111 Hobach, Lefeber & Ribbelink 2007, p. 170.

112 Crawford 1977, p.118.

113 Crawford 1977, p.118.

2.2.4 Democratically Legitimated Authority

Some authors have also contended that customary international law supports the position that the ‘public authority’ must be a ‘democratically legitimated.’ James Fawcett was the first who introduced the criterion of democratic legitimacy.¹¹⁴ In response to the unilateral declaration of independence by the white minority regime in Southern Rhodesia, he wrote in 1966:¹¹⁵

‘But to the traditional criteria for the recognition of a regime as a new State must now be added the requirement that it shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.’¹¹⁶

Talmon notes that while Fawcett broadened the classic criterion of ‘public authority’ to include ‘democratically legitimated public authority’, he did not provide any ground for the new criterion except from pointing to art. 21, paras. 1 and 3, of the Universal Declaration of Human Rights¹¹⁷ and to two United Nations General Assembly resolutions.¹¹⁸ Fawcett stated that this ‘principle’ was acknowledged in the case of Rhodesia by the almost unanimous condemnation of its unilateral declaration of independence by the international community and by the collective withholding of recognition of the new regime.¹¹⁹ In addition, he made reference to the ‘idea of self-determination’, even though he himself regarded the notion to be ‘highly political.’¹²⁰

114 Talmon 2004, p. 121.

115 Talmon 2004, p. 121-122.

116 Talmon 2004, p. 121.

117 A/RES/217 (III) of 10 December 1948. Art. 21 provides: ‘(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives [...] (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedure.’

118 A/RES/648 (VI) of 10 December 1952; A/RES/1514 (XV) of 14 December 1960. Talmon 2004, p. 121.

119 Talmon 2004, p. 121.

120 Talmon 2004, p. 121.

At least two arguments can be made against this new criterion for statehood. First, customary international law does not give each citizen the right to influence public authority by way of periodic, equal, and secret elections. This is evidenced by the continued existence of a large number of undemocratic States.¹²¹ Secondly, to establish such a criterion for statehood in customary international law there must be a constant and uniform practice coupled with the required *opinio juris*: also this is missing.¹²² Quite a considerable number of the new States that were created in the 1960s and 1970s during the process of decolonization often did not meet the criterion of having a democratically legitimated public authority. Nevertheless, their statehood was never called into question. In 1975, the International Court of Justice held in its advisory opinion in the *Western Sahara* case, that ‘no rule of international law [. . .] requires the structure of the State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.’¹²³ It should be noted, that in both the literature and in State practice a trend towards giving greater weight to the democratic legitimization of public authority may be detected. But the question of how public authority is organized is still irrelevant to the issue of statehood, as international law currently stands. As such, it would go too far to explain Rhodesia's non-recognition in these terms.¹²⁴

2.2.4 Capacity to Enter into Relations with Other States

The ‘capacity to enter into relations with States’ is not the exclusive entitlement of States: autonomous national authorities, liberation movements and insurgents are all capable of maintaining relations with States and other subjects of international law.¹²⁵ While States do possess that capacity, it is not a requirement, but a consequence of statehood. A consequence which is moreover irregular and dependent on the status and situation of a particular State. It can be said that the capacity to enter into full range of

121 Talmon 2004, p. 121-122.

122 Talmon 2004, p. 122.

123 ICJ 1975 Rep 12, p. 43-44, para. 94.

124 Talmon 2004, p. 122.

125 Crawford 1977, p. 119.

international relations can be a valuable measure, but capacity or competence in this sense depends in part on the power of the government, without which a State cannot carry out its international obligations. The ability of the government to independently carry out its obligations and accept responsibility for them in turn greatly depends on the previously discussed requirements of effective government and independence.¹²⁶ Moreover, a State cannot enter into relations with other States if it is not recognized. Consequently, it cannot be recognized as a State.

¹²⁶ Crawford 1977, p. 119

3. Statehood and Recognition: The Declaratory v. Constitutive Theory

The key question in the discussion about the legal effect of recognition is whether the formation (and continued existence) of a State is dependent or independent of recognition by the existing States: in other words, may a political entity be considered a State under international law, even if it is not recognized as such by the existing States?¹²⁷ The so-called 'constitutive theory of recognition' answer this question negatively. According to the constitutive theory, an entity may only become a State by virtue of recognition.¹²⁸ Once the three previously mentioned factual (classic) criteria of a territory, a population and a government are met, this 'factuality' must then be confirmed by the existing States, only then - after being 'constituted'- may it enjoy rights inherent in States under international law.¹²⁹

This interpretation of recognition fits well within the 19th century positivist view of international law as a purely consensual system, where legal relations may only arise with the consent of those concerned.¹³⁰ The positivist theory believed that the creation of a new State also created legal obligations for existing States. As such, the existing States either had to consent to the creation of the new State, or to its accession to

127 Hobach, Lefeber & Ribbelink 2007, p. 170.

128 The term 'recognition' can be used in at least two ways. First, a State may explicitly express its view with regard to the legal status of a certain political community. An example of such an explicit recognition is the recognition of Israel as a sovereign State by the United Kingdom. In April 1950 the government of the United Kingdom declared: "His Majesty's Government have (...) decided to accord *de jure* recognition to the State of Israel." Secondly, a State may indicate that it considers a community to be a State under international law, by entering into certain relations with that community (for example, by concluding a treaty with the State, by entering into diplomatic relationships, or by beginning a dispute settlement proceeding before the International Court of Justice). Such a form of recognition, is also called an implicit or tacit recognition. Whether entering into such relations may be considered the recognition of a particular political entity as a State under international law, must be inferred from the specific circumstances. Hobach, Lefeber & Ribbelink 2007, p. 177.

129 Hobach, Lefeber & Ribbelink 2007, p. 170.

130 Talmon 2004, p. 102.

international law (and the international community). This form of recognition gave important consideration to matters like ‘the degree of civilization’ (as measured by Western standards) and dynastic legitimacy.¹³¹

This approach of the State was gradually replaced by one which defined the State primarily as a ‘matter of fact’ rather than a ‘matter of law’. The State became to be viewed as an independent and defined unit of (centralized) authority, which exists independent of its recognition by other States. The notion that ‘recognition does not bring into legal existence a State which did not exist before’ is known as the ‘declaratory theory of recognition.’¹³²

The declaratory theory prescribes that recognition of a State is nothing more than expressing the willingness to enter into relations with that State. In other words, an entity becomes a State for the reason that it meets all the international legal criteria for statehood and the recognizing State ‘merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a State.’¹³³ Recognition is therefore retroactive and *status-confirming*. In contrast, the previously mentioned constitutive theory, views recognition as *status-creating* and non-recognition as *status-preventing*: without recognition, there can be no State.¹³⁴

In general terms, the proponents of the declarative theory can be divided into two groups. The first, more extreme group, regards recognition by existing States as completely irrelevant. The creation of States is seen as a factual process which happens *outside* of international law. This approach suggest that international law should regard States purely as a matter of fact, but that it should not determine which entities may be considered States or not.¹³⁵ This position is for example held by James, who argues that:

‘[I]t is not a provision of international law which has to be satisfied for a state to be ascribed sovereign status (...). Thus the position of international law in relation to sovereignty [meaning: the existence of States] is that it presupposes it. International law

131 Hobach, Lefeber & Ribbelink 2007, p. 170.

132 Meijknecht 2001, p. 43.

133 Talmon 2004, p. 105.

134 Talmon 2004, p. 101.

135 Hobach, Lefeber & Ribbelink 2007, p. 178.

makes only sense on the assumption that there are sovereign states to which it can be applied.’¹³⁶

The second group – which consists of most supporters of the declaratory theory - accepts however that international law (as formed by the existing States) does indeed contain criteria for the creation of States. They disagree, however, that recognition by other States belongs to these criteria. Recognition by existing States might be beneficial, but it is not required for the creation, or the continuation of a State.¹³⁷

Over the course of the 20th century the declaratory theory on recognition became the predominant theory on statehood.¹³⁸ It finds support in treaties, declarations of States and particularly jurisprudence.¹³⁹ This factual approach of the State is confirmed by art. 1 of the Montevideo Convention, which describes the attributes of the State in terms of effective authority and independence, instead of civilization or dynastic legitimacy.¹⁴⁰ Given the ‘factual’ description of the State in art. 1 of the Montevideo Convention it is not surprising that a statement against the constitutive theory of recognition can be found in art. 3 of the Montevideo Convention:¹⁴¹

‘The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and subsequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.’

This view is shared by the *Institute de Droit International*, which declared in art. 1 of its Brussels Resolution Concerning the Recognition of New States and New Governments

136 James 1986, p. 40.

137 Hobach, Lefeber & Ribbelink 2007, p. 179.

138 Talmon 2004, p. 105.

139 Talmon 2004, p. 106.

140 Hobach, Lefeber & Ribbelink 2007, p. 177.

141 Hobach, Lefeber & Ribbelink 2007, p. 177.

of 23 April 1936:¹⁴²

‘Recognition has a declaratory effect; The existence of a new State with all the juridical effects which are attached to that existence, is not affected by the refusal of recognition by one or more States.’¹⁴³

The declaratory position on recognition also finds support in the opinions of the Arbitration Commission of the Hague Conference on Yugoslavia (also known as the ‘Badinter Commission’), which was set up with the backing of the European Political Co-operation (EPC) (currently superseded by the Common Foreign and Security Policy). The Commission was charged with the task of studying questions relating to the recognition of new States and State succession, which resulted from the dismemberment of the Socialist Federal Republic of Yugoslavia (SFRY). In its first Opinion on 29 November 1991, it expressed that:¹⁴⁴

‘the principles of public international law (...) serve to define the conditions on which an entity constitutes a State; that is in this respect, the existence (...) of the State is a question of fact; that the effect of recognition by other States are purely declaratory.’¹⁴⁵

The declaratory theory also finds support in contemporary State practice. The *Deutsche Demokratische Republik* (DDR) was established on the 7th of October 1949, but it would take until the 1970s before it would be formally recognized by Western States. This does not mean however that the DDR lacked the properties of statehood before its recognition by the existing States. This was reflected by the Dutch position on the DDR until the early seventies (before it formally recognized the DDR as a State). The Dutch government argued that recognition of States was a political decision, not necessarily based on international law criteria.¹⁴⁶ This position is not surprising as it would otherwise not be possible for a non-recognizing State to hold a non-recognized State

142 Talmon 2004, p. 105-106.

143 *American Journal of International Law*, Suppl., 1936, p. 185ff.

144 Talmon 2004, p. 106-107.

145 *Opinion No. I [Disintegration of the SFRY]* (1991) 92 ILR 162, p. 164-165. Affirmed in *Opinion No. 8 [Extinction of the SFRY]* (1992) ILR 199, p. 201.

146 Hobach, Lefeber & Ribbelink 2007, p. 179.

liable for violating any international obligations. Nonetheless, State practice demonstrates that an 'unrecognized State' is also bound by international law. In 1949 a British fighter jet was shot down over Egypt by the Israeli armed forces. While the United Kingdom did not officially recognize Israel at that time (as it still adhered to the constitutive interpretation of recognition), it did hold Israel responsible for the incident and called for redress. Similarly, many Arab States do not formally recognize Israel as a State, but they frequently condemn Israel for not complying with its international obligations. Another example is the United States which held North-Korea liable for an attack on its ship the 'Pueblo' in 1968, even though North-Korea was not recognized by the United States at the time.¹⁴⁷

Despite the considerable support for the declaratory theory in international law, there is at least one issue that continues to reopen the debate between the declaratory and constitutive theories: international law does not have any mechanisms for authoritatively determining whether an entity fulfills the factual criteria for statehood.¹⁴⁸ The absence of such a body is one of the main arguments used by proponents of the constitutive theory to argue for the importance attached to recognition by existing States. Kelsen - one of the prominent defenders of the constitutive theory - argues for instance, that international law provides existing States the freedom to determine in each case separately whether an entity meets the necessary criteria for statehood.¹⁴⁹ Recognition is therefore necessary to close the gap between the general rules of international law and the specific facts on which these rules should be applied. Kelsen notes that recognition is a determination of facts: a determination of the existence of a sufficiently effective and independent authority (government) over a territory and a population.¹⁵⁰ Without such an approval it would not be possible to speak of the existence of a State under international law.¹⁵¹ This view would mean however, that the existence of a States is 'relative': an entity is considered a State by some States (those who have recognized it) and not a State by other States (those who have not recognized

147 Examples taken from Hobach, Lefeber & Ribbelink 2007, p. 178-179.

148 Hobach, Lefeber & Ribbelink 2007, p. 179.

149 Hobach, Lefeber & Ribbelink 2007, p. 179.

150 Hobach, Lefeber & Ribbelink 2007, p. 179.

151 Hobach, Lefeber & Ribbelink 2007, p. 179.

it).¹⁵² Subsequently, the question arises what the status of such a territorial entity is under international law, and – by extension – what rights it is entitled to and how it should be treated by other members of the international community. Is such an entity entitled to any form of sovereignty for example? The next Section will examine in more detail some of the ambiguities relating to the application of the declaratory and constitutive theories of recognition.

3.2 Recognition of Governments

Recognition of States must be distinguished from the recognition of governments, both of which are subject to their own set of rules. Questions regarding the recognition of governments normally only arise in relation to a (previously) recognized State (a State may have ‘competing’ governments, without having its (legal) continuity affected).¹⁵³ While international law distinguishes States from their governments, it is normally only the government of a State that has the capacity to bind a State, such as by treaty. As such, the existence of a government in a territory is a requirement for the normal conduct of international relations.

States can be roughly divided into three categories based on their recognition policy: States that explicitly recognize governments such as the United Kingdom before 1980 (*de jure* recognition), States that generally do not explicitly recognize governments, but might do so out of political considerations, such as the United States and lastly States that formally recognize only States and not their governments such as the Netherlands and those that follow the ‘Estrada-doctrine’ (*de facto* recognition).¹⁵⁴

152 The recognition of a State may depend on many other considerations than mere factual ones, such as political or economic considerations. Koojimans 2002, p. 2.

153 Hobach, Lefeber & Ribbelink 2007, p. 180-181.

154 The Estrada-doctrine is the name of Mexico's core foreign policy ideal from 1930 onwards (shortly discontinued between 2000 and 2006, during the Fox Administration). Its name derives from Genaro Estrada, Secretary of Foreign Affairs during the presidency of Pascual Ortiz Rubio (1930-1932), who pointed out that Mexico would refrain from the explicit recognizing governments ‘since that nation considers that such course is an insulting practice.’ At present, the majority of States adhere to the Estrada-doctrine and do not explicitly acknowledge governments. For more information, see: Hobach, Lefeber & Ribbelink 2007, p. 180-184.

The recognition of a government merely implies that a State acknowledges that one or more persons are competent to act as organs of the State and to represent it in its international relations.¹⁵⁵ This may be important for example, in cases where there are competing governments within the same recognized State (such as Congo in 1960¹⁵⁶), or in case of a possible secession. However, while it is generally accepted that statehood requires a government capable of exerting (effective and independent) authority over the territory and its people, it is not required that this government is recognized by the international community. The recognition of governments must therefore be considered separate from the criterion of effective authority.¹⁵⁷

155 Hobach, Lefeber & Ribbelink 2007, p. 181-182.

156 Crawford 1977, p. 116.

157 Hobach, Lefeber & Ribbelink 2007, p. 181-185.

4. Ambiguities Relating to the Application of the Declaratory and Constitutive Theories

It is clear that the temporary disruption of the effectiveness of the authority (due to for example internal unrest, civil war or hostile military occupation) does not lead to the loss of existing statehood. Depending on political opportunity, regional or global organizations, will attempt to restore some form of centralized authority and put an end to any serious fundamental human right violations.¹⁵⁸ However, even if the internal unrest or civil war leads to lasting anarchy and the *de facto* collapse of a State, State practice has not resulted in the denial or the ‘de-recognition’ of a State. Similarly, numerous territorial entities have achieved statehood, without having an effective and independent authority, both during and after the process of decolonization (such as Congo and Bosnia-Herzegovina). Recognition of these entities by the international community of States appears to have played a crucial role in their ability to achieve statehood. This Section will therefore examine whether the creation and continuation of States can be (fully) explained in accordance with either the declarative or constitutive theories. For this purpose, the case of Somalia and Somaliland will be considered, as it will help to identify many of the ambiguities arising from the practical application of the declarative or constitutive theories.

4.1 The Case of Somalia and Somaliland¹⁵⁹

Somalia is arguably the best-known example of a so-called ‘failed State.’ The notion of the failed State - sometimes also referred to as a ‘collapsed State’ or an ‘*etat sans gouvernement*’ - has no legal standing in international law. Neither does a clear (non-) legal universal definition of a failed State exist. In general, it may be defined as a way to

158 Kooijmans 2002, p. 22.

159 For a detailed discussion about the situation in Somalia and Somaliland, see M. Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes In International Law: The Case of ‘Somaliland*, Leiden/Boston: Martinus Nijhoff Publishers 2004.

describe a sovereign State that has failed at some of its fundamental responsibilities.¹⁶⁰ Insofar as relevant to this thesis, this fundamental responsibility will relate to the absence of an effective governmental authority, which is a necessary condition for statehood. In this regard, the case of Somalia and Somaliland is of particular interest, due to its combination of legal and factual circumstances.

Somalia's last functioning government was swept away during the outbreak of the Somali civil war in 1991. Since then, there has been no central government to control most of Somalia's territory. Large portions of Somalia, particularly in the south, remain under the influence of various clans opposing each other in their claim for authority. Somalia's official internationally recognized government, the Transitional Federal Government, which is backed by the United Nations, the United States and the African Union, has yet to establish effective governance on the ground, as it controls only the capital, Mogadishu, and some territory in the center of Somalia. Somalia has not only been unable to discharge its basic and primary functions, but it has *de facto* ceased to exist.¹⁶¹ It was ranked the most failed State by The Failed State Index for a third consecutive year, scoring 114.3 points out of a total of 120 points.¹⁶² The Economist, has described Somalia as 'the world's most utterly failed State.'¹⁶³ However, despite the

160 A well-known example of a definition of the failed State is given by the Crisis States Research Centre (CSRC). The CSRC is a centre that does interdisciplinary research into processes of war, state collapse and reconstruction in fragile States. The CSRC uses a number of definitions to describe States in various stages of failure and it has defined a failed State as 'a condition of "State collapse" – eg, a State that can no longer perform its basic security, and development functions and that has no effective control over its territory and borders. A failed State is one that can no longer reproduce the conditions for its own existence. This term is used in very contradictory ways in the policy community (for instance, there is a tendency to label a "poorly performing" State as "failed" – a tendency we reject).' It continues to describe that 'the opposite of a 'failed State is an enduring State and the absolute dividing line between these two conditions is difficult to ascertain at the margins. Even in a failed State, some elements of the State, such as local State organisations, might continue to exist.' For definitions of the terms 'fragile', 'crisis' and 'failed' state, as used by CSRC, see:

<<http://www2.lse.ac.uk/internationalDevelopment/research/crisisStates/Research/research.aspx>>

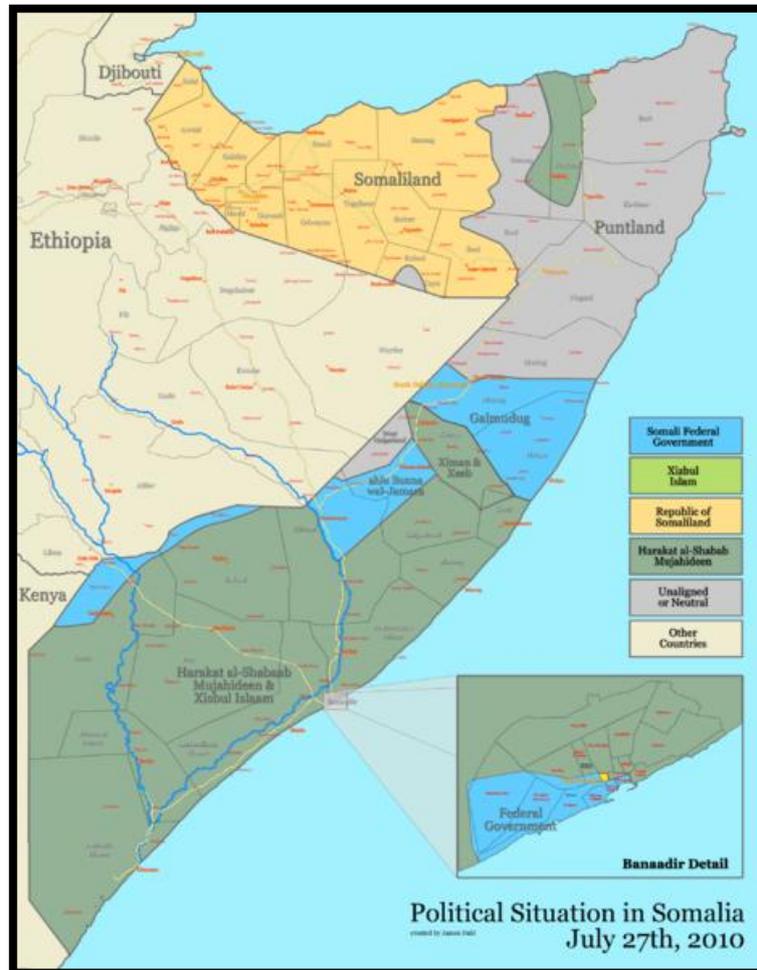
Another example is given by Schoiswohl 2004, p. 24-27.

161 Schoiswohl 2004, p. 131.

162 For more information about the Failed State Index and the methodology used for measuring State failure, see Introduction.

163 'Hope is four-legged and woolly', The Economist, October 15th-21st 2011, p.37.

collapse of Somalia as a unitary State,¹⁶⁴ it continues to be formally recognized as a sovereign State by the international community of States: it continues to exist ‘*de jure*’ as it were.



Within Somalia exist several *de facto* independent territories, with the most notable being the self-declared, but unrecognized, ‘Republic of Somaliland’ (Somaliland), located in the the north-western part of Somalia. In contrast to Somalia, which remains embroiled in destructive internal conflicts, Somaliland appears to function on the basis of an effective and working constitution (National Charter).¹⁶⁵ In accordance with the National Charter, Somaliland’s government consists of a parliament, an executive

164 ‘Hope is four-legged and woolly’, The Economist, October 15th-21st 2011, p.37.

165 Schoiswohl 2004, p. 133.

branch, and a legislative branch.¹⁶⁶ Security in Somaliland has been continuously improving and is generally regarded as high. Political opposition to the government is displayed through peaceful methods.¹⁶⁷ This is demonstrated, among other things, by the large amount of international NGOs operating in Somaliland, and the return of many Somali refugees after years in exile.¹⁶⁸ Somaliland has also demobilized the different clan forces and formed a national armed force, as well as a regular police force. Revenues are collected by the Somaliland authorities through exports taxes, fees for certain services and imports.¹⁶⁹ In addition, Somaliland maintains foreign relations with several States and organizations.¹⁷⁰

Based on the factual criteria for statehood, Somaliland may be regarded as a (sovereign) State: there exists a territory, a permanent population and an authority capable of exerting effective control over the territory. Somaliland's (lack of) recognition by other States is according to the (predominant) declaratory theory irrelevant. An entity's statehood is independent of its recognition by other States. A State, in this case Somaliland, must first exist, before other States may enter into relations with it. There is however no obligation for States under international law, to recognize an entity as a State once it fulfils the factual criteria for statehood. Consequently, without any recognition by the international community, Somaliland's existence may be described as '*de facto*': it meets all the necessary criteria for statehood, but remains unrecognized as a State by the international community.

This apparent difference raises several important question about the status of Somaliland in international law, and by extension the theories of statehood in general. Ideally a State exists as both *de jure* and *de facto*: once a territorial entity possesses all the necessary factual requirements for statehood it becomes a State and subsequently it is - without compulsion - recognized as such by the existing States. But the case of Somalia and Somaliland seems to indicate that it is possible for a State to exist, at some point, as either one, or the other. This is problematic, if only for the reason that it is not

166 Schoiswohl 2004, p. 134.

167 Schoiswohl 2004, p. 134.

168 Schoiswohl 2004, p. 134.

169 Schoiswohl 2004, p. 137.

170 More information regarding the foreign relations of Somaliland can be found on the website of the Somaliland Embassy at: <http://www.somalilandembassy.se/>.

possible for two separate States to occupy the same territory, simultaneously: one as *de jure* and the other as *de facto*. However, based on the above, it can be argued that States can be divided into three categories.

The first category consists of States that exist as both *de jure* and *de facto*: these States could be described as ‘ideal-typical’ sovereign States: they fulfill the factual requirements for statehood and are recognized as States by the international community. Most States fall into this category and examples are numerous, such as The United States, Lichtenstein and the Netherlands. These States meet the requirements of both the declaratory and constitutive theories. They meet the factual criteria for statehood (as required by the declaratory theory) and they are granted recognition by the existing States (which is required by the constitutive theory for its status-creating effect). The existence of the ideal-typical States, is widely accepted by the international community and their statehood is (for all intents and purposes) unchallenged. This is not to imply that they are free from *all* issues relating to international law. Nonetheless, as full and original subjects of international law they are entitled to all rights that are inherent in statehood. Subsequently, they may address these issues within the full framework of international law.

The second category of States are those that exist as *de jure*, but not *de facto*: these are States that are formally recognized by the international community as sovereign States, despite failing to meet the requirement of effective authority. These could be existing States such as Somalia, or States that have yet to be established, such as Congo during the decolonization period (Congo was granted recognition, despite lacking any resemblance of effective authority).¹⁷¹ However, neither the declaratory theory, nor the constitutive theory may accord statehood to these entities, as they do not meet the factual criteria for statehood. The question whether recognition is a requirement for statehood only becomes relevant once an entity meets the factual criteria for statehood (which is either status-confirming in accordance with the declaratory theory, or status-creating in accordance with the constitutive theory). While some (putative) States ultimately did meet the requirement of effective authority, such as Bosnia-Herzegovina, it was not until *after* they had achieved statehood. Other States such as Somalia, Chad and Congo remain (in varying degrees) ineffective until this day. In all these instances

171 See Section 2.2.3.1. on Effectiveness.

recognition by the international community appears to have played an essential role in the ability of these entities to achieve statehood.

The third and final category of States exist as *de facto*, but not *de jure*: these States fulfill the factual requirements for statehood, but they are not recognized as (sovereign) States by existing States, such as Somaliland. *De facto* States, may be considered States exclusively in accordance with the declaratory theory. They fulfill the factual criteria for statehood, but they are not granted (formal) recognition by existing States. Subsequently, they lack the status-creating effect of recognition, which is required by the constitutive theory. While the declaratory theory of recognition is considered to be the predominant theory of statehood in international law - it finds support in treaties, opinions and State practice - it is exactly the *de facto* States that are shrouded in most legal uncertainty.

For a State to be able to exercise its *full* legal rights under international law, it must first be recognized by other States. With regard to these rights, Talmon points out the following:

‘If a State's legal status is to be withheld from it, then the question arises as to what precisely that legal status is. States are ‘born’ subjects of international law. Their existence confers on them, the most comprehensive legal personality and capacity to act of all subjects of international law. *Capacity* or *competence*, however are not to be mistaken for *rights*: for example, a State has the capacity to conclude treaties with other States (treaty-making power) but, under customary international law, it does not have the right to demand that other States make treaties with it. Statehood merely bestows certain rudimentary rights. [...] It is necessary to distinguish between the rights inherent in statehood, i.e. the rights a State can demand under general international law because it is a State, and the optional relations between States (and the resulting rights and privileges) that depend on the consent or co-operation of the other States.’¹⁷² [emphasis added]

But even if there are only very few rights inherent in statehood, a State cannot be denied those rights.¹⁷³ More importantly however, issues relating to inherent rights only arise

172 Talmon 2004, p. 148.

173 Talmon cites three main documents that deal with the rights and duties of States and offer guidance regarding the inherent rights of States: the Draft Declaration on Rights and Duties of States which was drawn up by the ILC in 1949, and which was subsequently noted but not adopted by the General

once it is established that a State exists.

An example of such inherent rights may be membership of the United Nations. According to the art. 4 of the UN Charter:

‘1. Membership in the United Nations is open to **all** (...) **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.

2. **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.**’ [emphasis added]

Somalia (as a *de jure* State) is a member of the United Nations, while Somaliland (a *de facto* State) is not. In addition, Somaliland cannot become a member of the United Nations while it remains unrecognized by existing States.

If it were to be argued however that membership of the United Nations cannot be considered a right inherent in statehood, it is undeniable that (*de jure*) States such as Somalia are (at least in principle) entitled to respect for their independence and territorial integrity, by virtue of their sovereignty. An important rule in this regard is the prohibition of the use of force between States, which is controlled by both customary international law and by treaty law. Art. 2, paragraph 4 of the UN Charter reads:

‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.’

Somaliland (as a *de facto* State) however is unlikely to be able to invoke any rights inherent in statehood, due to its lack of (formal) recognition by the international

Assembly, The Charter of Economic Rights and Duties which was adopted by the General Assembly on 12 December 1974 over the opposition of important industrial States, and the Montevideo convention of 1933. These documents are primarily concerned with duties rather than rights as can be seen in the Draft Declaration of 1949, which lists just four rights as opposed to ten duties. The declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 24 October 1974 ('Friendly Relations Declaration') also mentions certain 'rights' of States. P.

community. What legal consequences would arise for example if Somalia attempted to ‘reassert’ its control over Somaliland after two decades of *de facto* independence? How does this relate to third States? And what consequences does this have for State-liabilities? Somaliland may still be subject to certain duties under international law, such as those relating to State liabilities, as in the case of the DDR: ‘all pain, no gain.’

While the above distinction is artificial - as there is no distinction in international law between different categories of States¹⁷⁴ - it does reveal, that neither the declaratory, nor constitutive theory of recognition can satisfactorily explain the objective legal situation of States in international law. If Somaliland has achieved statehood, the continuity and territorial integrity of Somalia should be affected. Yet, Somalia's statehood and borders remain internationally uncontested by existing States. This causes the curious situation where Somaliland is a State according to the predominant declaratory theory, yet it is Somalia which continues to (formally) exist through recognition and subsequently enjoys all rights inherent in statehood. On the other hand, if Somaliland is not a State, the declaratory theory would be inadequate, as the classic criteria for statehood have been met for well over two decades.

Some legal scholars have attempted to explain these ambiguities by pointing out that the factual criteria for statehood as described in the Montevideo Convention might primarily have been intended as criteria for assessing the *creation* of States rather than criteria for assessing the *continuation* of States. But this explanation falls short, as both *during* and *after* the process of decolonization, territorial entities have managed to achieve and maintain statehood, despite lacking effectiveness. Perhaps more importantly, as Talmon notes ‘The legal status of “State” [...] describes a state of affairs, not a one-off event; therefore, the criteria for statehood serve as a test for both the creation and the continued existence of the State.’¹⁷⁵

4.2 Possible Explanations

Given the above, it is therefore not surprising that an extensive debate exists in the legal

174 An entity cannot be ‘somewhat’ of a State (it is either a State, or it is not a State) and the (legal) relationship between States is founded on the principle of sovereign equality between States.

175 Talmon 2004, p. 124.

doctrine about whether the current criteria for statehood suffice, or whether they should be supplemented with additional norms.¹⁷⁶ These norms are either regarded as additional criteria of legality regulating the creation of States, or as reasons for the nullity of the State's creation.¹⁷⁷ Although such norms go *beyond* the generally accepted criteria of the declaratory and constitutive theories, certain remarks may be made with regard to some of the issues that arise from using additional norms to explain the notion of statehood in international law.

In recent decades, an understanding has emerged, that certain fundamental principles of international law are of such great importance for the protection of the interests of the international community as a whole that no derogation from these norms is ever permitted.¹⁷⁸ These norms are also known as 'peremptory norms' of international law, or '*ius cogens*.' Legal scholars have identified such norms as the prohibition of the use of force, the right to self-determination of peoples (during and after the period of colonial rule), the prohibition of racial discrimination (such as apartheid), genocide, torture, slavery, colonialism and numerous others.¹⁷⁹ Peremptory norms of international law create obligations towards the entire international community, also known as an '*erga omnes*' obligations.¹⁸⁰ According to art. 53 and 64 of the 1964 Vienna Convention on the Law of Treaties (Vienna Convention), a treaty is null and void if it conflicts with a peremptory norm of general international law. Some authors have argued by analogy

176 Hobach, Lefeber & Ribbelink 2007, p. 172.

177 Talmon 2004, p. 143.

178 Kooijmans 2002, p. 18-19.

179 Talmon 2004, p. 143, Kooijmans 2002, p. 18-19.

180 With regard to the breach of such obligations, the ICJ stated '[...] an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.[...]. Barcelona Traction case, ICJ Reports 1970, p. 32, para. 33.

with the Vienna Convention ‘that a new State created in violation of a norm having the character of *ius cogens* is illegal and therefore null and void.’¹⁸¹

While it is clear that the legal development in this area is in progress and may reflect the understanding that the international community is more than a collection of separate States (with separate interests) caution must be exercised. Although some authors have argued that a clear general consensus seems to have emerged with regard to certain norms,¹⁸² others - such as Talmon - have noted that the existence of additional legal criteria for statehood cannot be proven.¹⁸³ This is not to say that the existence of such norms is *in itself* controversial, but there is still considerable disagreement about which rules of international law may be considered to have a mandatory character for the creation and continued existence of States: that is, *within* the context of statehood. Insofar as these norms may be identifiable, establishing their exact content is not without difficulties. As such, determining whether – and to what degree - a violation of such norms has occurred would face many hurdles.

Other problems are more practical in nature. In the absence of an international central authority, States must themselves decide whether the violation of a certain norm is the concern of the international community as a whole and by what means they want to protect this norm (usually within the framework of the UN Charter). Without a broad consensus among States it will not be possible to determine a) if a violation of a norm of *ius cogens* has occurred, and b) whether the violation may serve a reason for the nullity of the State’s creation. However, if the past is an indication of the political hurdles that the international community faces when dealing with international crises, reaching such an agreement will not be an easy task.

While these issues are not exhaustive,¹⁸⁴ they do demonstrate that the existence of additional norms of *ius cogens* and *erga omnes* obligations for statehood should not be adopted too easily, as they may be uncertain, changeable or even contradictory.

Furthermore, the use of additional norms to explain the objective legal situation of

181 Talmon 2004, p. 129.

182 Hobach, Lefeber & Ribbelink 2007, p. 171-174.

183 Talmon 2004, p. 143-144.

184 Think for example of the temporal scope of a norm of *jus cogens*. Violation of a norm of *jus cogens* cannot be applied to a State that already exists. But what would the implications be for Somalia and Somaliland if a norm of *jus cogens* is being violated by Somalia, but not Somaliland?

States in international law only applies to situations where a territorial entity meets the three factual criteria for statehood, but remains unrecognized by the international community. The existence of such norms does not address situations where a territorial entity has achieved (formal) statehood, *without* fulfilling the factual criteria for statehood. Subsequently, additional criteria for statehood would - under ideal circumstances - only provide a solution in situations where the requirements of the declaratory theory have been met. They would not provide an explanation for situations where a territorial entity has achieved (and maintains) statehood but fails to meet the requirement of effective authority, as required by both the declaratory and constitutive theories.

Conclusions

The notion of the modern State has undergone numerous significant changes since its formal conception at the Peace of Westphalia in 1648. During the last two centuries, the State has gone from primarily being regarded as a ‘matter of law’, to being regarded as a ‘matter of fact’. In contemporary international law, the concept of statehood revolves around two competing theories: the (predominant) declarative theory and the constitutive theory. The core of the discussion around these theories revolves around question whether the formation (and continued existence) of States is dependent or independent of recognition by the existing States. In other words, it is about the legal effect of recognition on statehood.

According to the declaratory theory a State must possess a territory, a permanent population and an effective (and independent) government. Recognition of a State is nothing more than expressing the willingness to enter into relations with that State. As such, an entity becomes a State for the reason that it meets all the international legal criteria for statehood. The recognizing State merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a State. Recognition is therefore retroactive and *status-confirming*.

In contrast, according to the constitutive theory, a State only becomes a State by virtue of recognition by the existing States. Once the three factual criteria of the declaratory theory have been met, this ‘factuality’ must then be confirmed by the existing States. The constitutive theory views recognition therefore as *status-creating* and non-recognition as *status-preventing*: without recognition, there can be no State.

Proponents of the declarative theory have argued that the constitutive theory is unsustainable in practice, as there is no international body with the authority to acknowledge the existence of States on behalf of the entire community of States. As such, each State may individually decide whether a new State has come into being and (without any obligations) recognize it. This would have the consequence that an entity would be State relative to those States that have recognized it, and not to those States that have not recognized it. Subsequently, the question arises what the status of such a territorial entity is under international law, and – by extension – what rights it may invoke, and how it should be treated by other members of the international community.

In turn, proponents of the constitutive theory have criticized the declarative theory for being unable to explain the legal status of the collectively non-recognized territorial entities that do fulfill the factual criteria for statehood.

Closer examination reveals however that these are not the only shortcoming related to the declarative and constitutive theories. The principle of effective authority is regarded as an essential criterion for statehood according to both theories. Nevertheless, State practice demonstrates that there have been many instances where territorial entities have achieved statehood, while lacking any resemblance of effective authority. This has occurred both during, and after the process of decolonization. Similarly, there are numerous States that continue to exist without effective authority. In this regard, the case of Somalia and Somaliland is of particular interest, due to its combination of legal and factual circumstances.

Somalia is an example of what may be described as a failed State. Since the Somali civil war in 1991, it has not only been unable to discharge its basic and primary functions, but it has *de facto* ceased to exist. Despite of this, it continues to be formally recognized as a sovereign State by the international community of States: its continued existence is *de jure* as it were. In contrast, Somaliland – a *de facto* independent territory within Somalia - may be regarded as a State according to the declaratory theory, as it meets the factual criteria for statehood (territory, people and government) and it has done so for well over two decades.

This combination of legal and factual circumstances raises several important questions about the status of Somaliland in international law, and by extension the theories of statehood in general, as it seems to indicate that it is possible to have three different categories of States in international law.

Normally a State exists as both *de jure* and *de facto*. These States may be described as ‘ideal-typical’ sovereign States, as they meet the factual requirements for statehood and are recognized as States by the international community. The ideal-typical States are States in accordance with both the declaratory and constitutive theories: they meet the factual criteria for statehood (which is required by the declaratory theory) and they are granted recognition by the existing States (as required by the constitutive theory for its status-creating effect).

However, the situation of Somalia demonstrates, that it is also possible for States to

exist as *de jure* (but not *de facto*). These are States that are formally recognized by the international community as sovereign States, despite failing to meet the requirement of effective authority. Yet, neither the declaratory theory, nor the constitutive theory may accord statehood to these entities, as they do not meet the factual criteria for statehood.

In contrast, the situation of Somaliland demonstrates the existence of *de facto*, (but not *de jure*) States. These are States that meet the factual requirements for statehood, but are not recognized as (sovereign) States by existing States. *De facto* States may be considered States in accordance with the predominant declaratory theory, as they meet the factual criteria for statehood. Yet, it is exactly the *de facto* States, that are faced with the most legal uncertainty.

Without recognition, a State will not be able to exercise rights inherent in statehood. An example of such an inherent right may be membership of the United Nations. Somalia (as a *de jure* State) is a member of the United Nations, while Somaliland (a *de facto* State) is not. In addition, Somaliland cannot become a member of the United Nations as long as it remains unrecognized by existing States. If it were to be argued that membership of the United Nations is not a right inherent in statehood, it is undeniable that (*de jure*) States such as Somalia are (at least in principle) entitled to respect for their independence and territorial integrity, by virtue of their sovereignty. A key component in this regard is prohibition of the use of force between States, which is controlled by both customary international law and by treaty law. Somaliland (as a *de facto* State) is unlikely to be able to invoke any such rights against other States (including Somalia), as long as it lacks (formal) recognition by the international community. Meanwhile however, Somaliland may still be subject to certain duties under international law, such as those relating to State liabilities, as in the case of the DDR.

While the above distinction between States is artificial, it does reveal that neither the declaratory, nor constitutive theory of recognition can satisfactorily explain the objective legal situation of States in international law. If Somaliland has achieved statehood, the continuity and territorial integrity of Somalia should be affected. Yet, Somalia's statehood and borders remain internationally uncontested by existing States. This causes the curious situation where Somaliland is a State according to the predominant declaratory theory, yet it is Somalia which continues to (formally) exist

through recognition. Subsequently, it enjoys all rights inherent in statehood. On the other hand, if Somaliland is not a State, the declaratory theory would be inadequate, as the classic criteria for statehood have been met for well over two decades.

Some legal scholars have attempted to explain some of these ambiguities by arguing that the factual criteria for statehood as described in the Montevideo Convention might have been intended as criteria for assessing the creation of States rather than criteria for assessing the continuation of States. This explanation falls short however, as both during and after the process of decolonization, territorial entities have managed to achieve and maintain statehood, despite lacking effectiveness. But perhaps even more importantly is the legal nature of statehood. As Talmon notes: ‘The legal status of “State” [...] describes a state of affairs, not a one-off event; therefore, the criteria for statehood serve as a test for both the creation and the continued existence of the State.’

It is therefore not surprising that an extensive debate exists in the legal doctrine about whether the current criteria for statehood suffice, or whether they should be supplemented with additional norms. Norms that are either regarded as additional criteria of legality regulating the creation of States, or as reasons for the nullity of the State’s creation. While it was not the purpose of this thesis to establish whether any additional norms for statehood exist - as these go beyond the generally accepted criteria of the declaratory and constitutive theories – it can be said that the use of additional norms of *ius cogens* and *erga omnes* obligation for statehood should not be adopted too easily, as they may be uncertain, changeable or even contradictory.

In addition, the use of additional norms to explain the objective legal situation of States in international law only applies to situations where a territorial entity meets the three factual criteria for statehood, but remains unrecognized by the international community. The existence of such norms does not address situations where a territorial entity has achieved (formal) statehood, without fulfilling the factual criteria for statehood. Subsequently, the use of additional criteria for statehood would only provide answers to situations where the requirements of the declaratory theory have been met. Additional norms would not explain situations where a territorial entity has achieved (and maintains) statehood but fails to meet the requirement of effective authority, as required by both the declaratory and constitutive theories.

On the basis of the above, it seems that (non-) recognition of territorial entities is of

such great significance, that it can essentially function as a substitute for the factual criteria for statehood, by either allowing or preventing the creation of States. Given this immense influence of international relations – which manifests itself through recognition - on the (legal) notion of statehood, the question must be raised whether the State is an objectively determinable entity at all, or whether it is a abstract entity (mostly) subjected to the discretion of the international community.

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