

THE CRITERIA FOR STATEHOOD IN INTERNATIONAL LAW*

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I. INTRODUCTORY

It seems clear that the notion of statehood occupies a central place in the structure of international law and relations. Disputes over the international position of a given entity, or the legality of a particular use of force, or even over asserted violations of human rights standards, very frequently reduce themselves to disputes as to the statehood or otherwise of the entity in question. The so-called 'divided States' since 1945 provide obvious examples;² as do the various disputes over southern Africa (Rhodesia, Namibia, and now the Transkei),³ and the Middle East.⁴ The centrality of the notion of statehood manifests itself in other ways. Full participation in the major international organizations is usually either made expressly dependent on,⁵ or in practice requires,⁶ the classification of the claimant as a State; so too do various forms of restricted participation.⁷ It is almost a corollary that the three or four separate territorial entities whose statehood is generally denied⁸ only participate in international relations in a very restricted way.⁹ The continuing pressure for decolonization

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² See generally Caty, *Le statut juridique des états divisés* (1969); Martinez-Agullo, *Journal de droit international*, 91 (1964), pp. 265-84; J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (1975) (hereafter cited as Verhoeven, *Reconnaissance*), pp. 36-52.

³ Rhodesia and the Transkei are discussed *infra*, pp. 162-4, 176-80. On Namibia see especially Dugard, *The South West Africa/Namibia Dispute* (1973); Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (1973); Herman, *Canadian Yearbook of International Law*, 13 (1975), pp. 306-22, and works there cited.

⁴ Even in the recent literature on the Arab-Israel conflict the events of 1947-9 leading to the creation of Israel bulk large: see, e.g., Cattán, *Palestine and International Law. The Legal Aspects of the Arab-Israel Conflict* (2nd edn., 1976), pp. 63-130; Feinberg, *On an Arab Jurist's Approach to Zionism and the State of Israel* (1971); Elaraby, *Law and Contemporary Problems*, 33 (1968), pp. 97-108.

⁵ e.g. Charter of the United Nations, Art. 4; *Conditions for Admission of a State to Membership in the United Nations, I.C.J. Reports*, 1948, p. 57 at p. 62; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) (hereafter cited as Higgins, *Development*), pp. 17-42.

⁶ e.g. Covenant of the League of Nations, Art. 1 (2) ('fully self-governing State, Dominion or Colony'). In practice only States were admitted to League Membership under Art. 1 (2). See Schwarzenberger, *The League of Nations and World Order* (1936); Feinberg, *Recueil des cours*, 80 (1952), pp. 297-393, for an examination of League admission practice.

⁷ e.g. Charter of the United Nations, Arts. 32, 35 (2), as to which see Higgins, *Development*, pp. 50-2; Bailey, *The Procedure of the U.N. Security Council* (1975), pp. 145-52.

⁸ Sc., Andorra, Rhodesia and Taiwan (Formosa).

⁹ For the very limited participation of Rhodesia see Devine, *Acta Juridica*, 1974, pp. 112-24. The Republic of China on Taiwan of course maintains a considerable volume of bilateral relations even with States which do not recognize its claim to be the government of China: Chiu

since 1945 has also tended to focus on the single aim of 'independence', to the practical exclusion of other forms of self-government.¹ Other examples could be given.

Although it is sometimes suggested that the concept of statehood has no separate place in international law,² such a view is hard to square with the extensive reliance on the concept in international 'constitutional' documents such as the Charter, or in the practice of States. And yet—notwithstanding this practice—there has been surprisingly little detailed examination of the criteria for statehood in international law.³ Such an examination would seem more necessary in that recent developments appear to demonstrate a change in what have traditionally been regarded as the necessary conditions for the creation or subsistence of States.⁴ The relatively meagre literature on the criteria for statehood⁵ compares strikingly with the extensive literature on recognition,⁶ in which the recognition of States is usually treated together with more or less unrelated problems of recognition of governments, belligerency and insurgency. Indeed, discussion of the notion of statehood requires first an examination of its relationship with recognition, since the familiar ('constitutive') view that statehood is necessarily dependent upon recognition has tended to stand in the

(ed.), *China and the Question of Taiwan* (1973), pp. 169–71. But the Republic of China has had, since 1971, no status at all for United Nations purposes: cf. Stavropoulos, *International Lawyer*, 7 (1973), p. 71. During the debate which resulted in G.A. Res. 2758 (XXVI), by which the People's Republic of China was accepted as the proper representative of 'China' in the Assembly, the United States proposed a draft resolution providing for dual representation of China. Ambassador Bush, in proposing the item, stated that 'the U.N. should take cognizance of the existence of both the People's Republic of China and the Republic of China . . . [I]t should not be required to take a position on the respective conflicting claims . . . pending a peaceful reconciliation of the matter as called for by the Charter': U.N. Doc. A/8442; *International Legal Materials*, 10 (1971), p. 1100. The draft resolution was not put to the vote. See also *International Legal Materials*, 11 (1972), pp. 561–73.

¹ Cf. the terms of G.A. Res. 1514 (XV) ('Declaration on the Granting of Independence to Colonial Countries and Peoples'), paras. 3–5.

² Cf. Arangio-Ruiz, *L'état dans le sens du droit des gens et la notion du droit international* (Bologna, 1975), who identifies the notion of legal criteria for statehood with Kelsenian monism, which is rejected as inconsistent with the reality of a decentralized system. Instead he adumbrates the notion of '*puissances*': factual 'entities' whose existence the international legal system takes for granted.

³ See, however, Brownlie, *Principles of Public International Law* (2nd edn., 1973) (hereafter cited as Brownlie, *Principles*), pp. 74–82; Rousseau, *Droit international public*, vol. 2 (1974), pp. 13–44; Higgins, *Development*, pp. 11–57; Marek, *Identity and Continuity of States in Public International Law* (1955) (hereafter cited as Marek, *Identity and Continuity*), pp. 161–90; Lauterpacht, *Recognition in International Law* (1948) (hereafter cited as Lauterpacht, *Recognition*), pp. 26–32; Chen, *The International Law of Recognition* (1951), pp. 54–62; Kamanda, *A Study of the Legal Status of Protectorates in Public International Law* (1961), pp. 175–87; Antonowicz, *Polish Yearbook of International Law*, 1 (1966–7), pp. 195–207.

⁴ See further *infra*, § 5.

⁵ Noted by Jennings, *The Acquisition of Territory in International Law* (1963), pp. 11–12; Brownlie, *Principles*, p. 74.

⁶ In addition to the works, cited already, by Lauterpacht (*supra*, n. 3), Chen (*supra*, n. 3), and Verhoeven (*supra*, p. 93, n. 2), see Charpentier, *La reconnaissance internationale et l'évolution du droit des gens* (1956); Erich, *Recueil des cours*, 13 (1926), pp. 427–507; Le Normand, *La reconnaissance internationale et ses diverses applications* (1899); Patel, *Recognition in the Law of Nations* (1959); Redslob, *Revue de droit international*, 13 (1934), pp. 429–83, and the works cited *infra*.

way of an independent examination of the concept of statehood in modern international law.

2. RECOGNITION AND STATEHOOD

It is often asserted that the 'formation of a new State is . . . a matter of fact and not of law'.¹ That proposition was thought to follow from the fundamental premiss of the so-called 'constitutive' theory of recognition, which held that 'a State is, and becomes an International Person through recognition only and exclusively'.² This equation of statehood with 'fact' precluded the development of an international law of territorial status independent of recognition; it was also adopted by writers of the 'declaratory' school of recognition,³ amongst whom it was taken to assert the impossibility of criteria for statehood other than those based upon an overt or obvious form of effectiveness.⁴

It will be argued that neither theory of recognition satisfactorily explains modern State practice in this area. The declaratory theory assumes that territorial entities can be—by virtue of their mere 'existence'—readily classified as having the one particular legal status, and thus, in a way, confuses 'fact' with 'law'.⁵ For, accepting that effectiveness is the dominant principle in this area, it must none the less be a *legal* principle. A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said that a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules.⁶ And the declaratist's equation of fact with law also obscures the possibility that the creation of States might be regulated by rules premised on other fundamental principles—a possibility which, as we shall see, is borne out to some extent in modern practice. On the other hand, the constitutive theory, although it draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on 'fact', incorrectly identifies that cognition with diplomatic recognition, and fails to consider the possibility that identification of new subjects may be achieved by way of general rules, rather than on an *ad hoc*, discretionary, basis.

Fundamentally, the question is whether international law is itself, in one of its more important aspects, formally a coherent or complete system of law.⁷ According to predominant nineteenth-century doctrine, there were no rules

¹ Oppenheim, *International Law*, vol. 1 (1st edn., 1905), p. 624; vol. 1 (8th edn., ed. Lauterpacht, 1955), p. 544; cf. Erich, loc. cit. (previous note), p. 442; Jones, this *Year Book*, 16 (1935), p. 5 at pp. 15–16; Marston, *International and Comparative Law Quarterly*, 18 (1969), p. 1 at p. 33; Arangio-Ruiz, op. cit. (above, p. 94 n. 2), pp. 8–9.

² Oppenheim, *International Law*, vol. 1 (1st edn.), p. 108; (8th edn.), p. 125.

³ e.g. Chen, *The International Law of Recognition*, p. 38; but cf. pp. 8–9, 63.

⁴ See the works cited *infra*, pp. 144 n. 1, 148 n. 1.

⁵ Cf. Lauterpacht, *Recognition*, pp. 45–50, for an effective critique of the 'State as fact' dogma. His dismissal of the declaratory theory results in large part from his identification of the declaratory theory with this position.

⁶ Cf. Kelsen, *Revue de droit international*, 4 (1929), p. 613. Waldock, *Recueil des cours*, 106 (1962), p. 5 at p. 146 correctly describes the problem as a 'mixed question of law and fact'.

⁷ Cf. Chen, *The International Law of Recognition*, pp. 18–19.

determining what were 'States' for the purposes of other international law rules; the matter was within the discretion of existing recognized States.¹ The international law of that period thus exhibited a formal incoherence which was an expression of its radical decentralization.² But if international law is still, more or less, organizationally decentralized, it is generally assumed that it is a formally complete system of law. Certainly this is the case with respect to nationality, and the use of force. The inquiry into the relationship between statehood and recognition thus has considerable significance, not only in its own right but as bearing upon the formal coherence of international law as a system.

I. THE EARLY VIEW OF RECOGNITION

Although the early writers occasionally dealt with problems of recognition, it had no separate place in the law of nations before the middle of the eighteenth century. The reason for this was clear: sovereignty, in its origin merely the location of supreme power within a particular territorial unit, necessarily came from within and therefore did not require the recognition of other States or princes. As Pufendorf stated:

... just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such ... (I)t would be an injury for the sovereignty of such a king to be called in question by a foreigner.³

The only doubtful point was whether recognition by the parent State of a new State formed by revolution from it was necessary, and that doubt related to the obligation of loyalty to a superior, which, it was thought, might require release: the problem bore no relation to constitutive theory in general.⁴ The position of recognition towards the end of the eighteenth century was as stated by Alexandrowicz:

In the absence of any precise and formulated theory, recognition had not found a separate place in the works of the classic writers whether of the naturalist or early positivist period, and this is the reason why Ompteda (1785) observes that nothing special has been written on the subject.⁵

When recognition did begin to attract more detailed consideration, about the middle of the century, it was in the context of recognition of monarchs, especially

¹ Oppenheim, *International Law*, vol. 1 (1st edn.), p. 108; *contra*, 8th edn., p. 126.

² The same incoherence has been noted in respect of the legality of war: Lauterpacht, *Recognition*, pp. v-vii, 4-5; and the discretionary character of nationality: Brownlie, *this Year Book*, 39 (1963), p. 284; cf. *Principles*, p. 73. Also Briggs, *Proceedings of the American Society of International Law*, 44 (1950), p. 169 at p. 172.

³ *De Jure Naturae et Gentium Libri Octo* (1672) (trans. C. H. and W. A. Oldfather, 1934), Bk. VII, Ch. 3, para. 690.

⁴ *Ibid.*; and cf. Vattel, *Le droit des gens* (1758) (trans. Fenwick, 1916), Bk. I, Ch. 17, §202; Gentili, *On the Law of War* (1612), Bk. I, §§ 185-7. See further Frowein, *American Journal of International Law*, 65 (1971), pp. 568-71.

⁵ *This Year Book*, 34 (1958), p. 176.

elective monarchs; that is, in the context of recognition of governments. Von Steck¹ and later Martens² discussed the problem, reaching similar conclusions. Recognition, at least by third States in the case of secession from a metropolitan State, was either illegal intervention or it was unnecessary.³ As one writer put it:

. . . in order to consider the sovereignty of a State as complete in the Law of Nations, there is no need for its recognition by foreign powers; though the latter may appear useful, the *de facto* existence of sovereignty is sufficient.⁴

Thus, even after the concept of recognition had become a separate part of the law, the position was still consistent with the views held by the early writers. Alexandrowicz puts the matter as follows:

The writers of the early period of eighteenth century positivism, whenever faced with the eventuality of recognition as a medium of fitting the new political reality into the law, on the whole rejected such a solution, choosing the solution more consistent with the natural law tradition. Even if the law of nations was conceived as based on the consent of States, this anti-naturalist trend was not yet allowed to extend to the field of recognition.⁵

2. POSITIVISM AND RECOGNITION

But this was, it is clear, a temporary accommodation. According to positivist theory, the obligation to obey international law derived from the consent of individual States. If a new State subject to international law came into existence, new legal obligations would be created for existing States. The positivist premiss therefore required consent—either to the creation of the State itself or to its being subject to international law with respect to the States affected. It would be interesting to trace the evolution of international law doctrine from the essentially declaratory views of Martens and von Steck to the essentially constitutive ones of Hall and Oppenheim.⁶ The important point is, however, that the shift in doctrine did happen, although it was a gradual one, in particular because, while States commonly endorsed the positivist view of international law, their practice was not always consistent with this profession. Thus unrecognized States and native peoples with some form of regular government were in practice given the benefit of, and thought to be obliged by, the whole *corpus* of international law.⁷ The problem was thus largely theoretical, but it was none the less influential. For if one starts from the premiss that ‘Le droit des

¹ *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse* (1783).

² *A Compendium of the Law of Nations* (1789), pp. 18 ff.

³ Alexandrowicz, loc. cit. (above, p. 96 n. 5), pp. 180 ff. and authorities there cited.

⁴ Saalfeld, *Handbuch des positiven Völkerrechts* (1833), p. 26; cited by Alexandrowicz, loc. cit. (above, p. 96 n. 5), p. 189.

⁵ *Ibid.*, p. 191. Cf. also the same author, this *Year Book*, 37 (1961), pp. 506–15.

⁶ Wheaton's view that the ‘external’ sovereignty of a State is, but its ‘internal’ sovereignty is not, dependent upon recognition may be taken as an intermediate point: *Elements of International Law* (3rd edn., 1846), pp. 55–7. For his earlier hesitations see his 1st edn. (1836), pp. 192–4.

⁷ Smith, *Great Britain and the Law of Nations*, vol. 1 (1932), pp. 14–18.

gens est un droit contractuel entre des États',¹ the conclusion as to recognition and statehood seems to be inevitable:

. . . le droit international, qui est contractuel et qui a par conséquent la liberté immanente de s'étendre aux partenaires de son choix, comprend tels États dans sa communauté et n'y accueille pas tels autres . . . [L]a reconnaissance est un accord. Elle signifie l'extension de la communauté de droit international à un nouvel Etat.²

3. STATEHOOD IN NINETEENTH-CENTURY INTERNATIONAL LAW

It would seem useful here to attempt a summary of the position with regard to statehood and recognition in the nineteenth century. There was of course no complete unanimity among text-writers; nevertheless, what we find is an inter-related series of doctrines, based on the premiss of positivism, the effect of which was that the formation and even the existence of States was a matter outside the then accepted scope of international law. Oppenheim's *International Law* provides the clearest as well as probably the most influential expression of these inter-related doctrines. The main positions relevant here were as follows:

1. International law was regarded as the law existing between civilized nations. In 1859 the British Law Officers spoke of international law 'as it has been hitherto recognized and now subsists by the common consent of Christian nations'.³ Members of the society whose law was international law were the European States between whom it evolved from the fifteenth century onwards, and those other States accepted expressly or tacitly by the original members into the Society of Nations; for example the United States of America and Turkey.⁴ This satisfied the positivist canon that could discover obligation to obey international law only in the consent of States.

2. Accordingly how a State *became* a State was a matter of no importance to traditional international law, which concentrated on recognition as the agency of admission into 'civilized society'—a sort of juristic baptism, entailing the rights and duties of international law. 'Pre-states' had not consented to be bound by international law, nor had other States accepted them. States *in*

¹ Redslob, *Revue de droit international*, 13 (1934), p. 429 at pp. 430-1.

² *Ibid.* It should be noted that the essential theoretical problem related to the duties of the new State rather than its rights. Existing States could consent to the rules of law in respect of yet-to-be-created States, but those States could not for their part so consent: e.g. Anzilotti, *Corso di Diritto Internazionale*, vol. 1 (3rd edn., 1929), pp. 163-6, cited by Jaffé, *Judicial Aspects of Foreign Relations* (1933), p. 90 n. Cf., however, Lauterpacht, *Recognition*, p. 2.

³ Opinion of Harding, Bethell and Keating, 18 November 1859: cited Smith, *Great Britain and the Law of Nations*, vol. 1 (1932), p. 12.

⁴ Oppenheim, *International Law*, vol. 1 (1st edn.), p. 17; (8th edn.), p. 18. On Turkey's 'membership' see Smith, *op. cit.* (previous note), vol. 1, pp. 16-17; Hall, *International Law* (2nd edn., 1884), p. 40; Wood, *American Journal of International Law*, 37 (1943), pp. 262-74. In the *European Commission of the Danube, P.C.I.J.*, Series B, No. 14 (1927), p. 40, Art. VII of the Treaty of Paris was referred to as bringing about 'the elevation of the position of Turkey in Europe'. But cf. Judge Ammoun, *Barcelona Traction case (Second Phase)*, *I.C.J. Reports*, 1970, p. 3 at pp. 308-9.

statu nascendi were in no sense international persons. How they acquired territory, what rights and duties they had or owed to others as a result of activities before they were recognized as States, these were irrelevant to international law:

The formation of a new State is, as will be remembered from former statements, a matter of fact and not of law. It is through recognition, which is a matter of law, that such new State becomes subject to International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of International Law, and it matters not how this territory is acquired before the recognition.¹

Hence also, the acquisition of territory by a new State was not regarded as a mode of acquisition of territory in international law, though revolt was a method of losing territory: 'Revolt followed by secession is a mode of losing territory to which no mode of acquisition corresponds.'²

4. RECOGNITION OF STATES IN MODERN INTERNATIONAL LAW

It is against this background that the modern law of statehood, and its relationship with recognition, must be examined. The effect of the positivist doctrine was to place all the emphasis, in matters of statehood, on the question of recognition.³ And this is still so as far as the municipal law of many States is concerned; for example, English courts will not determine for themselves any questions of statehood in issue before them, even where the matter is between private citizens.⁴ They will sometimes be able to avoid the unnecessary and sometimes harmful effects on private rights of the commonly political act of recognition by means of construction.⁵ The executive will on occasions leave the matter, in substance, for the courts to decide.⁶ But where the international status of any entity is squarely in issue, executive certification is binding.⁷

¹ Oppenheim, *International Law*, vol. 1 (1st edn.), p. 264; (8th edn.), p. 544. Cf. Phillimore, *Commentaries upon International Law*, vol. 1 (2nd edn., 1871), p. 79.

² Oppenheim, *International Law*, vol. 1 (1st edn.), p. 297; (8th edn.), p. 579.

³ As both Verhoeven and Charpentier have pointed out, the rubric 'recognition' covers a very wide variety of situations. The term here is used to indicate the relatively formal diplomatic recognition of States and governments.

⁴ This was not always so: e.g. *Yrisarri v. Clement*, (1825) 2 C. & P. 223 at p. 225 *per* Best C.J. For an illuminating discussion of the cases in which Lord Eldon laid down the modern rule see Bushe-Foxe, this *Year Book*, 12 (1931), pp. 63-75; *ibid.*, 13 (1932), pp. 39-48. See also Jaffé, *Judicial Aspects of Foreign Relations*, p. 79.

⁵ *Luigi Montà of Genoa v. Cechofracht Co. Ltd.*, [1956] 2 Q.B. 552 (term 'government' in a charter party); *Kawasaki Kisen Kabashiki Kaisha of Kobe v. Bantham Steamship Co. Ltd.*, [1939] 2 K.B. 544 (C.A.) ('war'). For an extreme case of 'construction' see *The Arantzazu Mendi*, [1939] A.C. 256, criticized by Lauterpacht, *Recognition*, pp. 288-94.

⁶ *Duff Development Co. Ltd. v. Kelantan Government*, [1924] A.C. 797 at p. 825 *per* Lord Sumner; and cf. the certificate in *Salimoff v. Standard Oil Co.*, 262 N.Y. 220 (1933), just prior to U.S. recognition of the Soviet government.

⁷ *Luther v. Sagor*, [1921] 3 K.B. 532; but cf. *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, esp. at pp. 953-4 *per* Lord Wilberforce. The modern American position is less rigid: *Wulfsohn v. R.S.F.S.R.*, 234 N.Y. 372 (1923); *Solokoff v. National City Bank*, 239 N.Y. 158 (1924); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. 2d. 467 (1953), and for discussion see O'Connell, *International Law* (2nd edn., 1970), vol. 1, pp. 172-81.

However necessary or desirable it may be that the courts of a State should speak on matters of statehood with the same voice as the government of that State, in the international sphere the intimate connection established by nineteenth-century doctrine between recognition and statehood has done considerable harm. For a tension is thereby created between the conviction of lawyers, over a wide philosophical spectrum, that recognition is, despite its political overtones, essentially a legal act in the international sphere,¹ and that of politicians that they are, or should be, free to determine (once an entity possesses the requisite qualifications) the question of recognition on political grounds. This has led to some curious attempts at reconciliation.² The United Kingdom alone seems to have accepted a duty to recognize;³ and even its position is by no means an assertion of the constitutive theory of recognition.⁴

Before examining State practice, however, it is necessary again to refer to the doctrinal conflict over the nature of recognition. For a further effect of nineteenth century practice has been to focus attention more or less exclusively on the act of recognition itself, and its legal effects, rather than on the problem of the elaboration of rules determining the status, competence and so on of the various territorial, governmental units.⁵ To some extent this was inevitable, as long as the constitutive position retained its influence, for a corollary of that position was, as we have seen, that there could be no such rules. Examination of the constitutive theory is, therefore, first of all necessary.

(i) *The constitutive theory*⁶

The tenets of the strict constitutive position, as adopted by Oppenheim and others, have been referred to already. Many, if not most, of the adherents of

¹ Kelsen, *American Journal of International Law*, 35 (1941), pp. 605-17; Schwarzenberger, *International Law* (3rd edn., 1957), pp. 127-36 at p. 134; Lauterpacht, *Recognition*, p. 6 and *passim*.

² Alexander, *American Journal of International Law*, 46 (1957), pp. 631-40. Much the same tension exists over the relationship between United Nations membership and recognition.

³ Cf. *International Law Quarterly*, 4 (1951), pp. 387-8; Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), pp. 81-2.

⁴ In 1948, the British position, while supporting a duty to recognize, was that: 'the existence of a State should not be regarded as depending upon its recognition but on whether in fact it fulfils the conditions which create a duty for recognition' (U.N. Doc. A/CN. 4/2 (1948), p. 53). It is significant that Lauterpacht relies heavily on the practice of U.K. and U.S. courts in recognition cases: e.g. *Recognition*, pp. 44, 70-3. He regards this practice as consistently constitutive, and hence tends to minimize the importance of the exceptions to the non-recognition rule accepted in U.S. courts (*ibid.*, pp. 146-7). However, the difference between modern British and American practice is better explained by the differences in the operation of the principle of non-justiciability of 'political' disputes. British judicial practice is not, therefore, based on a particular view of the international law of recognition: but cf. *ibid.*, pp. 154-5. For discussion of the changing U.S. practice in recognition cases see *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (1952) at pp. 63-6.

⁵ Cf. Bot, *Non-Recognition and Treaty Relations* (1968), p. 1.

⁶ Constitutive writers include the following: Kelsen, *loc. cit.* (above, n. 1); Schwarzenberger, *International Law*, vol. 1, p. 134; Anzilotti, *op. cit.* (above, p. 98 n. 2); Redflob, *loc. cit.* (above, p. 98 n. 1); Lauterpacht, *Recognition*; Jellinek, *Allgemeine Staatslehre* (5th edn., 1928), p. 273; Le Normand, *op. cit.* (above, p. 94 n. 6); Patel, *op. cit.* (above, p. 94 n. 6), pp. 119-22; Jennings, *Recueil des cours*, 121 (1967), pp. 327-605 at p. 350; Devine, *Acta Juridica*, 1973, p. 1 at pp. 90-145; Verzijl, *International Law in Historical Perspective*, vol. 2 (1969), pp. 587-90

the constitutive position are also positivist in outlook.¹ On the other hand, it may well be possible to reconcile the declaratory theory with positivism, and it is certainly true that many writers have been both declaratory and positivist.² Moreover Lauterpacht, who was not a positivist, was one of the more subtle and persuasive proponents of a form of the constitutive position.³ Apart from the general tenets of positivism, the most persuasive argument for the constitutive position is a distinct one. Lauterpacht expresses it in the following way:

[T]he full international personality of rising communities . . . cannot be automatic . . . [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.⁴

In other words, it is said that, in every legal system, some organ must be competent to determine with finality and certainty the subjects of the system. In the present international system, that organ can only be the States, acting severally or collectively. Since they act as organs of the system, their determinations must have definitive legal effect.

It is first of all clear that this argument is not generally applicable in modern international law. Determining the legality of the use of force, or the violation or termination of a treaty, may involve 'difficult circumstances of fact and law', but it could not be contended that the determination of particular States as to such matters was 'constitutive' or conclusive. Were that so, international law would be merely a system of imperfect communications: every rule of international law would be the subject of, in effect, an 'automatic reservation' with respect to every State (in the absence of the compulsory jurisdiction of some court or tribunal).

If it is argued that the problem of determining the subjects of international law is so important that, exceptionally, there must exist some method of

(with reservations). Hall's position is of interest: 'although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired': *International Law* (8th edn., 1924, ed. Higgins), p. 103. Cf. also the German argument in the *Customs Union* case, *P.C.I.J.*, Series C, No. 53 at pp. 52-3. It is argued that the Permanent Court adopted a constitutive position in *Certain German Interests in Polish Upper Silesia*, *P.C.I.J.*, Series A, No. 7 (1926), at pp. 27-9, but this was in the context of the belligerency of the Polish National Committee, not the existence of Poland as a State.

¹ Lauterpacht, *Recognition*, pp. 38-9; but cf. Jaffé, *op. cit.* (above, p. 98 n. 2), pp. 80-1.

² Cf. Chen, *The International Law of Recognition*, p. 18 n. 41.

³ Lauterpacht, *Recognition*, at p. 2, distinguishes two major assertions of orthodox constitutive theory: viz. 'that, prior to recognition, the community in question possesses neither the rights nor the obligations which international law associates with full Statehood; (and) . . . that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the Community concerned'. Lauterpacht adopts the first but not the second of these propositions. It can be seen that neither is distinctly positivist: what is so is their combination. Cf. Kunz, *American Journal of International Law*, 44 (1950), pp. 731-9; Higgins, *Development*, p. 136.

⁴ *Recognition*, p. 55 (his italics); cf. Kelsen, *loc. cit.* (above, p. 100 n. 1), pp. 606-7.

conclusive determination, yet it is difficult to see that equating the individual States with the centralized organ of the 'normal' legal system has that effect. There would be nothing conclusive or certain (as far as other States were concerned) about a conflict between different States as to the status of a particular entity. Moreover, it is not necessarily the case that problems of status are peculiarly important in practice. International law has relatively few subjects, and the status of a great majority of them is not open to serious doubt. On the other hand, problems relating, for example, to the legality of the use of force occur with unfortunate frequency, and are often of very great difficulty. Fortunately, it is not argued that individual State pronouncements should therefore be definitive.¹

Two further arguments add decisive support to the rejection of the constitutivist position. In the first place, if State recognition is, *pro tanto*, determinative then it is difficult to conceive of an illegal recognition, and quite impossible to conceive of a recognition which is invalid or void. Yet the invalidity of certain acts of recognition has been accepted in practice, and rightly so.² Otherwise recognition would constitute an alternative form of intervention. It is of interest that Lauterpacht himself, in at least one place, allowed the possibility of an *invalid* act of recognition.³ If that is possible, then the test for recognition must be extrinsic to the act of recognition; that is, established by general international law. And that is a denial of the constitutive position.

A second difficulty with the constitutive position is its relativism. As Kelsen points out, it follows from the constitutive theory that:

. . . the legal existence of a state . . . has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence.⁴

To those who do not share Kelsen's philosophical premisses, this seems a violation of common sense.⁵ Lauterpacht, who accepts the relativity of recognition as inherent in the constitutive position, nevertheless refers to it as a 'glaring anomaly'⁶ and a 'grotesque spectacle' casting 'grave reflection upon international law'.⁷ Moreover, in his opinion, 'It cannot be explained away, amidst some complacency, by questionable analogies to private law or to

¹ Lauterpacht accepts that the decentralized function of recognition is quite unsatisfactory: *Recognition*, p. 67. He thus has to rely on an unsatisfactory situation as the chief support for his position.

² e.g. the German and Soviet 'recognition' of the 'extinction' of the Polish State in 1939: Secret Protocol to the Non-Aggression Pact of 23 August 1939: *British and Foreign State Papers*, vol. 143, p. 503 (Pact); Grenville, *The Major International Treaties 1914-1973* (1974), p. 200 (Protocol). On Poland after 1939 see Marek, *Identity and Continuity*, pp. 417-526, and works there cited.

³ He regarded Italian and German recognition of the Franco regime as 'illegal *ab initio*': *Recognition*, p. 234 n. 3; cf. p. 95 n. 2.

⁴ Kelsen, loc. cit. (above, p. 100 n. 1), p. 609. But cf. Maryan Green, *International Law* (1973), p. 34.

⁵ Cf. Verhoeven, *Reconnaissance*, pp. 714-15. Kelsen himself was previously declaratist: *Revue de droit international*, 4 (1929), p. 613 at pp. 617-18: 'en présence des règles positives incontestables du droit international, [on] ne peut nier que l'État nouveau ait des droits et des obligations internationales avant même d'être reconnu par les anciens États.'

⁶ *Recognition*, p. 67.

⁷ *Ibid.*, p. 78.

philosophical relativism.¹ But if a central feature of the constitutive position is open to such criticism, the position itself must be regarded as questionable. Moreover, aside from the various logical objections,² Lauterpacht's position is dependent on a straightforward assertion as to State practice:

. . . [M]uch of the available evidence points to what has here been described as the legal view of recognition. Only that view of recognition, coupled with a clear realization of its constitutive effect, permits us to introduce a stabilizing principle into what would otherwise be a pure exhibition of power and a negation of order . . .³

But State practice demonstrates neither acceptance of a duty to recognize,⁴ nor a consistent constitutive view of recognition. Moreover, Lauterpacht's argument, which in the passage cited was almost avowedly *de lege ferenda*,⁵ assumes the insufficiency of the declaratory view of recognition.

(ii) *The declaratory theory*

According to the declaratory theory, recognition of new States is a political act which is in principle independent of the existence of the new State as a full subject of international law.⁶ In Charpentier's terminology, statehood is opposable to non-recognizing States.⁷ This position has the merit of avoiding the logical and practical difficulties involved in constitutive theory, while still accepting a role for recognition in modern practice. It has the further, essential, merit of consistency with that practice, and it is supported by a substantial body of opinion, both judicial and academic. What is regarded as the *locus classicus* is a passage of Taft C. J.'s award in the *Tinoco* arbitration:

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by enquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned . . . Such non-recognition for any reason . . . cannot outweigh the evidence disclosed . . . as to the *de facto* character of Tinoco's government, according to the standard set by international law.⁸

¹ Ibid.

² A further logical objection relates to the difficulty of a duty to recognize an entity which has, prior to recognition, *ex hypothesi* no rights: see *Recognition*, pp. 74-5, 191-2. In Lauterpacht's view, the community is 'entitled to claim recognition', but this is an unenforceable or imperfect right. Even so, if it is a legal right then *cadit quaestio*. Cf. Chen, *The International Law of Recognition*, pp. 52-4.

³ *Recognition*, pp. 77-8.

⁴ Cf. Verhoeven, *Reconnaissance*, pp. 576-86.

⁵ Cf. *Recognition*, p. 78.

⁶ See Chen, *The International Law of Recognition*, for a full discussion of this position. It is of interest that L. C. Green's annotations to the published edition are consistently constitutivist: in this respect Green follows Schwarzenberger rather than Chen.

⁷ Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 15-68, 160-7.

⁸ *American Journal of International Law*, 18 (1924), p. 147 at p. 154. Cf. also the *Hopkins* claim, *ibid.*, 21 (1927), p. 160 at p. 166; *Cuculla v. Mexico* (1868), Moore, *International Arbitrations*, vol. 3, p. 2873 at pp. 2876-7; *Wulfsohn v. R.F.S.F.R.*, 138 N.E. 24 (1923) *per* Andrews J. at p. 25; *app. diss.* 266 U.S. 580 (1924).

But this was a case of recognition of governments, and it is arguable that, while recognition of governments might be declaratory in effect, recognition of new States is not. Where an authority in fact exercises governmental functions within an area accepted as being already a 'State-area', there might seem to be nothing for recognition to constitute, at least at the level of international personality. On the other hand, recognition of a new State involves the demarcation of a certain area as a 'State-area' for the purposes of international relations, with consequent effect upon the rights and duties of other States. In such a case, it might be argued that recognition, at least in the non-formal sense of 'treating like a State', is central rather than peripheral to the issue of international capacity.¹

But legal opinion in the context of recognition of States also seems to contradict this view. As a German-Polish Mixed Arbitral Tribunal stated in reference to the existence of the new State of Poland:

. . . the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates.²

Less well known in this context is the Report of the Commission of Jurists on the *Aaland Islands*. The passage of the Report dealing with the independence of Finland enumerated the various recognitions given to Finland, but went on to say that:

these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State . . . [T]he same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times . . . In addition to these facts which bear upon the external relations of Finland, the very abnormal character of her internal situation must be brought out. This situation was such that, for a considerable time, the conditions required for the formation of a sovereign State did not exist.³

It will be seen that the Jurists, while accepting the legal value of recognition as evidence, were not prepared to accept it as conclusive, but instead referred to the 'conditions required for the formation of a sovereign State' apart from recognition.⁴

¹ This was Le Normand's view: op. cit. (above, p. 94 n. 6), p. 268; cited Chen, *The International Law of Recognition*, p. 14 n. 1.

² *Deutsche Continental Gas Gesellschaft v. Polish State* (1929), *Annual Digest*, 5 (1929-30), No. 5.

³ *League of Nations Official Journal*, Special Supplement No. 4 (1920), p. 8.

⁴ The Report of the Commission of Rapporteurs is less explicit. Certain passages are at least capable of a constitutive interpretation: e.g. League of Nations, Council Doc. B7: 21/68/106 (1921), p. 23. But the crucial element in the Rapporteurs' argument was the continuity between the independent State of Finland after 1917 and the autonomous State of Finland before 1917. This continuity was regarded as a continuity of legal personality, despite absence of recognition of pre-1917 Finland: cf. the reference to 'an autonomous Finland which . . . on the 6th December 1917, proclaimed her full and entire independence of Russia, detached herself from the latter by an act of her own free will, and became thereafter herself a sovereign State instead of a dependent State' (ibid., p. 22).

Among writers the declaratory doctrine, with differences in emphasis, is now predominant. Brownlie states the position succinctly:

Recognition, *as a public act of state*, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally, if they ignore the basic obligations of state relations.¹

Moreover, States do not in practice regard unrecognized States as exempt from international law,² and they do in fact carry on a certain, often quite considerable, amount of informal intercourse, extending even to joint membership of the various inter-State organizations.³ Recognition is increasingly intended and taken as an act, if not of political approval, at least of political accommodation.⁴

5. CONCLUSIONS

It is sometimes suggested that the 'great debate' over the legal nature of recognition has been beside the point, and that it is mistaken to categorize recognition as either declaratory or constitutive.⁵ French writers, following

¹ *Principles*, p. 94 (his italics); cf. pp. 90-3. Other declaratist writers include: O'Connell, *International Law*, vol. 1, pp. 123-34; Chen, *The International Law of Recognition*; Brierly, *The Law of Nations* (6th edn., 1963), p. 139; Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 196-200; Starke, *Studies in International Law*, pp. 91-100; Marek, *Identity and Continuity*, pp. 130-61; Fawcett, *The Law of Nations* (2nd edn., 1971), pp. 49, 55; Higgins, *Development*, pp. 135-6; Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), pp. 78-9; Jaffé, *Judicial Aspects of Foreign Relations*, pp. 97-8; Erich, *Recueil des cours*, 13 (1926), p. 427 at pp. 457-68; Kunz, *American Journal of International Law*, 44 (1950), pp. 713-19; Borchard, *ibid.*, 36 (1942), pp. 108-11; Brown, *ibid.*, pp. 106-8; Waldock, *Recueil des cours*, 106 (1962-II), pp. 147-51. See also the Resolutions of the *Institut de Droit International* (1936): 'La reconnaissance a un effet déclaratif. L'existence de l'État nouveau avec tous les effets juridiques qui s'attachent à cette existence n'est pas affectée par le refus de reconnaissance d'un ou plusieurs États': Wehberg (ed.), *Institut de Droit International, Table Générale des Résolutions 1873-1956* (1957), p. 11; and cf. Brown, *Annuaire de l'Institut*, 1934, pp. 302-57. See also *Temple case*, *I.C.J. Reports*, 1962, p. 6 at pp. 130-1 (Judge Spender, dissenting).

² Brownlie, *Principles*, p. 92 n.; Briggs, *American Journal of International Law*, 43 (1949), p. 113 at pp. 117-20; Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 45-8, 56-68; Whiteman, *Digest*, vol. 2, at pp. 604-65. Cf. the Protocol of the London Conference, 19 February 1831: *British and Foreign State Papers*, vol. 18, pp. 779, 781 (Belgium); Marek, *Identity and Continuity*, p. 140. Non-recognition of North Korea and of Israel was not regarded as precluding the application of international law rules to the Korean and Middle East wars: Brownlie, *International Law and the Use of Force by States*, p. 380 and n.

³ Bot, *Non-Recognition and Treaty Relations* (1968); and see Whiteman, *Digest*, vol. 2, pp. 524-604; Moore, *Digest*, vol. 1, pp. 206-35; Hackworth, *Digest*, vol. 1, pp. 327-63, for details of these informal contacts. Failure to comply with international law is often cited as a justification for non-recognition.

⁴ Cf. Lachs, this *Year Book*, 35 (1959), p. 252 at p. 259; Higgins, *Development*, pp. 164-5. Verhoeven goes so far as to conclude that recognition is 'un acte purement politique, dépourvu comme acte de volonté d'effets de droit': *Reconnaissance*, p. 721. This follows from his basic thesis of the diversity of 'recognitions', and of the relations or situations being recognized. But it does not follow that recognition may not have legal effects in a particular case or type of case. What does follow is the need to study the particular types of case, rather than 'recognition' simply.

⁵ Cf. Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), p. 78.

de Visscher, have tended to regard recognition as combining both elements.¹ To some extent one can sympathize with these views: none the less, the proper position is that in principle the denial of recognition to an entity which otherwise qualifies as a State cannot entitle the non-recognizing States to act as if the entity in question were not a State. The categorical constitutive position, which implies the contrary view, is unacceptable. But it would be equally unacceptable to deny that, in practice, recognition can have important legal and political effects. For example, where an entity is widely recognized as a State, especially where such recognition has been accorded on non-political grounds, that is strong evidence of the statehood of that entity—though it is not conclusive.² Equally, where the status of a particular entity is doubtful, or where some necessary element is lacking, recognition, apart from its evidential importance, may oblige the recognizing State to treat the recognized entity as a State, and may thus contribute towards the consolidation of its status. In Charpentier's terms, recognition may render opposable a situation otherwise inopposable.³

In some situations, too, States may without acting unlawfully recognize an entity as a State even though it clearly does not qualify as such: in these circumstances bilateral legal obligations may be created, but the personality of the entity in question remains particular and non-opposable.⁴ Similarly, the term 'recognition' is sometimes used to describe acts which are properly speaking constitutive of a particular State or legal person: for example, a multilateral treaty establishing a new State will extend the signatories' recognition of that State. This situation is to be distinguished from that where the State or entity existed prior to the treaty, which merely confirms the status as recognized.⁵

The tentative conclusion is that the international status of an entity 'subject to international law' is, in principle, independent of recognition, although the qualifications already made suggest that the differences between the declaratory and constitutive schools are less in practice than might have been expected. This conclusion is tentative only, in that it assumes that there exist in international law and practice workable criteria for statehood. If there are no such

¹ de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), p. 191; cited by Salmon, *La reconnaissance d'état* (1971), pp. 19 ff. Cf. Charpentier, op. cit. (above, p. 94 n. 6), *passim*; de Visscher, *Théories et réalités en droit international public* (4th rev. edn., 1970), p. 258. Verhoeven, *Reconnaissance*, at p. 548, refers in the same vein to a 'dialectical relationship' between recognition and the criteria for statehood, although his basic position remains declaratory: *ibid.*, pp. 545, 714-15, 720.

² Cf. Taft C.J., *Tinoco arbitration*; cited *supra*, p. 103.

³ Charpentier, op. cit. (above, p. 94 n. 6), pp. 217-25.

⁴ For example, Byelorussia and the Ukraine, constituent republics of the Soviet Union, were admitted as 'States' to the United Nations in 1945, and have subsequently been treated as such for all United Nations purposes, although they are clearly not independent. For the decision in 1945 see *United States Foreign Relations, 1945, The Conferences at Malta and Yalta*, pp. 746-7, 975-9; and see also Timasheff, *Fordham Law Review*, 14 (1945), pp. 180-90; Dolan, *International and Comparative Law Quarterly*, 4 (1955), pp. 629-39; and especially Uibopuu, *ibid.*, 24 (1975), pp. 211-45. British India in the period 1919-47 was also recognized as having a separate legal personality, in much the same way: see Poulouse, this *Year Book*, 45 (1971), pp. 202-12.

⁵ But cf. Wright, *Proceedings of the American Society of International Law*, 48 (1954), pp. 23-37.

criteria, or if they are so imprecise as to be practically useless, then recognition must be in practice discretionary, as well as determinative, and the constitutive position will have returned, as it were, by the back door.¹ The question whether such criteria do exist remains to be resolved.²

3. THE CONCEPT OF STATEHOOD IN INTERNATIONAL LAW: SOME GENERAL OBSERVATIONS

If the effect of positivist doctrine in international law was to place the emphasis, in matters of statehood, on the question of recognition, then the effect of modern doctrine and practice has been to return the attention to issues of statehood and status, independent of recognition. But there is nevertheless no generally accepted and satisfactory contemporary legal definition of statehood.³ This may well be because the question normally arises only in the borderline cases, where a new entity has emerged bearing some but not all of the characteristics of undoubted States. International lawyers are thus confronted with difficult problems of characterization; and, as has been suggested, such problems do not occur, and cannot be solved, except in relation to the particular issues and circumstances.⁴ But, it may be asked, are there any legal consequences which attach to statehood as such, but which are not legal incidents of other forms of international personality? To put it another way, is there a legal concept of statehood, or does the meaning of the term vary infinitely depending on the context?⁵ We have discussed the attempt to dispense with criteria for statehood by way of recognition.⁶ On the other hand some modern writers come close to denying the existence of statehood as a legal concept in the

¹ Cf. Anzilotti, *Corso di diritto internazionale*, vol. 1 (3rd edn., 1929), pp. 163-6.

² *Post*, pp. 111 ff.

³ Both the League's Committee of Experts for the Progressive Codification of International Law (see their *Minutes* (ed. Rosenne, 1972), vol. 1, pp. 38-9), and the International Law Commission have consistently rejected proposals to codify rules relating to recognition and statehood. Cf. Lauterpacht, *Collected Papers*, vol. 1, pp. 477-9. For debates on the issue in the I.L.C., see e.g., *I.L.C. Yearbook*, 1949, pp. 64-8, 81-8, 150-2, 171-4, 178; *ibid.*, 1956-II, p. 107; *ibid.*, 1966-II, pp. 178, 192; *ibid.*, 1970-II, pp. 178, 306. The rather delicate balance between reluctance and need to deal with the issue is demonstrated in the Draft Articles on State Succession in respect of Treaties; Art. 2 para. 1 (e) defines the 'succession of States' by reference to the 'fact of succession'; but Art. 6 provides that only successions of States occurring consistently with international law are governed by the Articles. Cf., however, Vallat, *I.L.C. Yearbook*, 1974-II (1), pp. 18-19, for a reassertion of the long-standing position.

The topic of recognition of States and governments has remained on the I.L.C. work programme since 1949, but little interest has been shown in pursuing the matter. At the 1973 Session, during a discussion of the future work programme, the consensus was that: 'The question of recognition of States and governments should be set aside for the time being, for although it had legal consequences, it raised many political problems which did not lend themselves to regulation by law': *I.L.C. Yearbook*, 1973-I, p. 175 (Bilge); also p. 164 (Castañeda); but cf. pp. 165, 170 (Tsuruoka).

⁴ Higgins, *Development*, pp. 11-14.

⁵ Cf. Weissberg, *International Status of the United Nations* (1961), pp. 193-4.

⁶ *Supra*, pp. 97-103.

interests of a thorough-going functionalism. Such views are of value as a reaction against absolutist notions of statehood and sovereignty,¹ but statehood does appear to be a term of art in international law; though of course, like all legal, and especially international legal, concepts it is one of open texture. The following exclusive and general legal characteristics of States may be instanced.

1. In principle States have plenary competence to perform acts, make treaties and so on, in the international sphere: this is one meaning of the term 'sovereign' as applied to States.

2. In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2, paragraph 7 of the United Nations Charter. This does not of course mean that they are omnicompetent, in international law, with respect to those affairs: it does mean that their jurisdiction is *prima facie* both plenary and not subject to the control of other States.

3. In principle States are not subject to compulsory international process, jurisdiction or settlement, unless they consent, either in specific cases or generally, to such exercise.²

4. States are regarded in international law as 'equal', a principle also recognized by the Charter (Article 2 (1)). This is in part a restatement of the foregoing principles, but it may have certain other corollaries.³ It 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,⁴ 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, any derogations from these principles must be clearly established: in case of doubt an international court or tribunal will decide in favour of the freedom of action of States, whether with respect to external⁵ or internal affairs,⁶ or as not having consented to a specific exercise of international jurisdiction,⁷ or to a particular derogation from equality.⁸ This presumption—which is of course rebuttable in any given case—provides a useful indication as to the status of the entity in whose favour it is invoked. It will be referred to throughout this study as the *Lotus* presumption—its classic formulation being the judgment of the Permanent Court in *The Lotus*.⁹

¹ Cf. Higgins, *Development*, pp. 11-17, 42-5, 54-7; Riphagen, *Netherlands Yearbook of International Law*, 6 (1975), pp. 121-65.

² *Monetary Gold Removed from Rome in 1943*, *I.C.J. Reports*, 1954, p. 19; *Western Sahara case*, *I.C.J. Reports*, 1975, p. 12 at p. 33.

³ See Dickinson, *The Equality of States in Public International Law* (1920); the notion of equality of States is not historically a deduction from sovereignty, however: *ibid.*, pp. 56, 334-6.

⁴ Cf. Brierly, *The Law of Nations* (6th edn., 1963), pp. 130-3.

⁵ *The Lotus*, *P.C.I.J.*, Series A, No. 10 (1927) at p. 18; though, of course, in external affairs the strength of the presumption is less, since it must be weighed against the equal rights of other States.

⁶ *Polish War Vessels in the Port of Danzig*, *P.C.I.J.*, Series A/B, No. 43 (1931) at p. 142.

⁷ *Eastern Carelia* opinion, *P.C.I.J.*, Series B, No. 5 (1923) at pp. 27-9.

⁸ *Interpretation of Peace Treaties (Second Phase)*, *I.C.J. Reports*, 1950, p. 221, at pp. 228-9.

⁹ *P.C.I.J.*, Series A, No. 10 (1927), at p. 18. The cogency of the *Lotus* presumption in modern law has been doubted: see, e.g., Brownlie, *Principles*, p. 609. It was referred to with approval by the Permanent Court in its Order of 6 December 1930 in the *Free Zones* case, *P.C.I.J.*, Series A, No. 24 at pp. 11-12. But it was not applied by the Court in cases involving the consti-

These five principles, it is submitted, constitute in legal terms the hard core of the concept of statehood, the essence of the special position in customary international law of States. It follows from this, as a rule of interpretation, that the term 'State' in any document *prima facie* refers to States having these attributes: but this is of course subject to the context. Courts will tend towards strictness of interpretation of the term 'State' if the context predicates plenitude of functions—as for example in Article 4 (1) of the United Nations Charter. Conversely, if a treaty or other document is concerned with a specific issue, then 'State' may be construed liberally—that is, to mean 'State for the specific purpose' of the treaty or document.

This list of five principles appears nominal: but it would seem difficult to add more substantive candidates. Thus the possession of a nationality is not conclusive for statehood.¹ Nor is the fact that an entity is governed by international law conclusive: all subjects of international law are so governed.² The rule embodied in Article 2 (4) of the Charter, enjoining the use of force by States except in certain cases, applies also to certain non-State entities.³ That an entity is responsible for its external affairs (even if it does not itself conduct them) is not conclusive, since non-States may also be responsible for international wrongs.⁴ On the other hand that an entity is not internationally responsible for its acts is probably conclusive against its being a State,⁵ though which of two entities is responsible in a situation of divided competences is often a question of great difficulty. And it is sometimes said that States only are competent to develop or change customary international law.⁶ Even if true, this is

tutions of international organizations, when a relatively extensive interpretation was adopted: see *Competence of the I.L.O. with respect to agricultural labour*, Series B, Nos. 2-3 (1922), at pp. 23-6; *Competence of the I.L.O. to regulate, incidentally, the work of the employer*, Series B, No. 13 (1926), at pp. 21-3; *Jurisdiction of the European Commission of the Danube*, Series B, No. 14 (1927), at pp. 36, 63-4; *contra* Judge Negulesco (diss.) at pp. 104-5. And cf. *Territorial Jurisdiction of the Oder Commission*, Series A, No. 23 (1929), at p. 26. Like most of the so-called 'rules of interpretation' the *Lotus* presumption found no place in the Vienna Convention on the Law of Treaties: A/CONF. 39/27, 23 May 1969, and Corr., 1, Arts. 31-3. It was not applied by the majority in the *Admissions* case, *I.C.J. Reports*, 1948, p. 63; cf. dissenting opinion (Judges Basdevant, Winiarski, McNair, Read), at p. 86, referring to it as 'a rule of interpretation frequently applied by the Permanent Court'. It was applied by the majority in the *Asylum* case, *I.C.J. Reports*, 1950, p. 266, at p. 275. See also Lauterpacht, this *Year Book*, 26 (1949), pp. 48-85; Delupis, *International Law and the Independent State* (1974), pp. 23-5.

¹ Andorra, which may not be a State, none the less has its own nationality: Bélinguier, *La condition juridique des Vallées d'Andorre* (1970), pp. 206-21, esp. at 221; Ourliac, in *Mélanges Maury* (1960), vol. 1, pp. 403-15.

² On the notion of 'subjects' of international law see Lauterpacht, *Law Quarterly Review*, 63 (1947), pp. 438-560; *ibid.*, 64 (1948), pp. 97-119; O'Connell, *Revue générale de droit international public*, 67 (1963), pp. 3-43.

³ Brownlie, *International Law and the Use of Force by States* (1963), pp. 380-1; Higgins, *Development*, pp. 221-2.

⁴ This is probably the case with the United Nations: Weissberg, *International Status of the United Nations*, p. 209.

⁵ Cf. Waldock: 'a distinction must be made between the conduct of international relations, and responsibility for international relations. The latter phrase has always been used in connection with dependent territories in the past, and was the best short definition possible': *I.L.C. Yearbook*, 1972-I, p. 271; and for discussion of this formula, *ibid.*, 1974-II (1), pp. 26-8.

⁶ *Nanni v. Pace and the Sovereign Order of Malta* (1935), *Annual Digest*, 8 (1935-7), No. 2.

unhelpful as a criterion because it is not equally (or at all) true of all States. Other examples could be given.

If there is then a legal concept of statehood, it follows that the law must find some means of determining which entities are 'States', with the above attributes; in other words, of determining the criteria for statehood. It is with this that we are here concerned.

Two preliminary points should, however, be made. First, upon examination the exclusive attributes of States listed above are found not to prescribe specific rights, powers or liberties which all States must, to be States, possess: rather they are presumptions as to the existence of such rights, powers or liberties, rules that these exist unless otherwise provided for. This must be so, since the actual powers, rights and liberties of particular States vary considerably. The legal consequences of statehood are thus seen to be—paradoxically—matters of evidence, or rather of presumption. Predicated on a basic or 'structural' independence,¹ statehood does not involve any necessary substantive rights. Equally the law recognizes no general duty on a State to maintain that independence: independence is protected while it exists, but there is no prohibition on its partial or permanent alienation.² The legal concept of statehood provides a measure for determining whether in a given case rights have been acquired or lost.

Secondly, the criteria for statehood are rather special rules, in that their application conditions the application of most other international law rules. As a result, existing States have sometimes tended to assert more or less complete freedom of action with regard to new States.³ This may explain the reluctance of the International Law Commission to frame comprehensive definitions of statehood when engaged on other work—albeit work which assumed that the category 'States' is certain or ascertainable.⁴ It follows that, at the empirical level, the question must again be asked: whether, given the existence of international law rules determining what are 'States', those rules are sufficiently certain to be applied in specific cases, or else have been kept so uncertain or open to interpretation as not to constitute rules at all. And this question is independent of the point—which is accepted—that States may on occasions treat as a State an entity which does not come within the accepted definition of the term.⁵ The question is rather: can States legitimately refuse, under cover of the 'open texture' of rules, to treat entities as States which do in fact qualify? Preventing that is the point of having—if in fact we do have—'objective' criteria for statehood.

¹ For the concept of independence see *post*, pp. 119–39.

² Cf. Judge Anzilotti, separate opinion, *Austro-German Customs Union case*, P.C.I.J., Series A/B, No. 41 (1931), at p. 59.

³ e.g., U.S. Ambassador Austin, cited by Brown, *American Journal of International Law*, 42 (1948), p. 621 (on the U.S. recognition of Israel). But it is interesting that State Department advice was opposed to the instantaneous recognition in that case: Snetsinger, *Truman, the Jewish Vote and the Creation of Israel* (1974), pp. 108–9, 181.

⁴ *Supra*, p. 107 n. 3.

⁵ But cf. Higgins, *Development*, p. 41 n. 69; Marek, *Identity and Continuity*, p. 145, both of whom are too unqualified in their support of the 'declaratory' theory.

4. THE CRITERIA FOR STATEHOOD AND THE PRINCIPLE OF EFFECTIVENESS

The best known formulation of the basic criteria for statehood is that laid down in Article 1 of the Montevideo Convention, 1933:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.¹

It is a characteristic of these criteria—and of the others to be examined in this section—that they are based on the principle of effectiveness among territorial units. In contrast, certain modern criteria to be examined in the next section either supplement or in certain cases contradict this principle. But they operate only in rather exceptional cases: the accepted criteria must first be dealt with.

1. DEFINED TERRITORY

It is evident that States are territorial entities. 'Territorial sovereignty . . . involves the exclusive right to display the activities of a State.'² Conversely, the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory. But, although a State must possess some territory, there appears to be no rule prescribing the minimum area of that territory. States may thus occupy an extremely small area, provided they are independent in the sense to be explained. Monaco and Nauru, for example, are respectively only 1.5 and 21 square kilometres in area.³ The relationship between statehood and territorial sovereignty thus appears to be of a special kind—a point which the traditional law failed to emphasize, since it concentrated on problems of acquisition of territory by already existing States, on the view that territorial sovereignty was analogous to the ownership of land by natural persons. That analogy was of limited value even in those situations, and in the case of acquisition of territory by new

¹ *League of Nations Treaty Series*, vol. 165, p. 19. The American Law Institute's *Restatement (2nd), Foreign Relations Law of the United States* (1965), § 4, defines 'state' as . . . 'an entity that has a defined territory and population under the control of a government and that engages in foreign relations.' Fitzmaurice, as I.L.C. Rapporteur on the Law of Treaties, included in an early draft the following 'related definition': 'For the purposes of the present Code (a) In addition to the case of entities recognized as being States on special grounds, the term "State" (i) means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf of any given State must be negotiated—depending on its status and international affiliations; (ii) includes the government of the State . . .' (Art. 3, *I.L.C. Yearbook*, 1956-II, p. 107). The definition was deleted from the Draft Articles: cf. *ibid.*, 1966-II, pp. 178-92. Cf. Crane, *The State in Constitutional and International Law* (1907), p. 65; Kelsen, *Revue de droit international*, 4 (1929), p. 613 at p. 614.

² *Island of Palmas* arbitration (1928), *Reports of International Arbitral Awards*, vol. 2, p. 829 at p. 839 (Judge Huber).

³ For the Vatican (0.4 km.) see *post*, p. 114 n. 5; generally see Mendelson, *International and Comparative Law Quarterly*, 21 (1972), p. 609 at pp. 610-17; Verhoeven, *Reconnaissance*, p. 54.

States it was positively misleading.¹ It is enough to say here that the category 'statehood' probably takes priority over the category 'acquisition of territory': in other words, that the establishment of a new State on certain territory defeats claims by other States which relate to the whole of the territory so occupied; and where the claims relate to part only of the territory, makes them dependent for settlement on the consent of the new State.²

It is suggested then that a State may exist despite claims to its territory, just as an existing State continues despite such claims.³ Two different situations may be distinguished: claims relating to the entire territory of a new State; and those relating only to the boundaries of the State. In particular cases the two types of claim may co-exist. This was so with Israel in 1948: it was argued that General Assembly Resolution 181 (II) of 29 November 1947 in some way conferred territory on the new State, so that the case was merely one of undefined frontiers, but the other view is tenable. In any case, Israel was admitted to the United Nations on 11 May 1949,⁴ it seems on the former supposition. Jessup, when he argued for Israel's admission on behalf of the United States, discussed the requirement of territory in the following terms:

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 delimitation 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 . . .⁵

Claims to the entire territory of a State have commonly been raised in the context of admission to the United Nations: this was the case with Israel, and also with Kuwait and Mauritania.⁶ The proposition that a State exists despite claims to the whole of its territory was not challenged in these cases.

¹ Cf. Jennings, *The Acquisition of Territory in International Law* (1963), pp. 7-11.

² *Ibid.*, p. 38. To the same effect see the *consultation* of MM. Basdevant, Jèze and Politis on the creation of Czechoslovakia: *P.C.I.J.*, Series C, No. 68, pp. 51-3, 58-9. The case was not proceeded with.

³ The point was assumed by the Permanent Court in two cases: *Monastery at St. Naoum (Albanian Frontier)*, Series B, No. 9 (1924); *Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Series B, No. 8 (1923). But cf. the stricter view proposed in the British Memorial in the *Case Concerning Interpretation of the Treaty of Lausanne*, Series C, No. 10 at pp. 202-3. There is no reference to the matter in the judgment: Series B, No. 12 (1925).

⁴ G.A. Res. 273 (III) (37-12: 9); S.C. Res. 70, 4 March 1949 (9-1 (Egypt): 1 (U.K.)).

⁵ *Security Council, Official Records*, 383rd Meeting, 2 December 1948, p. 41. See further Alexander, *International Law Quarterly*, 4 (1951), pp. 423-30; Halderman, *Law and Contemporary Problems*, 33 (1968), pp. 78-96; and the works cited *supra*, p. 93 n. 4.

⁶ On Kuwait see Al Baharna, *The Legal Status of the Arabian Gulf States* (1968), pp. 250-8; Hassouna, *The League of Arab States and Regional Disputes* (1975), pp. 91-140. On Mauritania see Higgins, *Development*, pp. 18-19, 307. For the Iranian claim to Bahrain see Tadjbakhche, *La question des Îles Bahreïn* (1960); Adamiyat, *Bahrain Islands. A Legal and Diplomatic Study of the British-Iranian Controversy* (1955); and Al Baharna, *op. cit.*, pp. 31-5. For the settlement of the dispute see Al Baharna, *International and Comparative Law Quarterly*, 22 (1973), pp. 541-52.

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.¹

It is only to be expected then that claims to less than the entire territory of a new State and, in particular, boundary disputes, do not affect statehood. A German-Polish Mixed Arbitral Tribunal stated the rule succinctly:

Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation 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 delimited, and that the State actually exercises independent public authority over that territory.²

And the International Court in the *North Sea Continental Shelf* cases confirmed the rule as it were *en passant*:

The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation 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 delimited 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.³

The question is whether there are any exceptions to this rule which are not better referred to defects of government or independence. Higgins asserts that, when the doubts as to the future frontiers [are] of a serious nature, statehood [becomes] in doubt. Thus when in 1919 Estonia and Latvia were recognized by the Allied Powers, no recognition was granted to Lithuania on the express ground that owing to the Vilna dispute, its frontiers were not yet fixed.⁴

In view of what has been said, this may be doubted: in any event the specific example given, that of Lithuania, is not such a case. It is true that *de jure* recognition of Lithuania by the Allies was refused because of the Vilna dispute,⁵ but this action appears to have been politically motivated; it was not an expression of an Allied view that Lithuania was not a State. The British Under-Secretary of State for Foreign Affairs had previously admitted that the Polish occupation of Vilna (Wilno) was an occupation 'of Lithuanian territory',⁶ and as late as 1920 the Prime Minister agreed that the same considerations applied to the *de jure* recognition of Lithuania as to Latvia and Estonia.⁷ The

¹ Cf. *supra*, p. 109 n. 3.

² *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929), *Annual Digest*, 5 (1929-30), No. 5, at pp. 14-15.

³ *I.C.J. Reports*, 1969, p. 3, at p. 32.

⁴ Higgins, *Development*, p. 20 n.

⁵ *Hansard*, H.C. Deb., vol. 139, col. 2207 (21 March 1921).

⁶ *Ibid.*, vol. 116, col. 1201 (28 May 1919).

⁷ *Ibid.*, vol. 129, col. 240 (11 May 1920).

merits of the Vilna dispute appear to have been very decidedly in favour of Lithuania,¹ and the Allied actions to have been based more on the desire for a strong Poland than appreciation of those merits.² However that may be, it is clear that Lithuania and the other so-called 'Border States' were independent States by mid-1919, despite then-existent or subsequent territorial claims. Arbitrator Reichmann in *Germany v. Reparations Commission* held that:

Le Gouvernement lithuanien a été reconnu *de facto* en septembre 1919, mais il existait comme Gouvernement indépendant déjà lors de la signature du Traité de Versailles . . .³

Lithuania was thus not included in the territory of 'Russia' within the meaning of Article 260 of the Treaty at the time it was signed (28 June 1919). And the same opinion was evidently held, though it was not directly in point in either case, by the Permanent Court in two cases concerning Lithuania.⁴

It appears then that even a substantial boundary or territorial dispute with a new State is not enough to bring statehood into question. The only requirement is that the State must consist of a certain coherent territory effectively governed.

2. PERMANENT POPULATION

If States are territorial entities, they are also aggregates of individuals. A permanent population is thus necessary for statehood, though, as in the case of territory, no minimum limit is apparently prescribed. For example in 1973 the estimated population of Nauru was only 6,500; that of San Marino was 20,000. Of putative States with very small populations, only the Vatican City may be challengeable on this ground, and this as much because of the professional and non-permanent nature of its population as because of its size.⁵

The rule under discussion requires States to have a permanent population: it is not a rule relating to the nationality of that population. It appears that the grant of nationality is a matter which only States by their municipal law (or by way of treaty) can perform.⁶ Nationality is thus dependent upon statehood, not the reverse. Whether the creation of a new State on the territory of another results in statelessness of the nationals of the previous State there resident,⁷

¹ Lapradelle, le Fur, Mandelstam, *The Vilna Question* (1929); Langer, *Seizure of Territory* (1947), pp. 22-5; Scelle, *Revue générale de droit international public*, 35 (1928), pp. 730-80; Brockelbank, *American Journal of International Law*, 20 (1926), pp. 483-501.

² Cf. Judge Anzilotti, *Railway Traffic between Lithuania and Poland*, P.C.I.J., Series A/B, No. 62 (1931), at p. 123.

³ *Reports of International Arbitral Awards*, vol. 1, p. 524 at p. 525 (13th Question) (1924).

⁴ In the *Railway Traffic* case, P.C.I.J., Series A/B, No. 42 (1931), at p. 112, the Court thought the establishment of Lithuania antedated the seizure of Vilna on 9 October 1920. See also *Panevezys-Saldutiskis Railway* case, P.C.I.J., Series A/B, No. 76 (1939), p. 10.

⁵ Mendelson, *International and Comparative Law Quarterly*, 21 (1972), p. 609 at pp. 611-12; Rousseau, *Revue générale de droit international public*, 37 (1930), pp. 145-53; but cf. Kunz, *American Journal of International Law*, 46 (1952), pp. 308-14.

⁶ *Nottebohm* case (*Second Phase*), I.C.J. Reports, 1955, p. 4, at p. 23.

⁷ Cf. the Israeli cases in the period (1948-52) when there was no Israeli nationality law: I.L.R., 17 (1950), pp. 110-12. See also *Naqara v. Minister of the Interior*, I.L.R., 20 (1953), p. 49.

or an automatic change in nationality,¹ or in retention of the previous nationality until provision is otherwise made by treaty or the law of the new State² is a matter of some doubt. The problem is made more difficult because of the confusion prevalent between 'international nationality' (i.e. nationality under the 'effective link' doctrine) and municipal nationality. Persons could very well be regarded as nationals of a particular State for international purposes before the State concerned had established rules for granting or determining its (municipal) nationality. On the other hand, apart from treaty a new State is not obliged to extend its nationality to *all* persons resident in its territory. Two views of the matter may be contrasted:

. . . in view of the rule that every State must have a determinate population (as an element of its statehood), and therefore nationality always has an international aspect, there is no very fundamental distinction between the issue of statehood and that of transfer of territory . . . [T]he evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality.³

Although inhabitants of territory ceded by or seceding from the Crown lose their British nationality, it does not follow that they acquire either automatically or by submission that of the successor State. The latter may withhold the granting of its nationality to all or portions of the persons concerned . . . Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality.⁴

A tentative reconciliation may be suggested: in the absence of provision to the contrary, persons habitually resident in the territory of the new State automatically acquire the nationality of that State, for all international purposes, and lose their former nationality, but this is subject to a right in the new State to delimit more particularly which persons it will regard as its nationals. This view is at least consistent with the judgment of the Permanent Court in the *Case Concerning Acquisition of Polish Nationality*:

the Minorities Treaties in general, and the Polish Treaty in particular, have been concluded with new States, or with States which, as a result of the war, have had their territories considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance. One of the first problems which presented itself in connection with the protection of the minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic

¹ *A.B. v. M.B.*, I.L.R., 17 (1950), p. 110, referring to the 'absurd result of a State without nationals'; Draft Convention of Harvard Law Research, Art. 18 (2); *Wildermann v. Stinnes*, *Annual Digest*, 2 (1923-4), No. 120; *Poznanski v. Lentz & Hirschfeld*, *Recueil des Tribunaux Arbitraux Mixtes*, 4 (1925), p. 353.

² *Date of Entry into Force of Versailles Treaty (Germany)* case, I.L.R., vol. 32, p. 339 (1961); Weis, *Nationality and Statelessness in International Law* (1956), pp. 151 ff.

³ Brownlie, *this Year Book*, 39 (1963), pp. 284-364, at p. 320.

⁴ O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. 1, pp. 497-528 at p. 503.

grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States¹.

3. GOVERNMENT

The requirement that a putative State have an effective government might be regarded as central to its claim for statehood. 'Government' or 'effective government' is obviously a basis for the other central requirement of independence.² Moreover, international law defines 'territory' not by adopting private law analogies of real property, but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some area and population. Territorial sovereignty is not ownership of, but governing power with respect to, territory. There is thus a strong case for regarding government as the central criterion of statehood, since all the others depend upon it. The difficulty is, however, that the legal criteria for statehood are of necessity nominal and exclusionary: that is to say, their concern is not with the central, clear cases but with the borderline ones. Hence the application of the criterion of government in practice is much less simple than the above analysis might suggest.

A striking modern illustration is that of the former Belgian Congo, granted a hurried independence in 1960 as the Republic of the Congo (now Zaïre). The situation in the Congo after independence has been described elsewhere.³ No effective preparations had been made; the new government was bankrupt, divided, and in practice hardly able to control even the capital. Belgian and other troops intervened, shortly after independence, under claim of humanitarian intervention; and extensive United Nations financial and military assistance became necessary almost immediately.⁴ Among the tasks of the United Nations force was, or came to be, to suppress the secession in Katanga, the richest Congolese province.⁵ Anything less like effective government it would be hard to imagine.

¹ *P.C.I.J.*, Series B, No. 7 (1923), at p. 15. Cf. also *Nationality (Secession of Austria) case*, I.L.R., 21 (1954), p. 175; *Murray v. Parkes*, [1942] 2 K.B. 123; Graupner, *Transactions of the Grotius Society*, 32 (1946), pp. 87-120.

² It is clear that 'government' and 'independence' are closely related as criteria—indeed, they may be regarded as different aspects of the requirement of separate and effective control. For present purposes, government is treated as the exercise of authority with respect to persons and property within the territory claimed; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other international persons, whether within or outside the territory claimed. Other writers draw a similar distinction but in different terms: for example Wheaton, *supra*, p. 97 n. 6 ('internal' and 'external' sovereignty); Kamanda, *Legal Status of Protectorates*, pp. 175-82 ('sovereignty' (internal) and 'independence' (external)).

³ Kanza, *Conflict in the Congo* (1972), p. 192; Barraclough (ed.), *Survey of International Affairs 1959-60* (1961), pp. 396-436; Hoskyns, *The Congo since Independence* (1965); Higgins, *Development*, pp. 162-4.

⁴ See, e.g., the U.N.-Congolese Agreement on Financial Assistance, 23 August 1960: *United Nations Treaty Series*, vol. 373, p. 327, providing \$5 million to finance normal imports (Art. 4) and 'to meet its current budgetary needs, preference being given to the government pay-roll and emergency relief expenditure' (Art. 7). Cf. Said, *De Léopoldville à Kinshasa. Le situation économique au Congo ex-Belge au jour de l'indépendance* (Neuchâtel, 1969).

⁵ On the Katangan secession see also Lemarchand, *American Political Science Review*, 56 (1962), pp. 404-16; O'Brien, *To Katanga and Back: A U.N. Case History* (1962).

Yet despite this there can be little doubt that the Congo was in 1960 a State in the full sense of the term. It was widely recognized. Its application for United Nations membership was approved without dissent.¹ United Nations action subsequent to admission was of course based on the 'sovereign rights of the Republic of the Congo'.² On no other basis could the attempted secession of the Katanga province have been condemned as 'illegal'.³

What then is to be made of the criterion of 'effective government'? Three views can be taken of the Congo situation in that regard. It may be that international recognition of the Congo was simply premature or wrongful, because, not possessing an effective government, the Congo was not a State.⁴ It may be that the recognition of the Congo was a case where an entity not properly qualified as a State is treated as such by other States, for whatever reason; that is, a case of constitutive recognition. Alternatively, it may be that the requirement of 'government' is less stringent than has been thought, at least in particular contexts. The last view, it will be argued, is to be preferred.⁵

The point about 'government' is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority. Prior to 1960 Belgium had that right, which it transferred to the new entity. Of course the Congo could thereafter have disintegrated; none the less, by granting independence, Belgium estopped itself from denying the consequences of that independence. There was thus no international person as against whom recognition of the Congo could be illegal. *Prima facie* a new State granted full formal independence by a former sovereign has the international right to govern its territory:⁶ hence the United Nations action in support of that right. On the other hand, in the revolutionary situation no such estoppel exists and (in general⁷) statehood can only be obtained by effective and stable exercise of governmental powers.⁸ Although acquisition of territory does not provide an exact analogy, the difference is the same as between cession and prescription.

The position of Finland in 1917-18 provides a good example of the latter situation. Finland had been an autonomous part of the Russian Empire from 1807; it declared its independence after the November Revolution. Its territory was thereafter subject to a series of military actions and interventions, and it was not until after the defeat of Germany by the Entente and the removal of Russian troops from Finnish territory by Sweden that some degree of order was restored. In those circumstances it was not surprising that the Commission

¹ S.C. Res. 142, 7 July 1960; G.A. Res. 1480 (XV), 20 September 1960.

² Cf. G.A. Res. 1974 (ES-IV), 20 September 1960 (70-0: 11), para. 6.

³ S.C. Res. 169, 24 November 1961 (9-0: 2).

⁴ This was, it seems, the older view: Baty, *American Journal of International Law*, 28 (1934), pp. 444-5. Higgins describes the Congo's U.N. admission as a derogation from 'the fairly distinct pattern of consistent adherence to the requirement of a stable and effective government': *Development*, pp. 21-2.

⁵ Cf. the position in Cyprus at various stages after 1960: *A.G. v. Ibrahim*, I.L.R., vol. 48, pp. 6 (1964); and the cases of Ruanda and Burundi, discussed by Higgins, *Development*, pp. 22-3.

⁶ See further *post*, pp. 134-7.

⁷ For a possible qualification see *post*, pp. 161-2.

⁸ For the test of independence in cases of secession see *post*, pp. 137-8.

of Jurists appointed by the League to report on certain aspects of the *Aaland Islands* dispute were of opinion that,

for 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 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 that time onwards it was possible to re-establish order and normal political and social life, little by little.¹

The test applied, with comparative strictness, by the Jurists may be taken accurately to state the requirement of government in a secessionary situation. The Commission of Rapporteurs, on the other hand, disagreed with the Jurists on this point, because of the importance they attached to Soviet recognition of Finland,² and, more particularly, because of Finland's continuity of personality before and after 1917. They therefore applied rules relating to the restoration of law and order in Finnish territory, and to the legality of foreign assistance for that purpose,³ rather than the stricter rules relating to the creation *ab initio* of stable government in a new State.⁴

The requirement of government thus has the following legal effects. Negatively, the lack of a coherent form of government in a given territory militates against that territory being a State, in the absence of other factors, such as the grant of independence to that territory by a former sovereign. The continued absence of a government will tend to the dissolution of any State in that area. Certain, particularly nomadic, tribes do not have government in the sense required and so are not States, though they may have a more limited legal personality.⁵ Positively, the existence of a system of government in, and referable to, a specific territory indicates without more a certain legal status, and is in general a pre-

¹ *League of Nations Official Journal*, Special Supplement No. 4 (1920), pp. 8-9.

² *League of Nations*, Council Doc. B7 21/68/106 (1921), p. 22.

³ *Ibid.*, p. 23.

⁴ Larnaude and Struycken, two of the Commission of Jurists, later reaffirmed their view before the Council: *League of Nations Official Journal*, September 1921, p. 697. Huber was absent and could not give an opinion.

⁵ Cf. the status of the nomadic tribes of the Western Sahara in 1884-5: *Western Sahara* opinion, *I.C.J. Reports*, 1975, p. 12 at pp. 39 (majority opinion), 85-7 (Judge Ammoun), 75 (Judge Gros), 124 (Judge Dillard), 171 (de Castro).

condition for statehood. Continuity of government in a territory is one factor determining continuity of the State concerned, as well as continuity between different forms of legal personality.¹ And, although the law distinguishes States from their governments, normally only the government of a State can bind that State, for example, by treaty. The existence of a government in a territory is thus a precondition for the normal conduct of international relations.

To summarize, statehood is not 'simply' a factual situation but a legally defined claim of right, specifically to the competence to govern a certain territory. Whether the asserted right exists depends both on the facts and on whether it is disputed. Like other territorial rights, government as a pre-condition for statehood is thus, after a certain point, relative. But it is not entirely so: each State is an original foundation predicated on a certain basic independence. This was represented in the Montevideo formula by 'capacity to enter into relations with other States'.

4. CAPACITY TO ENTER INTO RELATIONS WITH OTHER STATES

Capacity to enter into relations with States is no longer, if it ever was, the exclusive prerogative of States.² On the other hand, States pre-eminently possess that capacity; but this is not a criterion, merely a consequence, of statehood, and one which is not constant but depends on the status and situation of particular States.³ It might still be said that *capacity* to enter into the full range of international relations is a useful criterion.⁴ But capacity or competence in this sense depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of such relations so that no other entity both carries out and accepts responsibility for them. In other words, capacity to enter into relations with other States, in the sense in which it might be a useful criterion, is a conflation of the requirements of government and independence. To the latter we must now turn.

5. INDEPENDENCE

Independence is the central criterion of statehood.⁵ As Judge Huber stated in the *Island of Palmas* case:

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 the exclusive competence of the State

¹ See generally Marek, *Identity and Continuity*, *passim* (cf. Gentili, *De Jure Belli* (1612), Bk. I, Ch. 23, §§ 192-3).

² *Supra*, p. 109.

³ *Ibid.*

⁴ Cf. Montevideo Convention, *supra*, p. 111 n. 1, Art. 1 (d); *Restatement 2nd, Foreign Relations Law of the United States*, §§ 4, 100 (c).

⁵ See Higgins, *Development*, pp. 25-42; Kamanda, *Legal Status of Protectorates*, pp. 188-91; Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 455-90; and works cited *infra*.

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.¹

It must first be said that different legal consequences may be attached to lack of independence in specific cases. Lack of independence can be so complete that the entity concerned is not a State but an internationally indistinguishable part of the dominant State. A grant of 'independence' may, in certain circumstances, be a legal nullity, or even an act engaging the responsibility of the grantor, as with so-called 'puppet States'. Or an entity may be independent in some basic sense 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.

Moreover, it must be emphasized that the criterion of independence as the basic element of statehood in international law may operate differently in different contexts. In particular, it is important to distinguish independence as an initial qualification for statehood, and as a criterion for its continued existence.² For example, the presumption of continuity of existing legal rights, which may be regarded as a general principle of law, may operate in different directions in the two cases. A new State formed by secession from a metropolitan State will have to demonstrate substantial independence, both formal and real, before it will be regarded as definitively created.³ On the other hand, the independence of an existing State is protected by international law rules against illegal invasion and annexation, so that the State may, even for a considerable time, continue to exist as a legal entity despite lack of effectiveness.⁴ But where a new State is formed by grant of power from the previous sovereign (the situation referred to here as devolution⁵), considerations of pre-existing rights are no longer as relevant and independence is treated as a predominantly formal criterion.⁶ These three situations will be referred to in more detail later; first, some more general discussion of the notion of independence is required.

(i) 'Independence' and the Austro-German Customs Union case

The different meanings or applications of 'independence', referred to above, are also relevant to an examination of the 'leading case' on independence, the *Austro-German Customs Union* case,⁷ which involved the meaning of the term 'independence' in a treaty designed to guarantee the continuance of Austria and its separation from Germany; and the question of the putative loss of independence of an existing State. The Court was asked to advise whether the proposed customs union between Germany and Austria was consistent with

¹ *Reports of International Arbitral Awards*, vol. 2, p. 829 at p. 838 (1928).

² There is a further, related, distinction to be drawn between independence as a criterion for statehood, and independence as a right of States. Cf. Whiteman, *Digest*, vol. 5, pp. 88-124.

³ *Post*, pp. 157-8.

⁴ *Post*, p. 165.

⁵ O'Connell, *State Succession* (1967), vol. 2, pp. 88, 101, distinguishes 'revolutionary' from 'evolutionary secession'. Cf. also International Law Association, *The Effect of Independence upon Treaties* (1965), p. 1.

⁶ Cf. the Congo after 1960: *supra*, pp. 116-17; and for further elaboration see *post*, pp. 134-7.

⁷ *P.C.I.J.*, Series A/B, No. 41 (1931).

obligations of Austria under the Treaty of Saint-Germain and the Protocol of Geneva.¹ The judges were unanimous in holding that the proposed regime, based as it was on the equality of the two parties and with provision for withdrawal at twelve months' notice,² was not an 'alienation' of independence. Indeed, that proposition could 'scarcely be denied'.³ But, by eight votes to seven, the Court held the proposed union illegal. The majority opinion, while agreeing that Austria's independence was not 'strictly speaking' endangered within the meaning of Article 88, held that the proposed union was a 'special regime or exclusive advantages calculated to threaten [sc. economic] independence' within the meaning of the Protocol.⁴ Judge Anzilotti doubted whether the Protocol could, in any case, legally extend the Treaty, but held the union inconsistent with both Treaty and Protocol.⁵ A strong minority held it inconsistent with neither.⁶ The case has been subject to the most stringent criticism⁷; moreover it is one of those instances where a majority can be found against each possible *ratio decidendi*. Nevertheless, its importance in our context is much less than has been made out, for several reasons.

For it seems clear that the Protocol, with its emphasis on 'economic independence', asserted an extensive interpretation of Article 88. The Protocol seems to suggest that 'a special regime or exclusive advantages' threatening merely 'economic independence' were prohibited by Article 88, a point the majority expressly denied.⁸ Moreover, the various agreements were not concerned with the criteria for statehood but with the preservation of full independence as a (possibly unwelcome) duty incumbent upon Austria for the benefit of general European peace.⁹ This point was emphasized in the French submission, and in the oral argument of M. Basdevant,¹⁰ and was implicitly accepted in the majority opinion:

irrespective of the definition of the independence of States which may be given by legal

¹ By Art. 88 of the Treaty of St. Germain, 1919, Austria's independence was alienable except with the consent of the League Council; Austria undertook 'to abstain from any act which might directly or indirectly or by any means whatever compromise her independence . . . by participation in the affairs of another Power': *British and Foreign State Papers*, vol. 112, pp. 317, 360. By Protocol No. 1 of 1922, Austria again undertook not to alienate its independence, to abstain from all 'negotiation and from any economic or financial undertaking calculated directly or indirectly to compromise this independence', and not to grant 'to any State whatever a special régime or exclusive advantages calculated to threaten this independence': *British and Foreign State Papers*, vol. 116, p. 851 (italics added).

² Protocol of Vienna, Arts. XI (3), XII: *British and Foreign State Papers*, vol. 134, p. 991. The proposal was in fact abandoned prior to the Court's judgment.

³ Majority opinion, *P.C.I.J.*, Series A/B, No. 41 at p. 52; Judge Anzilotti, *ibid.*, at pp. 66-7.

⁴ *Ibid.*, p. 52.

⁵ *Ibid.*, pp. 64, 73.

⁶ *Ibid.*, pp. 81-7.

⁷ Brierly, in Waldock and Lauterpacht (eds.), *The Basis of Obligation in International Law and Other Papers* (1958), pp. 242-9; Morgenthau, *Politics among Nations* (5th edn., 1973), p. 426; Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 47-9.

⁸ *P.C.I.J.*, Series A/B, No. 41, p. 52.

⁹ *Ibid.*, p. 57 (Judge Anzilotti).

¹⁰ Cf. French submission, *P.C.I.J.*, Series C, No. 53, at p. 128: 'le Traité de Saint-Germain et le protocole de 1922 . . . ont envisagé non la conception théorique de l'indépendance des États, mais l'indépendance de l'Autriche . . . telle qu'elle se comportait en 1919.' Emphasized in oral argument of Basdevant: *ibid.*, pp. 400, 404, 417. Cf. the remarks of M. Kaufmann, *ibid.*, pp. 508-9; Basdevant's reply, pp. 566-7.

doctrine or may be adopted in particular instances in the practice of States, the independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.¹

This passage is often cited as a definition of independence, but it must be referred to its specific context. As a general definition of independence as the criterion of statehood it is much too absolute.

The minority opinion differed not so much over the definition of 'independence' for the relevant purposes as over the disputed questions of fact.² On the other hand, the definition of independence given by Judge Anzilotti has become the *locus classicus* and deserves quotation at length:

. . . (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 facto* independence which characterise the relation of one 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 the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.³

Two main elements are involved here: the separate existence of an entity within reasonably coherent frontiers; and the fact that the entity is 'not subject to the authority of any other State or group of States', which is to say, that it has over it 'no other authority than that of international law'.⁴ 'Separate existence' in this sense would seem to be dependent upon the criteria discussed already; that is, upon the exercise of substantial governmental authority with respect to some territory and people. Where this exists, the area concerned is potentially a 'State-area', but as Judge Anzilotti made clear, some further

¹ *P.C.I.J.*, Series A/B, No. 41, p. 45 (author's italics). Cf. the significantly wider terms of Art. 4 of the Austrian State Treaty, 1955: *United Nations Treaty Series*, vol. 217, p. 225, at p. 229.

² They thus gave a purely formal, and unhelpful, definition of independence: 'A State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails' (*P.C.I.J.*, Series A/B, No. 41, p. 77).

³ *Ibid.*, pp. 57-8. But cf. Anzilotti's view (a denial of any objective rules defining statehood): *op. cit.* (above, p. 107 n. 1).

⁴ Cf. Vattel, *Le droit des gens*, Bk. I, Ch. 1, §§ 5-11; sovereignty is 'the right to self-government', so that a people 'under the rule of another' is not a State.

element—the absence of subjection to the authority of another State or States—is necessary. Such a requirement appears to exclude two distinct situations. It may be that an entity, while not formally independent, operates in fact with substantial freedom in both internal and external affairs. This situation arises where formal or nominal claims are made to ‘suzerainty’ or ‘residual sovereignty’, or in a situation where the gradual grant of power from a metropolitan State to a former colony masks the emerging statehood of the latter. Alternatively, it may be that an entity formally independent is in fact under the direction of another State to the extent that its formal independence is nugatory or meaningless. The two situations correspond with an ambiguity in the word ‘authority’ or (in Vattel’s formulation) ‘rule’, which may mean a claim of right, or the actual exercise of power in derogation from such a claim. It is thus necessary to distinguish ‘formal’ from ‘actual’ independence, and to determine their relationship.¹

(ii) *The distinction between formal and actual independence*

(a) *Formal independence.* Formal independence exists where the powers of government of a territory (both in internal and external affairs) are vested in the separate authorities of the putative State. The vesting of power, in this sense, may be the result of the municipal law in force in the territory concerned, or it may be the result of a grant of full power from the previous sovereign; it may be established, or recognized, by bilateral or multilateral treaty. Formal independence thus involves, in Rousseau’s terminology, ‘*l’exclusivité de la compétence*’.² This aspect is best illustrated by examining the factors which have been regarded as relevant to formal independence.

1. *Situations not derogating from formal independence.* The following types of situation are not regarded, in international practice, as derogating from formal independence, although if extended far enough, they may derogate from actual independence.³

(i) *Constitutional restrictions upon freedom of action.* The written constitutions of many States contain legally enforceable restrictions on governmental action: these are, of course, entirely consistent with independence. An extreme case was the 1960 Constitution of the Republic of Cyprus.⁴ Provided no other State possesses discretionary authority to alter the constitution of the State concerned,⁵ the fact that the latter has no power even to change its Constitution is not a derogation from formal independence. Canada only acquired that power (and then with certain exceptions) in 1949, after more than 20 years of

¹ Marek, *Identity and Continuity*, pp. 162–89; Higgins, *Development*, p. 26.

² Rousseau, *Recueil des cours*, 73 (1948), pp. 171–253 at p. 220; and his *Droit international public* (1974), vol. 2, pp. 55–93.

³ Post, p. 126. Cf. Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 455–90.

⁴ Cmd. 1903 (1960), pp. 91–172. Cf. *British and Foreign State Papers*, vol. 164, p. 219; Emilianides, in *Mélanges Sefériadés* (1961), vol. 2, pp. 629–39; Xydis, *Cyprus, Reluctant Republic* (1973); Higgins, *Development*, pp. 33–4. See also Ehrlich, *Cyprus, 1958–1967* (1974), pp. 7–35.

⁵ This seems to have been an objection to Cracow’s independence: Ydit, *Internationalized Territories* (1961), pp. 95–108, at p. 107.

independence.¹ The power referred to is of course municipal legal authority: the people of a State normally have the international competence to change their constitution in violation of previous municipal law,² though here again Cyprus is an apparent exception.

(2) *Municipal illegality of the actual government of a State.* It is a further corollary of the rule that revolutions do not affect the continuity of the State, that the municipal illegality of its actual government is not a derogation from formal independence.³

(3) *Treaty obligations.* The International Court has frequently confirmed the principle that treaty obligations do not derogate from the formal independence of the States parties. In *The Wimbledon*, which concerned the effects on Germany of the Treaty of Versailles, the Court.

decline(d) to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right to enter into international engagements is an attribute of State sovereignty.⁴

And this principle was confirmed in a number of other decisions of the Permanent Court.⁵

(4) *The existence of military bases or other territorial concessions (whether under treaty or by reservation in a grant of independence).* Military or other territorial concessions do not, of themselves, constitute a derogation from formal independence. The sometimes extensive territorial concessions granted by the North African States and China nevertheless preserved the formal 'territorial integrity and political independence' of those States.⁶ One consequence of continued statehood in such situations seems to be the ability to cancel or avoid such arrangements, whether or not legally.⁷

(5) *The exercise of governmental competence on a basis of agency.* It is clear that the exercise of governmental competence by another international person or persons on behalf of and by delegation from a State is not inconsistent with formal independence. The foreign affairs and defence powers are quite often so delegated; as are certain economic or technical facilities. The important

¹ By the British North America Act (No. 2) 1949, s. 1.

² That is, revolutions do not affect the continuity of the State. See Marek, *Identity and Continuity*, pp. 24-73, and works there cited.

³ See the cases cited by Marek, *op. cit.* (previous note), pp. 38-42.

⁴ *P.C.I.J.*, Series A, No. 1 (1920), p. 25. The same argument was raised by Germany, and rejected, prior to signature of the Treaty of Versailles: Temperley, *History of the Peace Conference at Paris* (1920-4), vol. 2, pp. 397, 408.

⁵ *Exchange of Greek and Turkish Populations*, *P.C.I.J.*, Series B, No. 10 (1925), p. 21; *Jurisdiction of the European Commission of the Danube*, *P.C.I.J.*, Series B, No. 14 (1927), p. 36; cf. Austrian Memorial in the *Customs Union* case, *P.C.I.J.*, Series C, No. 53, pp. 91-3.

⁶ Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 482-8.

⁷ Higgins, *Development*, p. 32. On military 'servitudes' generally see *ibid.*, pp. 31-4; Esgain, in O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 42-97; Delupis, *International Law and the Independent State* (1974), pp. 200-23.

element is always that the competence is exercised not independently but in right of the State concerned.

(6) *The possession of joint organs for certain purposes.* The creation of joint organs to carry out certain governmental functions is a quite common feature of international relations. Thus Austria-Hungary possessed joint organs for foreign affairs, defence and currency, but Austria and Hungary arguably remained separate international entities.¹ The operations of the European Communities are not regarded as inconsistent with the independence of the member States.²

(7) *Membership of international organizations, even those possessing a degree of coercive authority.* Despite the extensive powers of the Security Council under the Charter, the United Nations 'is based on the principle of the sovereign equality of all its Members'.³ If United Nations membership preserves independence, *a fortiori* this is true so far of other international organizations, possessing lesser powers.

(8) *The existence of special legal relations between two States as a result of devolution.* Where a State comes into existence by gradual devolution, special relations may well continue to exist between the new and the old State. These may include common citizenship, special provision for immigration, extradition, and such matters, and special defence arrangements. Within certain limits such relations do not prejudice formal independence.⁴

2. *Situations regarded as derogating from formal independence.* Two basic situations may be regarded as derogating from what would otherwise be formal independence, as defined above.⁵

(1) *The existence, as a matter of international law, of a special claim of right, irrespective of consent, to the exercise of governmental powers.* Where a State claims the right to exercise governmental authority over a territory, the formal independence of that territory is in issue. This is an expression of Rousseau's requirement of '*l'exclusivité de la compétence*'.⁶ Excluded from the category of

¹ This was the view taken by the Permanent Court in its opinion on the *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Series B, No. 8 (1923) at pp. 42-3 (interpretation of the term 'international frontier'). Cf. *Administrative Decision No. 1* (1927), *Reports of International Arbitral Awards*, vol. 6, p. 203 at pp. 209-10 (Commissioner Parker); *Reparations Commission v. German Government* (1924), *Reports of International Arbitral Awards*, vol. 1, pp. 440-1 (Arbitrator Beichmann). Marek, *Identity and Continuity*, pp. 204-7, argues that Austria-Hungary before 1918 was a single international entity.

² '[T]he Community is not a State, especially not a federal State, but a *sui generis* community in the process of progressive integration, an "inter-State institution" within the meaning of Article 24 (1) German Constitution': *Internationale Handelsgesellschaft mbH v. Einfuhr Vorratsstelle für Getreide und Futtermittel*, [1974] 2 C.M.L.R. 540 (German Federal Constitutional Court); and cf. *N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Tariefcommissie*, [1963] C.M.L.R. 105 at p. 129 (European Court of Justice).

³ Charter Art. 2 (1). On the relationship between State sovereignty and the Charter see also Bourquin, *L'état souverain et l'organisation internationale* (1959); Ninčič, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (1970); Korowicz, *Organisations internationales et souveraineté des états membres* (1961), pp. 185-257.

⁴ Cf. the relations between independent members of the Commonwealth: Jennings, *this Year Book*, 30 (1953), pp. 320-51.

⁵ *Supra*, p. 123.

⁶ *Recueil des cours*, 73 (1948), pp. 171-253 at p. 220.

'special claims of right' are rights under general international law: for example, the rights of a belligerent occupant. Included in the category 'special claim of right' for example would be the claim of the Government of Great Britain to bind the Dominions, without their separate consent, to the Treaty of Lausanne, 1924;¹ or the claim of the Porte to conclude concessions for lighthouses in Crete and Samos.² The acceptance by the Nationalist authorities of the proposition that Taiwan is part of a single China is perhaps a further example.³ In this context it is crucial that the governmental authority is claimed as of right, and not on a basis of consent by the local unit.

(2) *Discretionary authority to determine upon and effect intervention in the internal affairs of the putative State.* Such authority, whether or not the result of a treaty or other consensual arrangement, would appear to be inconsistent with formal independence. A most striking example was the British claim to 'paramountcy' over the Indian Native States.⁴ What is crucial here is *la compétence de la compétence*; the undetermined powers of intervention possessed by France in respect of Monaco, for example, have led to doubts concerning the latter's independence.⁵ The point is that, in the absence of machinery for adjudication, a broad discretionary power of intervention could always be used with colour of right to deny local independence.

(b) *Actual independence.* Apart from formal independence, it may be necessary to inquire further as to the actual or effective independence of the putative State: this element corresponds to Rousseau's '*plénitude de la compétence*'.⁶ Actual independence is essentially relative, or in Rousseau's term 'quantitative': the difficulty of applying it arises because it is a matter of degree.⁷

Actual independence, for our purposes, may be defined as the minimum degree of real governmental power at the disposal of the authorities of the putative State, necessary for it to qualify as 'independent'. It is thus a matter of political fact, and its evaluation in specific cases will tend to raise, whether in an international or a municipal forum, particularly acute problems. Nevertheless, it need not be said that the problem 'escape[s] all definition'.⁸ The way in which a rule is applied to the sorts of factual situations that arise is hardly less of a legal problem than the enunciation of the rule itself: this is especially

¹ See Dawson, *The Development of Dominion Status 1900-1936* (1937), pp. 258-72; cf. Keith, *The Sovereignty of the British Dominions* (1929), pp. 390-6.

² *Lighthouses in Crete and Samos, P.C.I.J., Series A/B, No. 71* (1937).

³ Cf. *supra*, p. 93 n. 9.

⁴ As to which see Fawcett, *The British Commonwealth in International Law* (1963), pp. 126-9; Sen, *The Indian States* (1930); Somervell, *this Year Book*, 11 (1930), pp. 55-62; cf. *Rann of Kutch* arbitration, *International Legal Materials*, 7 (1968), pp. 633 at pp. 657, 675, 696.

⁵ Another example was Cuba under the Treaty of Future Relations of 22 May 1903, incorporating the Platt Amendment in the Act of Congress of 2 March 1901: *British and Foreign State Papers*, vol. 96, p. 548, especially Art. 3. The debate among international lawyers is summarized by Fitzgibbon, *Cuba and the United States 1900-1935* (1935), pp. 89-93. The 1903 Treaty was abrogated by a much less draconian Treaty of 29 May 1934: *League of Nations Treaty Series*, vol. 153, p. 369.

⁶ *Recueil des cours*, 73 (1948), p. 171 at p. 248.

⁷ Cf. *Duff Development Co. v. Government of Kelantan*, [1924] A.C. 797, at p. 814 *per* Viscount Finlay.

⁸ Marek, *Identity and Continuity*, p. 112.

so when the rule is of a general, and thus unhelpful, character. An examination of the practice reveals, first, that the degree of actual independence necessary to satisfy this branch of the rule may be minimal, but that in cases of conflict of legal rights the rule is of considerable importance; and, secondly, that there are several presumptions as to the existence or otherwise of actual independence, which aid in application, and indeed condition the application, of the rule. Again the rule may be illustrated by an examination of factors which have been regarded as relevant.

1. *Situations not derogating from actual independence*

(1) *Diminutive size and resources.* Diminutive size and resources are consistent with both formal and actual independence, as has been seen.¹

(2) *Political alliances: Policy orientation between States.* The existence of close political and ideological links between States is a feature of post-war (indeed of any) international relations. Such links do not of themselves derogate from actual independence.²

(3) *Belligerent occupation.* Pending a final settlement of the conflict, belligerent occupation does not affect the continuity of the State.³ The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist. This is strictly not an application of the 'actual independence' rule but a legal exception from it.

(4) *Illegal intervention.* Equally, illegal intervention, in the absence of *debellatio*, does not extinguish either the formal or (up to a point) the actual independence of the State. The Soviet invasion of Czechoslovakia, and subsequent events there, were not regarded by other States as putting an end to the existence of Czechoslovakia as a State. The same was true of the earlier intervention in Hungary, although the credentials of the Hungarian delegation were not approved in the period 1956-63, as a gesture of disapproval of the Kadar government.⁴ No equivalent action has been taken in the Czechoslovak case. On the other hand, the continuance of even an illegal occupation for a sufficiently

¹ *Supra*, pp. III, 114.

² This issue was raised by the Anglo-Iraqi Treaty of Alliance of 30 June 1930, *British and Foreign State Papers*, vol. 132, p. 280, intended to regulate relations after the termination of the Mandate. The treaty provided for 'co-ordination' of foreign policies (Art. 1), mutual assistance in war (Art. 4), and granted to the U.K. extensive facilities in time of war, including two permanent air bases (Art. 5). The 'sovereign rights of Iraq' were reserved, and the treaty was to be renegotiated after twenty-five years. The new treaty, it was agreed, must still preserve Britain's essential communications (Art. 11). The Permanent Mandates Commission, while expressing certain reservations, nevertheless concluded that . . . 'although certain of the provisions of the Treaty . . . were somewhat unusual in treaties of this kind, the obligations entered into by Iraq towards Great Britain did not explicitly infringe the independence of the new State': Main, *Iraq from Mandate to Independence* (1955), pp. 104-12. The Treaty of Alliance came into force upon Iraq's admission to the League on 3 October 1932. It was replaced by a Special Agreement of 4 April 1955: *British and Foreign State Papers*, vol. 162, p. 112, when the British bases were closed down.

³ Cf. Marek, *Identity and Continuity*, pp. 73-216. For Iran (1941-6), see *infra*, p. 134.

⁴ Higgins, *Development*, pp. 158-9; other cases of allied and belligerent occupation are discussed *infra*, pp. 130-3.

long time after the cessation of hostilities will lead to the extinction of the occupied State by *debellatio*:¹ this must be taken to have been the case with Hyderabad.²

2. *Situations derogating from actual independence.* Three factors are relevant here.

(1) *Substantial illegality of origin.* Where an entity comes into existence in violation of certain basic rules of international law, its title as a 'State' is in issue. Traditionally, international law in matters of statehood has been based almost exclusively on the principle of effectiveness;³ although illegality of origin might be considered as grounds for non-recognition. The question whether, and to what extent, the modern law has developed criteria of statehood not based on effectiveness is examined in the next section.

(2) *Entities formed under belligerent occupation.* However in at least one case pre-1939 international law appeared to condition effectiveness by considerations of legality. As has been said, it was, and remains, clear law that belligerent occupation does not deprive the occupied State of its independence, though it might suspend the exercise of the powers of the State.⁴ As a result, even before 1939, any new 'State' established during belligerent occupation was presumed not to be independent.⁵ But it is important to note that this was rather a presumption than a substantive rule. The independence of the illegal entity was probably not precluded, although of course its formation might attract the responsibility of the occupying State.

This distinction between illegality of origin and effectiveness was, however, blurred during the Manchurian crisis. There, as the Lytton Commission found, Japanese action contrary both to the Covenant and the Kellogg-Briand Pact had resulted in the establishment of the 'State of Manchukuo', a puppet State under Japanese control.⁶ This inspired the well-known 'Stimson doctrine': the refusal of the United States, and of the large majority of the League, to 'admit the legality of any situation *de facto* . . . which may impair . . . the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China . . .' or to recognize 'any situation . . . brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928' [or, in the case of League Members, of the Covenant].⁷ In its

¹ *Post*, p. 174.

² As to which see Higgins, *Development*, pp. 51-2; Eagleton, *American Journal of International Law*, 44 (1950), pp. 277-302; *Foreign Relations of the United States*, 1948-V, pp. 360-1, 373, 411, 417.

³ See Kelsen, *Principles of International Law* (2nd edn., 1966), pp. 420-33; Touscoz, *Le principe d'effectivité dans l'ordre international* (1964), pp. 125-8, and *post*, pp. 144-8, for further discussion.

⁴ *Supra*, p. 127.

⁵ Marek, *Identity and Continuity*, pp. 111-26: the same rule applies to puppet governments.

⁶ Manchukuo's independence was proclaimed on 18 February 1932, under the former Chinese Emperor Henry Pu-yi. The regime was eventually recognized by or had relations with Japan (see the Protocol of Good Neighbourship, 1932: *British and Foreign State Papers*, vol. 135, p. 637), San Salvador, Germany, Italy and Poland.

⁷ Secretary of State to Chinese and Japanese Govts., 7 January 1932: *Foreign Relations of the United States*, 1932-III, p. 7; endorsed by Assembly Resolution of 24 February 1933:

reply to the Stimson note, the Japanese Government, while denying responsibility, doubted whether 'the impropriety of means necessarily and always avoids the end secured',¹ a point the 'academic validity' of which was conceded by some commentators.² Since Manchukuo was both illegally created and not independent, the need to distinguish the two points did not arise. But extensive inquiry by the League and its Committees into the reality or otherwise of Manchurian independence would have been unnecessary if the illegality of its creation operated as a permanent bar on statehood.³

For present purposes then, the following rules were established by 1945:

(i) Where a putative State (or government) was created in territory under belligerent occupation, there was a strong presumption against its real independence.

(ii) A non-independent 'State' (or 'government') so established was regarded as no more than the agent of the belligerent occupant, with no more competence to bind the occupied State than its principal. The status of these rules in the modern law will be discussed in the next section.⁴

(3) *Substantial external control of the State.* It is established that an entity which, while possessing the formal marks of independence, is in substance subject to foreign domination and control is not 'independent' for the purposes of statehood in international law. In applying this principle, two difficulties arise. First, in certain cases at least, external interference may not be regarded as 'foreign', and may not therefore derogate from the statehood of the entity concerned. For example, the fact that a foreign citizen is head of State does not necessarily mean that the State concerned is subject to foreign control, if the head of State operates as the local government or upon the advice of such a government.⁵ But these examples are exceptional, and limited in scope. What is necessary in this type of case is a relatively precise and binding understanding as to the capacity in which the various powers are exercised.⁶

Secondly, and more generally, the problem is to determine at what point foreign influence becomes 'control' or 'domination'. This is notoriously difficult. However, examination of some of the cases of 'non-independent States' may help to indicate certain basic criteria.

(I) *Protected States.* An illustration of the problem of lack of real independence is provided by the case of Kelantan. Under an Agreement of 1910 the Sultan

League of Nations Official Journal, Special Supplement No. 101/I, p. 87. Japanese action in Manchuria was in violation of Art. 12 of the Covenant, but in view of the fact that the hostilities were not part of a declared 'war', there was doubt whether Japan was technically in breach of Art. 16 ('resort to war'): Lauterpacht, *American Journal of International Law*, 28 (1934), pp. 43-60. There was, however, a clear breach of Art. 2 of the Pact of Paris: *British and Foreign State Papers*, vol. 128, p. 447. See also Jessup, *Birth of Nations* (1975), pp. 395-34.

¹ *American Journal of International Law*, 26 (1932), p. 343.

² Wright, *ibid.*, pp. 342-8 at p. 345. ³ See also *post*, pp. 165-6. ⁴ *Post*, pp. 164-73.

⁵ This is the case with those Commonwealth Members which have retained the Crown as Head of State. For the curious case of Rajah Brooke, see Smith, *Great Britain and the Law of Nations*, vol. 2, pp. 83-96.

⁶ This is the crucial problem with Andorra: see this writer, *Revue de droit international, des sciences diplomatiques et politiques*, 55 (1977), pp. 259-73.

agreed to have no political relations with any foreign power except through the British Government and to follow in all matters of administration (save those touching the Mohammedan religion and Malay custom) the advice of a British adviser.¹ The House of Lords was subsequently faced with the issue of the sovereign immunity of the Sultan in British courts, which was settled in the Sultan's favour by a Foreign Office certificate. The substantive point was, however, raised in an interesting way: it was said that the certificate (which incorporated the text of the 1910 Agreement) was self-contradictory, and that the matter was thus effectively still open. Counsel for the Company argued that [t]he distinguishing mark of an independent sovereign power is that it has reserved to itself the right to manage its own internal affairs, but by the terms of the agreement . . . the King of England has the right to appoint a resident official to tell the Sultan . . . how he is to manage the internal affairs of his country. That is wholly inconsistent with the idea of an independent sovereignty as that term is understood by jurists of repute . . .²

For the Sultan it was argued merely that 'some dependence on the protecting power is not inconsistent with sovereignty'.³ The majority of the Court held the certificate not to be contradictory since the Foreign Office must be taken to have considered the Agreement before determining the question: its determination was in any case conclusive, irrespective of conflict. However, Viscount Finlay and Lord Carson (who dissented on a different point) disagreed on the question of real independence. Viscount Finlay thought that

[w]hile there are extensive limitations upon its independence the enclosed documents do not negative the view that there is quite enough left to support the claim to sovereignty.⁴

Lord Carson, on the other hand, thought it

difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law.⁵

The case was perhaps borderline, but it is difficult to see that the Government of Kelantan had much, if any, real power at all. Lord Carson was thus probably right on the general issue, but as Fawcett has pointed out, British practice has favoured the immunity of even merely formal sovereigns or princes.⁶

(II) *So-called puppet States.* The term 'puppet State' is used to describe nominal sovereigns under effective foreign control, especially in cases where the establishment of the puppet State is intended as a cloak for manifest illegality. The creation of Manchukuo has already been mentioned: in that case the Lytton Commission's Report of October 1932 found as a fact that:

The independence movement, which had never been heard of in Manchuria before

¹ *British and Foreign State Papers*, vol. 103, p. 518, Arts. 1-2.

² *Duff Development Co. v. Government of Kelantan*, [1924] A.C. 797, at p. 800.

³ *Ibid.*, p. 803.

⁴ *Ibid.*, p. 816.

⁵ *Ibid.*, p. 830.

⁶ *The British Commonwealth in International Law* (1963), pp. 126-9.

September 1931, was only made possible by the presence of Japanese troops and for this reason the present regime cannot be considered to have been called into existence by a genuine and spontaneous independence movement¹

—a conclusion endorsed by the League Assembly.² On this basis Manchuria was held to be still Chinese territory, although it remained in Japanese control until 1945. The Yalta Agreement provided merely that China would 'retain full sovereignty in Manchuria'.³ No formal action was deemed necessary for the reacquisition by China of the Three Provinces, and there was no reference to Manchuria in the Peace Treaty of 1951. In particular there was no retrocession or renunciation of title by Japan.⁴ This provides strong confirmation of the view that Manchuria remained under Chinese sovereignty in the period 1932–45.

The same conclusion must be reached with regard to two European 'States' established in German occupied territories. Slovakia was a nominally independent part of Czechoslovakia under German protection from 18 March 1939 to April 1945. It was accorded a certain degree of recognition at least *de facto* prior to September 1939,⁵ but there can be little doubt as to its puppet character.⁶ Croatia was also established on occupied (Yugoslavian) territory, between 1941 and 1945. A United States International Claims Commission held that Yugoslavia was not a successor State to Croatia, and that damage to property caused by the puppet State was not action 'by Yugoslavia':

Croatia embraced approximately one-third of the total area of Yugoslavia and approximately one-third of its population. At all times during the period of its existence as a so-called independent State, forces headed by Mihalovic and Tito conducted organized resistance within it. At no time . . . was Croatia's control of its territory and population complete. It was created by German and Italian forces and was maintained by force and the threat of force, and as soon as the threat subsided Croatia ceased to exist. . . . [I]t appears well established that . . . Croatia was . . . during its entire 4-year life, . . . subject to the will of Germany or Italy or both, in varying degrees, except as to civil administration matters. . . . It was unwanted by, and never became a part of, the permanent Government of Yugoslavia. It was not established through any dereliction on the part of the Government of Yugoslavia and that Government had no control over the acts of Croatia. It further seems clear that neither the Government of Yugoslavia nor its peoples received benefits from the takings alleged . . . Croatia is defined

¹ League of Nations Publication 1932 VII A.12, p. 71; in Wright *et al.*, *Legal Problems in the Far Eastern Conflict* (1941), pp. 57–8.

² Resolution of 24 February 1933: *League of Nations Official Journal*, Special Supplement No. 101/I, p. 87. *Contra* Cavaré, *Revue générale de droit international public*, 42 (1935), pp. 5–99.

³ Whiteman, *Digest*, vol. 3, pp. 600–26 at p. 600.

⁴ But by Art. 8 (a) Japan recognized *inter alia* 'any other arrangements by the Allied Powers for or in connection with the restoration of peace': *United Nations Treaty Series*, vol. 136, p. 45. Cf. *In re Nepogodin's Estate*, I.L.R., 22 (1955), p. 90 (Manchuria part of China in 1945).

⁵ Marek, *Identity and Continuity*, pp. 287–91 at p. 290. The U.S. did not recognize it: *Foreign Relations of the United States*, 1941–III, pp. 32–3. The Czechoslovak Government-in-exile was recognized by the Allies during the War: e.g., *Hansard*, H.C. Deb. (5th Ser.), vol. 356, col. 522 (20 December 1939); *ibid.*, vol. 373, col. 861 (18 July 1941). This must have involved withdrawal of the previous *de facto* recognition accorded to Slovakia. See also Lemkin, *Axis Rule in Occupied Europe* (1944), pp. 139–44; Langer, *Seizure of Territory*, pp. 207–44.

⁶ Marek, *op. cit.* (previous note); *Foreign Relations of the United States*, 1948–IV, p. 434; *contra* Mikus, *La Slovaquie dans le drame de l'Europe* (1955), pp. 97–204.

by contemporary writers as a 'puppet state' or 'puppet government', terms which appear to be of comparatively recent adoption in the field of international law. . . . A 'puppet state' or local *de facto* government such as Croatia also possesses characteristics of 'unsuccessful revolutionists' and 'belligerent occupants'. It is . . . settled that a State has no international legal responsibility to compensate for damage to or confiscation of property by either. . . . [F]or the reasons . . . given . . . the Government of Yugoslavia is not factually or legally a successor to the Government of Croatia.¹

Although the findings of fact, and the actual decision reached by the Tribunal, were undoubtedly correct, it is doubtful whether comparison of a puppet entity with a local *de facto* government is of much value. Puppet entities—whether 'States' or 'governments'—bind the existing State only so far as the Geneva Conventions allow:² different tests apply to genuine *de facto* governments. Moreover, even if a puppet entity extended over the entire State, its status would be the same; that is not true of *de facto* governments. Finally, it is clear that Croatia was a 'puppet State', not a 'puppet government' of an existing State. The distinction is not without consequences for the extinction or continuity of the previous State.

In the absence of general recognition or other special factors, the status of a puppet entity, and its international capacity, are therefore minimal. Thus a request for annexation or intervention made by the puppet Government of an admitted State is without international validity: the Baltic States annexed in 1940 by the Soviet Union provide the best example.³ Neither can a cession of territory by such a Government bind the State.⁴ It is established, in both types of case, that the existence of a puppet entity does not *per se* lead to the extinction of the previously existing State.⁵

The question remains how the puppet character of a given entity is to be determined. In practice this raises less difficulty than might have been thought. The presumption of puppet character of regimes constituted under belligerent occupation,⁶ or subsequent to illegal intervention or to the threat or use of force, is frequently of assistance. Apart from that, it is of course a question of fact. In the cases mentioned, the factors taken into account have included the following: that the entity concerned was established illegally, by the threat or use of external armed force; that it did not have the support of the vast majority of the population it claimed to govern; that in important matters it was subject to foreign direction or control;⁷ that it was staffed, especially in

¹ *Socony Vacuum Oil Co. Claim*, I.L.R., 21 (1954), p. 55 at pp. 58–62. Cf. the useful analysis by Sereni, *American Political Science Review*, 35 (1940), pp. 1144–51.

² See further *post*, pp. 180–1.

³ Marek, *Identity and Continuity*, pp. 375–416; *post*, pp. 175–6.

⁴ On the Lublin Government of Poland, see Lauterpacht, *Recognition*, p. 353 n. 1; but cf. Marek, *Identity and Continuity*, Pt. IX.

⁵ See further this writer, 'The Polish Question at Yalta and Potsdam', *Studies for a New Central Europe*, Series 4, No. 1 (1977), pp. 89–100.

⁶ *Supra*, p. 128.

⁷ But the influence of a belligerent occupant on a pre-existing government in the occupied State may not be enough: the Vichy regime was regarded as the genuine government of France until 1944. As a result de Gaulle's Free French were not accorded recognition as the French government-in-exile: see, e.g., *Hansard*, H.C. Deb. (5th ser.), vol. 371, col. 1713 (27 May 1941); Flory, *Le statut international des gouvernements réfugiés* (1952).

more important positions, by nationals of the dominant State. It was not regarded as relevant that certain individuals or groups (including minority groups) in the territory concerned carried out normal administrative functions, or constituted the formal government, if the elements mentioned above were present.¹ In such circumstances, any acts of a puppet entity must be regarded as void *ab initio*, as far as binding the previously effective State is concerned, except to the extent that they can be regarded as acts of the belligerent occupant itself,² and unless and until ratified by an effective government of the State concerned. Thus by Article 31 of the Peace Treaty of 1947, Italy recognized that all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7, 1939 to September 3, 1943, are null and void.³

(III) *Other cases of absence or loss of actual independence.* The category of non-independent entities is not, of course, closed; nor would much purpose be served by further detailed description.⁴ The basic contention is that the degree of actual independence necessary, as a matter of general international law, and apart from special requirements that may exist in particular cases, is fairly minimal.⁵ To prove lack of real independence, one must show foreign *control* overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a permanent basis.⁶

To establish such lack of independence, in the absence of foreign occupation or illegal military intervention, is thus to overcome a formidable burden of proof, though it may be said that in practice puppet or non-independent entities are often self-evident.⁷ Perhaps the most difficult case is that where an existing government remains in power during a period of foreign occupation

¹ Other cases of puppet entities include Napoleonic Holland (Marek, *Identity and Continuity*, pp. 170-3); the Kuusinen Government of Finland, 1939-40 (*ibid.*, pp. 66-8); and Albania, 1939-44 (*ibid.*, pp. 331-7). On the puppet government set up by the Japanese in the Philippines, see *Foreign Relations of the United States*, 1943-III, pp. 1105-7; United Nations Legislative Series, *Materials on Succession of States* (1967), pp. 143-6.

² Cf. *In re G.*, *Annual Digest*, 12 (1943-5), No. 151 (on the puppet governments in Greece during the Second World War); Ténékidès, *Revue générale de droit international public*, 51 (1947), pp. 113-33.

³ *United Nations Treaty Series*, vol. 49, p. 3.

⁴ Cf. Marek, *Identity and Continuity*, p. 336; and see generally Verhoeven, *Reconnaissance*, pp. 54-64, 93-9.

⁵ Cf. the interesting discussion in Hart, *The Concept of Law* (1961), pp. 216-17, where the requirement of independence is described as variable and essentially 'negative in force'. Kamanda, *The Legal Status of Protectorates in Public International Law*, pp. 188-91, goes so far as to describe it as a fiction. As a legal concept, however, although its operation is variable, it will often be far from 'fictional' in effect. The most important 'particular case' is secession in a non-colonial context, where substantial and continued independence is required: *post* pp. 137-8.

⁶ Brownlie, *Principles*, p. 76 (his italics); Eagleton, *International Government* (3rd edn., 1957), pp. 82-3, has 'regular control or direction by another State'.

⁷ The lengthy opposition to Mongolia's U.N. admission was, ostensibly at least, based on lack of effective independence. After ten rejections in the Security Council (1946-57) the Mongolian People's Republic was eventually admitted by S.C. Res. 166 (1960) (9-0:1, 1 n.p.); G.A. Res. 1630 (XVI), 27 October 1961 (accl.). Cf. the pertinent comments of Higgins, *Development*, pp. 28-30, 40; and see generally Friters, *Outer Mongolia and its International Position* (1951); Nemzer, *American Journal of International Law*, 33 (1939), pp. 452-64; Hackworth, *Digest*, vol. 1, pp. 75-6; Whiteman, *Digest*, vol. 3, pp. 600-16.

in time of war, a situation which occurs both with respect to allied and enemy forces. The case of Vichy France has been mentioned already.¹

The extent to which statehood may coexist with substantial lack of independence is demonstrated by the case of Iran under Allied occupation from 1941 to 1946. In August 1941, Soviet and British forces occupied Iran to forestall fears of impending German control. Both parties emphasized that they had no designs on Iranian sovereignty or territorial integrity² and that the occupation of the country would be temporary.³ The occupation was followed by a change in government, Reza Shah Pahlevi replacing his father. The former was not regarded as a puppet government, and the change in government was widely recognized.⁴ The American view was that the British and Russian occupation was necessary and justified, although fears were expressed as to the future independence of Iran.⁵ At the Teheran Conference, the three Allies reaffirmed 'their desire for the maintenance of the independence, sovereignty and territorial integrity of Iran.'⁶ Under these circumstances, there was little justification for any view that Iran had in some way ceased to exist, despite the inability of the Iranian government effectively to control events in parts of its territory during the war.⁷

(iii) *The relationship between formal and actual independence*

In discussing the relationship between the notions of formal and actual independence, it is necessary again to refer to the different contexts in which the problem arises.⁸ In some situations independence tends to be a purely formal criterion; in others, a substantial degree of actual or material independence is required. The three most significant such situations will be referred to in turn.

(a) *Devolution.* Like the competence to cede territory, the competence to transfer governmental power in part of the metropolitan territory to a new State appears to be regarded as an attribute of State sovereignty.⁹ There is, however, this difference, that in the latter case a new legal person is created, and the legal position of third States is *pro tanto* affected. The power is thus an important one, but it would seem that there are relatively few legal limitations to its

¹ *Supra*, p. 132 n. 7.

² *Foreign Relations of the United States, 1941-III*, p. 439. See also the Tripartite Treaty of Alliance of 29 January 1942: *British and Foreign State Papers*, vol. 144, p. 1017, Arts. I, 4, 6.

³ *Ibid.*, and cf. *Foreign Relations of the United States, 1941-III*, p. 443.

⁴ *Ibid.*, p. 462.

⁵ Memorandum of 23 January 1943: *ibid.*, 1943-IV, pp. 331-3; cf. pp. 378-9.

⁶ Declaration regarding Iran, 1 December 1943: *ibid.*, p. 413.

⁷ For the Soviet refusal to evacuate northern Iran, and the Azerbaijan secession movement, see *ibid.*, 1945-VIII, pp. 359-522; *ibid.*, 1946-VIII, pp. 289-567; Hamzavi, *Persia and the Powers, An Account of Diplomatic Relations 1941-1946* (1946). For a strong application of the same presumption in favour of continued independence, cf. *Restitution of Household Effects belonging to Jews deported from Hungary* (1965), I.L.R., vol. 44, p. 301 (Hungary under German control, 1938-44). The decision would undoubtedly have been different if an occupied *enemy* State's legislation had been in point.

⁸ Cf. *supra*, p. 120.

⁹ Pufendorf, *De Jure Naturae et Gentium Libri Octo*, Bk. VII, Ch. 3, § 690; *supra*, p. 96.

exercise. That this is so is no doubt due to the absence of any political desire, and, perhaps, any need, to regulate the number of new States.

A variety of means has been used to transfer competence to the local entities: municipal legislation,¹ the termination of treaties of protection,² the conclusion of an agreement in the nature of a treaty between the former sovereign and the new State,³ or a combination of some of these methods.

The effect of metropolitan consent or recognition in these situations is amply demonstrated in State practice. In a study of United States recognition policies with respect to sixty new States, O'Brien and Goebel note that forty-five States were accorded 'instantaneous' or even 'anticipatory' recognition.⁴ Such recognition would have been quite improper without the consent or acquiescence of the previous sovereign.⁵ It is thus not the case in modern practice that 'the mere declaration by the metropolitan State that independence has been granted is not of itself sufficient'.⁶ On the contrary, modern practice demonstrates with some consistency the proposition that, prima facie, a new State granted full formal independence by the former sovereign has the international right to govern its territory as a State. The Congo after 1960, which possessed full formal independence but very little control in practice, is a clear example.⁷

On the other hand, where the grant of independence is fictitious or falls short of the formal relinquishment of control by the previous sovereign, different considerations apply. The cases of Syria and Lebanon (1942-6) provide a good illustration. These two 'A' Mandates had been 'provisionally recognized' as independent in 1919, but had remained under effective French control until 1940.⁸ In 1941, Allied Forces evicted the Vichy French administration and installed a Free French administration under General Catroux. By proclamation of 27 September 1941 the French Delegate-General purported to transfer to Syria

all rights and prerogatives of an independent and sovereign State, limited only by the exigencies of the war and the security of its territory.⁹

¹ Cf. Roberts-Wray, in Anderson (ed.), *Changing Law in Developing Countries* (1963), pp. 43-62; *Liyanage v. R.*, [1967] 1 A.C. 259 at p. 286.

² e.g. Kuwait: see Al Baharna, *The Legal Status of the Arabian Gulf States* (1968), p. 114; Exchange of Notes of 19 June 1961; *British and Foreign State Papers*, vol. 166, p. 112. Cf. Pillai and Kumar, *International and Comparative Law Quarterly*, 11 (1962), pp. 108-30; O'Brien and Goebel, in O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 165-7.

³ e.g. Articles of Agreement for a Treaty between Great Britain and Ireland, 6 December 1921, *League of Nations Treaty Series*, vol. 26, p. 10.

⁴ O'Brien and Goebel, loc. cit. (above, n. 2), pp. 207 ff., especially at p. 212. In only two cases (India and Burma) was recognition anticipatory of independence by more than a few days. Of the thirteen cases of delayed recognition, three (Senegal, Guinea and probably Morocco) were political and two (Nepal and Yemen) were probably the result of the isolation of the entities in question. In the other eight cases subsisting disputes, or doubts about independence, were regarded as justifying the withholding of recognition. Cf. also Myers, *American Journal of International Law*, 55 (1961), p. 703; Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 66-89; Verhoeven, *Reconnaissance*, pp. 12-19.

⁵ *Post*, pp. 137-8.

⁶ Hone, *Report of International Law Conference, 1960*, pp. 14-16, cited O'Brien and Goebel, loc. cit., (above, n. 2), p. 308 n.

⁷ *Supra*, pp. 106-7.

⁸ Cf. Whiteman, *Digest*, vol. 2, pp. 188-9.

⁹ *Foreign Relations of the United States, 1941-III*, p. 786. Cf. Whiteman, *Digest*, vol. 2, p. 189

The United Kingdom shortly accorded recognition to Syria and Lebanon,¹ but the United States declined to do so,² agreeing only to accredit a 'diplomatic agent'.³ In March 1943, when General Catroux replaced the existing Syrian regime with a new provisional government,⁴ Secretary of State Hull described the change as 'essentially only a replacement of one French-appointed regime for another'.⁵ While accepting the need for control of certain aspects of government by the military authorities, the State Department required 'a considerable degree of independence' with respect to civilian activities.⁶ Specifically, Acting Secretary of State Willis on 22 August 1943 described his Government's

established policy to defer recognition of another executive until:

(1) It is in possession of the machinery of State, administering the government with the assent of the people thereof

(2) It is in a position to fulfil the international obligations and responsibilities incumbent upon a sovereign State under treaties and international law. We welcome the successful re-establishment of constitutional government in Syria as an important step toward the fulfilment of these conditions, but believe that there must be an effective transfer of substantial authority and power to the new government before serious consideration can be given to the extension of full recognition.⁷

In November 1943, after elections had been held, the French Delegate-General once again removed a local (in this case Lebanese) government—an action reversed only after strong Allied protests.⁸ There followed an 'accelerated transfer of governmental powers': on 5 September 1944, the United States concluded that the local Governments may now be considered representative, effectively independent and in a position satisfactorily to fulfil their international obligations and responsibilities.⁹

'Full and unconditional' recognition followed, despite the continued presence of French troops in the Levant and the failure of the French and local governments to agree on a treaty of future relations. In the American view, the war powers exercised by the French and British authorities . . . could not be

(Lebanon). However, a French *aide-mémoire* at the same time argued that, because the Mandate required termination by the League, 'the regime . . . set up in Syria during the war cannot be anything but provisional': *Foreign Relations of the United States, 1941-III*, p. 791.

¹ Cf. *Hansard*, H.C. Deb. (5th ser.), vol. 393, col. 157 (27 October 1943).

² Memorandum of 16 December 1941: *Foreign Relations of the United States, 1941-III*, p. 813.

³ '[T]he Department contemplates the extension only of limited recognition to Syria and Lebanon, at least for the present. Since diplomatic agents are accredited by the U.S. to areas such as Morocco which are less than fully independent, the establishment of such a rank in Beirut would be in accord with the existing situation there': *ibid.*, 1942-IV, p. 656; cf. pp. 663, 665. Other reasons for the U.S. refusal were the uncertainty over the future French position in the area, and the maintenance of U.S. rights under the treaty of 1924: *British and Foreign State Papers*, vol. 120, p. 399.

⁴ It was argued that 'non-recognition by most foreign States justified in itself a continuing exercise of the mandatory power': *Foreign Relations of the United States, 1943-IV*, p. 956.

⁵ *Ibid.*, p. 966.

⁶ *Ibid.*, p. 970.

⁷ *Ibid.*, p. 987; repeated in a Memorandum of 25 October, *ibid.*, pp. 1000-1 and cf. also pp. 1007-8.

⁸ *Ibid.*, p. 1022 et seq.; Khadduri, *American Journal of International Law*, 38 (1944), pp. 601-20

⁹ *Foreign Relations of the United States, 1944-V*, p. 774.

considered inconsistent with or derogatory to the independence of the States, since these powers have been freely and willingly granted and have been repeatedly confirmed by the local governments.¹

The presence of French troops gave rise to further difficulty in May 1945, when force was used in an attempt to secure agreement on a treaty of future relations. A British ultimatum, accompanied by military intervention, ensued; but on this occasion, the illegality of French action was a corollary of the independence of Syria and Lebanon, and of their original membership of the United Nations.² The cases of Syria and Lebanon demonstrate how the criterion for independence in cases of devolution is a predominantly formal one, since even after October 1944 the local authorities were hardly fully effective in their own right.³

(b) *Secession*. On the other hand, where the local unit seizes its independence by secession, without the consent of the metropolitan State, both formal and a considerable degree of effective or actual independence are required. The strict test applied to Finland after 1918 by the League's Committee of Jurists⁴ accurately states the requirement of independence in such cases.⁵ Many other instances could be cited.

For example, in a letter to Lieven concerning the prospective Austrian recognition of Greece, Canning formulated the test as follows:

It is to be presumed that when the Austrian Plenipotentiaries speak of the acknowledgement of the Morea and the islands as an independent State, they intend that acknowledgement to be subject to the qualification that such State shall have shown itself substantially capable of maintaining an independent existence, of carrying on a Government of its own, of controlling its own military and naval forces, and of being responsible to other nations for the observance of international laws and the discharge of international duties.

These are questions of fact. By acknowledgement we can only acknowledge what is. We have never recognized in Spanish America any State in whose territory the dominion of the mother-country has not been practically extinguished, and which has not established some form of government with which we could treat.⁶

¹ *Ibid.*, p. 796 (5 October 1944).

² *Ibid.*, 1945-VIII, pp. 1093, 1124, 1130-1, 1179. For a full account see Longrigg, *Syria and Lebanon under French Mandate* (1958), pp. 317-38. Also Whiteman, *Digest*, vol. 2, pp. 188-98, 218-26; O'Brien and Goebel, *loc. cit.* (above, p. 135 n. 2), pp. 190-4.

³ As we have seen (*supra*, p. 124), continuance of foreign troops on local territory by agreement is not a derogation from *formal* independence.

⁴ *Aaland Islands* case, cited *supra*, p. 118 n. 1.

⁵ For the problem of self-determination in this context see *post*, pp. 161-4.

⁶ *British and Foreign State Papers*, vol. 40, p. 1216, 4 September 1826; reaffirmed *ibid.*, p. 1222. Cf. the Marquis of Lansdowne, *Hansard N.S.*, vol. 10, col. 974 (15 March 1824), cited Paxson, *The Independence of the South American Republics* (1903), p. 224. The Earl of Liverpool for the Government agreed that 'there could be no right (to recognize) while the contest was actually going on . . . so long as the struggle in arms continued undecided' (col. 999). But the timing of the actual decision, he asserted, was peculiarly a matter for the executive. In August 1823 the U.S. had also declined to recognize or aid the Greeks, pleading the constitutional incapacity of the President to declare war on Turkey, and the fact that Greek independence was not yet 'undisputed, or disputed without any rational prospect of success': *British and Foreign State Papers*, vol. 11, p. 300 (Adams).

The position was summarized by Harcourt:

When a sovereign State, from exhaustion or any other cause, has virtually and substantially abandoned the struggle for supremacy it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established; nor can it prolong its sovereignty by a mere paper assertion of right. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State is a hostile act towards the sovereign State . . .¹

The strictness of this position is in marked contrast to the position in the case of States granted full formal independence by the previous sovereign, where a minimal degree of *de facto* control may suffice.

(c) *Subsistence and extinction of States*. Finally, we have seen that there is a strong presumption in favour of the continued independence of an existing State—even despite foreign military occupation, as with Iran after 1942.² In such cases, again, the criterion of independence appears to be a predominantly formal one.³

(d) *Conclusions*. The concepts of formal and actual independence analysed here are closely linked; their exact relationship is, however, complex. Where formal independence and actual independence as defined coexist, there is no problem. Equally, where formal independence masks lack of all actual independence the entity is to be regarded as not independent for the purposes of statehood.⁴ Much more difficult is the intermediate case: that is, where a certain lack of formal independence coexists with substantial *de facto* independence—as with the Dominions in 1924.⁵ It must be emphasized that the specific issues, and the specific legal consequences sought to be drawn from alleged lack of independence, are of great importance: so too, in borderline cases, are such factors as recognition (especially if the practice is consistent), and permanence, which may provide valuable confirmatory evidence.⁶ Finally, in applying the flexible and in some situations minimal requirements of the independence rule, certain presumptions are of value.

In an opinion of 6 June 1844, Dodson advised that 'in December 1830 . . . the course of events had shown that the separation between Belgium and Holland consequent on the Revolution in the former country would be final . . .'. However, the 'independent political existence of Belgium had not . . . at that time assumed any definite shape'. It was, in his view, impossible to determine whether Britain had recognized Belgium as at 6 August 1831: Smith, *Great Britain and the Law of Nations*, vol. 1, pp. 245–7. The same strict test was applied by the British government to the Confederacy, e.g. Russell to Mason, 2 August 1862: *British and Foreign State Papers*, vol. 55, p. 733, cited Lauterpacht, *Recognition*, p. 17. See also Wright, in Falk (ed.), *The International Law of Civil War* (1971), pp. 30–109.

¹ *Letters by Historicus on some Questions of International Law* (1863), p. 9. Cf. Moore, *Digest*, vol. 1, p. 78 (Adams, 1818).

² *Supra*, p. 134.

³ For problems of illegality and extinction see *post*, pp. 173–6.

⁴ Subject to recognition (*post*, p. 142), or substantial illegality (*post*, pp. 144 et seq.).

⁵ On the status of the Dominions in this period see Dunn, *Virginia Law Review*, 13 (1926–7), pp. 354–79; Fawcett, *The British Commonwealth in International Law* (1963), pp. 75–105; Johnston, *American Journal of International Law*, 21 (1927), pp. 481–9; Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* (1929), *passim*.

⁶ *Post*, p. 140.

1. As a matter of general principle, any territorial entity formally separate and possessing a certain degree of actual power is capable of being, and *ceteris paribus* should be regarded as, a State for general international law purposes. The denomination '*sui generis*' often applied to entities which, for some reason, it is desired not to characterize as States, is of little help. On the one hand the regime of rules concerning States provides a flexible and readily applicable standard; on the other, the induction of the multitude of necessary (and usually unexpressed) rules regarding a '*sui generis* entity' is both laborious and, usually, unnecessary. The assumption that, for example, 'internationalized territories' are *a priori* excluded from statehood in the legal sense is unwarranted, since it exaggerates the importance and rigidity of the international legal regime of statehood. Significantly, the International Court has never made that assumption.¹

2. More specifically, it is submitted that independence for the present purposes may be presumed where: (i) an entity is formally independent, and (ii) its creation was not attended by serious illegality. On the other hand the presumption is against independence where either: (i) the entity in question is not formally independent, or (ii) though formally independent, its creation was attended by serious illegalities, or (iii) in the case of territory under belligerent occupation, a new regime is created with the express, tacit or implied consent of the occupant.²

3. There is also, as we have seen, a strong presumption in favour of the continued statehood of existing States, despite sometimes very extensive loss of actual authority.

4. Finally, as has been suggested, the presumption is in favour of the independence of a territorial unit as a whole, when it has been granted full formal independence by its former metropolitan State.³

It has been assumed here that an entity may become a State despite serious illegalities in the method or process of creation. In traditional international law that assumption was unchallenged, and the only problems were problems of application. The question will be examined in the next section.

6. SOVEREIGNTY

The term 'sovereignty' is sometimes used in place of 'independence' as a basic criterion for statehood. However, it has, as has been seen, another more viable meaning as an incident or consequence of statehood, namely, the

¹ Cf. the various statements of the Permanent Court on the status of Danzig: *Treatment of Polish Nationals in Danzig*, P.C.I.J., Series A/B, No. 44 (1932), pp. 23-4; *Polish War Vessels in the Port of Danzig*, Series A/B, No. 43 (1931), pp. 7, 18; *Free City of Danzig and the I.L.O.*, Series B, No. 18 (1930), p. 15; *Polish Postal Service in Danzig*, Series B, No. 11 (1925), pp. 39-40. *Contra*, Skubiszewski, in *Menzel Festschrift* (1975), p. 469 at pp. 471-4.

² See further *post*, pp. 164 et seq.

³ *Supra*, pp. 134-5.

plenary competence that States *prima facie* possess.¹ Since the two meanings are distinct, it seems preferable to restrict 'independence' to the prerequisite for statehood, and 'sovereignty' to the legal incident.

The term 'sovereign' is also, it may be noted, used in other senses, for example, to indicate actual omnicompetence with respect to internal or external affairs. This meaning of the term 'sovereign' is perhaps the most common in political discourse. Nevertheless as a matter of international law a State or other entity has in general no entitlement to 'sovereignty' in this wider sense.

7. OTHER CRITERIA

Certain other criteria are sometimes suggested as necessary for statehood.

(i) *Permanence*

The American Law Institute's Draft Restatement provides as a precondition for recognition, *inter alia*, that an entity 'shows reasonable indications that the(se) requirements . . . will continue to be satisfied.'² But no such requirement is contained in its definition of 'State'³ and in fact States may have a very brief existence, provided only that they have an effective independent government with respect to a certain area and population. Thus the Mali Federation lasted only from 20 June to 20 August 1960, when it divided into two separate States. And British Somaliland was a State for five days, from 26 to 30 June 1960,⁴ when it united with the former Italian Trust Territory of Somaliland to form the Somali Republic.⁵

This is not to say that permanence is not relevant to issues of statehood in some cases. In particular where another State's rights are involved (for example in a secessionary situation), or where certain criteria for statehood are said to be missing, continuance of an entity over a period of time is of considerable evidential value.⁶ In the divided State situations, whatever the original legality of the establishment of certain of those regimes, long continuance has forced effective recognition of their position.⁷ Permanence is thus not strictly a criterion

¹ *Supra*, p. 108. See especially Rousseau, *Recueil des cours*, 73 (1948), pp. 171-253, for a forceful argument in favour of the distinction and terminology adopted in the text—though his essay concerns rather the consequences of than the preconditions for statehood.

² *Restatement (2nd), Foreign Relations Law of the United States* (1965), § 100.

³ *Ibid.*, § 4; *supra*, p. 111 n. 1.

⁴ It was informally accorded separate recognition by the U.S.: *Department of State Bulletin*, 43 (1960), p. 87; Whiteman, *Digest*, vol. 1, pp. 216-17. See also Waldock, *I.L.C. Yearbook*, 1972-II, pp. 34-5; Contini, *Proceedings of the American Society of International Law*, 60 (1966), p. 127.

⁵ An earlier and less well-known case was that of Yugoslavia, independent on 31 October 1918, which united with Serbia to form the Serb-Croat-Slovene State on 1 December 1918: Marek, *Identity and Continuity*, pp. 239-44; *contra*, *Peinitsch v. Germany*, *Recueil des Tribunaux Arbitraux Mixtes*, 2 (1923), p. 621.

⁶ Cf. the U.S. position with regard to Yemen: Whiteman, *Digest*, vol. 2, pp. 240-1.

⁷ *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 907 *per* Lord Reid. On the short-lived Italian Republic of Salò, see *Levi claim*, I.L.R., 24 (1957), p. 303; *Trèves claim*, *ibid.*, p. 313; and *Annual Digest*, 13 (1946), No. 4; I.L.R., vol. 29, pp. 21, 34, 51.

of statehood in the sense of an indispensable attribute; it is a sometimes important piece of evidence as to the possession of those attributes.

(ii) *Willingness and ability to observe international law*

It is sometimes said that 'willingness to observe international law' is a criterion for statehood.¹ But it is particularly necessary to distinguish recognition from statehood in this context. Unwillingness or refusal to observe international law may well constitute grounds for refusal of recognition,² or for such other sanctions as the law allows, just as unwillingness to observe Charter obligations is a ground for non-admission to the United Nations. Both are, however, distinct from statehood.³

A different, though connected, point is whether inability to observe international law may be grounds for refusal to treat the entity concerned as a State. H. A. Smith puts the point thus: 'a State which has fallen into anarchy ceases to be a State to which the normal rules of international intercourse can be applied'.⁴ But again one must distinguish between permitted sanctions for breach of international obligations (which used to extend to armed reprisals and war), and a lack of responsibility for public order or government such that the territory concerned ceases to be part of the defaulting State or (if the whole State territory is concerned) such that it ceases to be a State. The former circumstance is clearly distinguishable from the latter and much more common. The latter case concerns not 'ability to obey international law' but a failure to maintain any State authority at all. As such it is referable to the criterion of government; reference to international law is unnecessary and confusing.

(iii) *A certain degree of civilization*

United States practice, in particular, has on occasions supported the view that, to be a 'State of International Law',

the inhabitants of the territory must have attained a degree of civilization such as to enable them to observe with respect to the outside world those principles of law which are deemed to govern the members of the international society in their relations with each other.⁵

But once again this requirement is better formulated as one of government: 'international law presupposes, not any common faith or culture, but a certain minimum of order and stability'.⁶

¹ Moore, *Digest*, vol. 1, p. 6; Hackworth, *Digest*, vol. 1, pp. 176-9; Whiteman, *Digest*, vol. 2, pp. 72-3, 78-82; and *supra*, p. 136 (Syria and Lebanon).

² Cf. *Restatement (2nd), Foreign Relations of the United States*, § 103. For U.S. practice see O'Brien and Goebel, *loc. cit.* (above, p. 135 n. 2), pp. 106 ff.

³ Chen, *The International Law of Recognition*, pp. 61-2; Lauterpacht, *Recognition*, pp. 109-14; Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 298-90; Brownlie, *Principles*, p. 80.

⁴ *Great Britain and the Law of Nations*, vol. 1, pp. 18-19, citing an Opinion of Harding on anarchy in Mexico: FO. 83/2305, 20 March 1857.

⁵ Hyde, *The International Law (2nd edn., 1947)*, vol. 1, p. 23; cf. pp. 127-9; cited in relation to Indonesia, Whiteman, *Digest*, vol. 1, pp. 223-4.

⁶ Smith, *op. cit.* (above, n. 4), vol. 1, p. 18; cf. Brownlie, *Principles*, p. 80; Chen, *The International Law of Recognition*, p. 60. In *Hunt v. Gordon*, (1883) 2 N.Z.L.R. 160 at p. 186,

(iv) *Recognition*

As we have seen, recognition is not strictly a condition for statehood in international law.

An entity not recognized as a State but meeting the requirements for recognition has the rights of a State under international law in relation to a non-recognizing State . . .¹

On the other hand, in some cases at least, States are not prohibited from recognizing or treating as a State an entity which for some reason does not qualify as a State under the general criteria discussed here. Such recognition may well be constitutive of legal obligation for the recognizing or acquiescing State; but it may also tend to consolidate a general legal status at that time precarious or *in statu nascendi*. Recognition, while in principle declaratory, may thus be of crucial importance in particular cases.² In any event, at least where the recognizing government is addressing itself to legal rather than purely political considerations, it is important evidence of legal status.³

(v) *Legal Order*

Since the modern State is the territorial basis for a legal order,⁴ it might be thought that the existence of a 'legal order', or at least its basic rules, is a useful criterion for the existence of the State.

As a political organization, the state is a legal order. But not every legal order is a state. . . . The state is a relatively centralized legal order. . . . The legal order of primitive society and the general international law order are entirely decentralized coercive orders and therefore not states. . . . In traditional theory the state is composed of three elements, the people of the state, the territory of the state, and the so-called power of the state, exercised by an independent government. All three elements can be determined only juridically, that is, they can be comprehended only as the validity and the spheres of validity of a legal order.⁵

It is of course clear that 'legal order' is an important element of government, and hence an indication of statehood; but its status as a distinct criterion is open to doubt. Thus a revolutionary (that is, illegal) change of constitution does not necessarily affect the identity or continuity of the State.⁶ Entities which, by all other criteria, are States, at the time they come into existence may have

Richmond J. declined to recognize a Samoan nationality on the ground that, although Samoa was recognized as independent, it was not recognized as a civilized Power 'capable of accepting a transfer of allegiance'. The Court of Appeal, affirming, relied rather on the absence of British recognition and of orderly government: *ibid.*, pp. 198-202, 267-8. To the same effect, *Hunt v. R.* (No. 2), (1882) 1 Fiji L.R. 59, at p. 63 *per* Gorrie C.J. (Samoa); *The Helena*, (1701) 4 C. Rob. 3, at pp. 5-7 *per* Sir Wm. Scott (the Barbary States).

¹ *Restatement (2nd), Foreign Relations Law of the United States* (1965), § 107; *supra*, pp. 103-6.

² e.g. in the cases of Taiwan (*supra*, p. 93 n. 9); the Vatican City (*supra*, p. 114 n. 5); the divided States (*supra*, p. 93 n. 2); and Andorra (*supra*, p. 129 n. 6). ³ Cf. *supra*, p. 106.

⁴ D'Entrèves, *The Notion of the State* (1967), p. 96.

⁵ Kelsen, *The Pure Theory of Law* (2nd edn., trans. Knight, 1964), pp. 286-7.

⁶ *Supra*, p. 124 n. 2.

only rudimentary or fragmentary legal systems. In extreme cases, there may be no more than a diffused willingness to accept the system to be established by a Constituent Assembly.¹ Moreover a single State may well compose several interlocking legal systems, having a complex interrelationship and without the subordination of one to the other; this is the case with some federations. As a criterion, 'legal system' seems to be least helpful in just those cases for which the criteria exist.

Alternatively, it can be argued that, although 'legal system' as a whole may not be a useful criterion, the existence of a 'basic norm' within a State is both necessary and sufficient. Thus Marek finds it

both necessary and possible to define 'separateness' of the State in strictly legal terms: and in these terms it simply means that every State is determined by the basic norm of its legal order, which it does not share with any other State. This basic norm is its own; it is not, and cannot be, derived from any other State order. In other words, *the legal source, the reason of validity* of the legal order of a State cannot be found in the legal order of one or several other States. The legal order of a State cannot be delegated by any other State or group of States, for if it were, the entity in question would not be an independent State, but a component legal order of that State or group of States by whom it would be delegated.²

Nevertheless, as a separate criterion the 'basic norm' is no better. It is, as Marek points out, a purely formal notion, and as such, it fails in two distinct ways. First, it fails to explain the independence of a State whose basic norm was given to it by the legal system of another State. In such a case, formal and sometimes even municipal legal dependence may coexist with international independence. Equally, Marek is driven to reject, *a priori*, the statehood of 'internationalized territories' such as the Free City of Danzig—a position both too rigid, and inconsistent with practice.³ Secondly, the basic norm can only explain the case of puppet States, with full formal but no actual validity, by an equivocation on the term 'reason for validity'. In such circumstances, the 'reason' appealed to is not formal but material, a conclusion of political fact in all the circumstances.

It follows that one can only know the basic norm of a State when the State itself is identified as such. Like international responsibility,⁴ the basic norm is a conclusion to the problems of existence, identity and continuity, not the means of their solution. Nor can there be such a thing as an 'independent' basic norm,⁵ but merely a basic norm of a State that is independent. Again, this is not to deny that the legal system of an entity is a part of its general system of government, and as such relevant to questions of existence, identity and continuity of statehood.⁶

¹ Austria in 1918 seems to be an example: Marek, *Identity and Continuity*, p. 202. The common phenomenon of continuity of law is not in point here.

² *Ibid.*, p. 168 (italics added). She none the less accepts that change in the basic norm *per se* does not change the State: *ibid.*, p. 188.

³ Marek, *Identity and Continuity*, p. 168 n. 2; cf. *supra*, p. 139 n. 1.

⁴ With which Marek compares it: *ibid.*, p. 189.

⁵ *Ibid.*, p. 188.

⁶ For similar criticism see Kamanda, *The Legal Status of Protectorates in Public International Law*, pp. 181–2.

5. CRITERIA FOR STATEHOOD AND OTHER PRINCIPLES OF INTERNATIONAL LAW

I. LEGALITY AND STATEHOOD

It has been seen that the traditional criteria for statehood were based almost entirely on the principle of effectiveness. The proposition that statehood is a question of fact derives strong support from this equation of effectiveness and statehood. In other words, although it is admitted that effectiveness in this context is a legal requirement, it is denied that there can exist legal criteria for statehood not based on effectiveness. In Charpentier's view:

les tentatives de développement de règles de légalité objective détachées de l'effectivité jointes à l'absence de sanctions capables de les faire respecter entraînent fatalement un *conflit entre le droit et le fait* dans lequel celui-là risque de l'emporter, constituant ainsi à lui seul un critère de validation de l'extension illégale des compétences.¹

We must first distinguish two possible positions: that there can *a priori* exist no criteria for statehood independent of effectiveness, and that no such criteria exist as a matter of positive law. Clearly, if the former position be correct, there can be no inquiry into the effect of particular rules on status. That position thus requires examination.

The first point to be made is that, in recent practice, effective separate entities have existed which have, virtually universally, been agreed not to be States—in particular, Rhodesia and Formosa. Moreover, non-effective entities have also been generally regarded as being, or continuing to be, States: for example, Guinea-Bissau prior to Portuguese recognition,² and the various entities illegally annexed in the period 1936–40. The proposition that statehood must always be equated with effectiveness is not supported by modern practice. None the less, various arguments have been adduced in support of that view.

In the first place, it is argued that to apply rules of this type in the absence of an authoritative system of determination of status is quite impracticable. Since there will be no certainty as to the application of peremptory rules in this situation, in the absence of something like collectivization of recognition,³ no such rules can be accepted. This is, of course, a variant of an argument which is central to the constitutive position in general:⁴ the arguments which were adduced in that context are equally relevant here. No such compulsory procedure for determining disputed questions exists elsewhere in the law, and the view that statehood is, exceptionally, a matter requiring such certification has already been rejected. 'Collectivization of recognition' is no doubt desirable,⁵

¹ Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 127–8 (his italics). Cf. Mouskhély, *Revue générale de droit international public*, 66 (1962), pp. 469–75, referring to 'les tentatives de réglementation juridique de la naissance des États'; Verhoeven, *Reconnaissance*, pp. 548–9, 589–91.

² *Post*, p. 168.

³ Cf. Charpentier, *op. cit.* (above, p. 94 n. 6), p. 318.

⁴ *Supra*, p. 101.

⁵ Cf. Lauterpacht, *Recognition*, p. 78.

but since 1947 there has developed in United Nations practice and elsewhere a system of certification which has in substance fulfilled the function of collectivization, without the attribute of complete and binding certainty.¹

A second argument is that international law risks being ineffective and creating a 'fatal conflict between law and fact', if it challenges the validity of effective situations, especially situations of power such as the existence of States. But the question is exactly whether the term 'State' should be regarded as for all purposes and in all cases equivalent to certain situations of power. It could be said that international law risks being ineffective precisely if it does not challenge effective but illegal situations. For example, the Rhodesian situation is probably, because of the general non-recognition of an effective situation, closer to solution than it would otherwise have been. That non-recognition is, it seems, both obligatory and a result of lack of status of the entity in question.² Of course, effectiveness remains the dominant *general* principle, but it is quite consistent with this that there should exist specific, limited, exceptions based on other fundamental principles.

A further, more persuasive, argument relates to the difficulty of applying the rule of extinctive prescription to a situation where law and fact conflict for a long period of time. None the less, this difficulty arises most acutely in the area where the continued acceptance of non-effective legal entities is most clearly demonstrated: that is, in the area of the non-extinction of States by illegal annexation. The application of the doctrine of extinctive prescription in this area causes difficulties, but they have not been regarded as insurmountable. It is sufficient to say here that the same problems of application occur in other contexts (for example, acquisition and loss of territory), and that this difficulty ought not to prevent a proper study of established practice.

It may also be argued that, if international law withholds legal status from effective illegal entities, the result is a legal vacuum undesirable both in practice and principle. But this assumes that international law does not apply to *de facto* illegal entities; and this is simply not so. Relevant international legal rules can apply to *de facto* situations here as elsewhere. For example, Formosa, whether or not a State, is not free to act contrary to international law, nor does it claim such a liberty. The process of analogy from legal rules applicable to States is quite capable of providing a body of rules applicable to non-State entities. The argument that no such rules apply smacks of the old view that international law can only apply to States.

Fundamentally, the argument that international law cannot regulate or control effective territorial entities is an expression of the view that international law cannot regulate power politics at all; that it is, essentially, non-peremptory. But, on its own terms and with whatever results, international law is undoubtedly in a stage of development towards greater coherence. In the present context, an important recent development has been the acceptance of the notion of *jus cogens*; that is, of relatively imprescriptible and peremptory international

¹ Briggs, *Proceedings of the American Society of International Law*, 44 (1950), pp. 169-81.

² *Post*, pp. 162-4.

legal rules. This development, and its possible relevance to questions of statehood, must now be considered.

(i) *Jus cogens in modern international law*

The existence of a hierarchy of international law rules has long been posited; but to avoid confusion certain preliminary distinctions must be made. There are rules which are preconditions for meaningful international activity—for example, *pacta sunt servanda*. To abrogate that rule is not possible: a treaty providing that *pacta sunt servanda* is mere reaffirmation; a treaty denying it is an absurdity. The point is that the very activity of treaty-making assumes the general rule. Equally, a treaty abolishing States (without providing for their replacement by other governmental forms) would be meaningless, because the activity of international relations as at present carried on assumes States as the basic international units. It follows that, in discussing the problem of *jus cogens*, we are concerned only with what may be called substantive, not with structural, rules.¹ It also follows that the problem of *jus cogens* is the problem of restrictions upon the possible freedom of action of States, not of limitations upon some absolute liberty that States have never had. Thus the proposition that States are in principle free to make whatever treaties they like is too absolute; rather, States are in principle free to make whatever provision they like concerning their own rights (or, in general, concerning the rights of their nationals). The *pacta tertiis* rule has nothing to do with *jus cogens*: States simply do not have, in the absence of consent, the competence to deprive other States of their legal rights by way of treaty. A treaty attempting to impose duties on third States is not void—as is a treaty in violation of a *jus cogens* norm. It merely provides a possible set of rules which are, in the absence of the consent of the State or States affected, non-opposable.² So the principle of consent is a further, structural, principle of international law, distinct from *jus cogens*.

The problem is whether the principle of State autonomy as enunciated admits of exceptions. Modern opinion, though not quite unanimous,³ is substantially in favour of *jus cogens*, which may be said to have received its *imprimatur* in the text of the Vienna Convention. Article 53 provides that:

A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁴

¹ Cf. (to the same effect) Verdross, *American Journal of International Law*, 60 (1966), p. 55 at pp. 58–9; Scheuner, *Zeitschrift für Völkerrecht*, 27 (1967), pp. 520–32 at p. 525.

² Vienna Convention on the Law of Treaties (1969), Art. 34.

³ At the Vienna Conference only Liechtenstein opposed the notion outright. Among writers Schwarzenberger is notable for his opposition: *Texas Law Review*, 43 (1965), pp. 455–78; but cf. his *International Law*, vol. 1, pp. 425–7. Cf. also Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (1974), for a full account.

⁴ Arts. 65–6 provide for judicial settlement of disputes concerning, *inter alia*, Art. 53. The

Jus cogens is thus well established, but the content of the category is less well settled, and despite last-minute redrafting, Article 53 is of little help, being quite circular.¹ Nevertheless the extent of disagreement over the content of *jus cogens* can be exaggerated, and it may well be that in practice courts will have less difficulty in applying the rule than might have been thought.² Scheuner suggests three categories of *jus cogens*: first, rules protecting the foundations of international order, such as the prohibition of genocide or of the use of force in international relations except in self-defence; secondly, rules concerning peaceful co-operation in the protection of common interests, such as freedom of the seas; and thirdly, rules protecting the most fundamental and basic human rights, and, one might add, the basic rules for the protection of civilians in time of war. At least the first and third of these would appear to be genuine *jus cogens* norms. On the other hand, some suggested candidates are much less certain: the invalidity of unequal treaties,³ and self-determination,⁴ are both controversial even as *jus dispositivum*: the suggestion that they constitute *jus cogens* rules is difficult to accept.⁵

These few rules then have a special character in modern international law. Treaties in conflict with them are void,⁶ and pre-existing treaties are annulled when *jus cogens* norms inconsistent with them come into existence.⁷ But the question arises whether *jus cogens* norms invalidate situations other than treaties.

(ii) *Legal effects of jus cogens on acts or situations other than treaties*

It may be suggested that *jus cogens* norms must invalidate not just treaties but all legal acts and situations inconsistent with them. This goes beyond the terms of the Vienna Convention itself, although as a codification of treaty law it was arguably outside its province to go further. But Article 53 does state that 'no derogation is permitted' from *jus cogens* norms, and this language seems to be sufficiently wide to include acts other than treaties. It is difficult to accept that a rule should be sacrosanct in one context and freely prescriptible in another. But it must be admitted that *jus cogens*, which was designed to deal with problems of the validity of treaties, is acutely difficult to apply to problems of territorial status.⁸ In these latter cases, the question must be whether the illegality is so

Convention is not yet in force. For the *travaux préparatoires* see Rosenne, *The Law of Treaties* (1970), pp. 290-3.

¹ Rousseau, *Droit international public*, vol. 1, pp. 149-51; de Visscher, *Revue générale de droit international public*, 75 (1971), pp. 5-11 at p. 7.

² Cf. Schwelb, *American Journal of International Law*, 61 (1967), pp. 946-75; Reisenfeld, *ibid.*, 60 (1966), pp. 511-15.

³ Judge Ammoun, *Barcelona Traction (Second Phase)*, *I.C.J. Reports*, 1970, p. 3, at p. 304.

⁴ *Ibid.*, and Scheuner, *loc. cit.* (above, p. 146 n. 1) at p. 525, both referring (erroneously) to Brownlie, *Principles* (1st edn.), pp. 75, 412; cf. *ibid.* (2nd edn.), p. 500 n. 4. See also Bedjaoui, *I.L.C. Yearbook*, 1975-I, p. 48.

⁵ Self-determination may, however, be protected by the *pacta tertiis* rule.

⁶ Vienna Convention, Art. 53; cf. *Foreign Relations of the United States*, 1946-VIII, pp. 1082-3 (France). ⁷ Vienna Convention, Art. 69. There is no severance: Art. 44 (5).

⁸ Scheuner, *loc. cit.* (above, p. 146 n. 1), p. 525 n. On different grounds, Marek, *Guggenheim Festschrift* (1968), p. 426 at pp. 439-41.

central to the existence or extinction of the entity in question that international law may justifiably, and exceptionally, treat an effective entity as not a State (or a non-effective entity as continuing to be a State). Arguably a rule which was *jus dispositivum* in the context of treaties might yet be sufficiently relevant and important to be regarded as a criterion for statehood. However, *jus cogens* would still be relevant here in two ways. That a particular rule is one of *jus cogens* must be relevant in determining whether illegality under that rule is such as to warrant refusing to accept the statehood of the entity created in breach of the rule. And that the rule violated is one of *jus cogens* would be relevant in applying the principle of extinctive prescription.

(iii) *Legality and statehood: some tentative conclusions*

It has been argued that there is nothing *a priori* incoherent about the legal regulation of statehood on a basis other than that of effectiveness. And, although this has been denied,¹ there is a considerable amount of practice supporting regulations of this type. This position was foreshadowed by Lauterpacht in 1948:

International law acknowledges as a source of rights and obligations such facts and situations as are not the result of acts which it prohibits and stigmatizes as unlawful. . . . It follows from the same principle that facts, however undisputed, which are the result of conduct violative of international law cannot claim the same right to be incorporated automatically as part of the law of nations . . .²

Thirty years later, it can be argued that other principles unrelated to effectiveness may be relevant.³ No doubt the principle of effectiveness remains the dominant criterion, but practice does not support the view that it is the only one. On the other hand, although international practice has developed the formal concept of *jus cogens*, that concept, at least as elaborated in the Vienna Convention, is not the key to the inquiry. The provisions of the Convention relating to *jus cogens* do not have and were not intended to have direct application to situations involving the creation of States. Their importance is rather indirect, as has been said: the emphasis is on the centrality and permanence of certain basic rules. In the context of statehood, what is necessary is not reliance upon the provisions of the Vienna Convention,⁴ but an examination of rules specifically adapted to the context.

Finally, three different problems must be distinguished: illegality as affecting the creation of a State; illegality as affecting the title of its government to represent it, and illegality as affecting its termination. Different considerations may apply in each case, and only the first problem will be dealt with in detail here.⁵

¹ Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 127-8; Chen, *The International Law of Recognition*, p. 54. Cf. Verhoeven, *Reconnaissance*, pp. 607-17.

² Lauterpacht, *Recognition*, pp. 409-10; cf. *ibid.*, pp. 285, 340-1.

³ Cf. Eekelaar, in Simpson (ed.), *Oxford Essays in Jurisprudence* (2nd ser., 1973), p. 22 at pp. 39-40; Brownlie, *Principles*, pp. 82-3; Reuter, *I.L.C. Yearbook*, 1975-I, p. 45.

⁴ But see Bokor-Szegö, *New States in International Law* (1970), pp. 66-75.

⁵ For illegality and extinction of States see *post*, pp. 173-6. Illegality and governmental representation is a topic on which practice is, to say the least, scanty. It is outside the scope of this study.

2. STATEHOOD AND SELF-DETERMINATION

The relationship between statehood and self-determination is an important, and to some extent a neglected, problem. Although there is a substantial body of practice, it remains to be seen whether self-determination as such has become a criterion of statehood.

(i) *Self-determination in modern international law*

Strictly speaking, discussion of the legal status of self-determination is preliminary to rather than an integral step in the present argument: however, the problem is sufficiently important and controversial to warrant at least some treatment here. Indeed there has probably been since 1945 no more divisive issue among writers (at least in the Western tradition of international law) than the question whether there exists a legal right or principle of 'self-determination of peoples'. If such a principle does exist, it is certainly of recent origin. The Commission of Jurists in the *Aaland Islands* case thought that the principle was not part of general international law,¹ although it is of interest that, in the unsettled and precarious situation of Finland in 1918–20² they thought that the principle did operate to preclude the Aaland Islands question from being a matter within the domestic jurisdiction of Finland.³ That view was accepted by the Council of the League.⁴ Nearly sixty years later a vast literature and at least two⁵ advisory opinions of the International Court have failed to settle the matter; indeed, the intensity of the dispute might lead one to suppose a failure on each side to analyse with sufficient care the opposing positions. In this respect two preliminary distinctions may be of assistance.

In the first place it is necessary to distinguish clearly the political principle or value of self-determination from the putative legal right or principle. The former, as a principle of general application, has had a place in democratic thought since at least 1789, and has at particular periods (most notably 1917–20) assumed great prominence in international affairs.⁶ The latter is of much more recent origin, and applies as of right (if at all) only to a restricted category of cases.⁷ The weight sometimes accorded the political principle of self-determination has no doubt contributed, at least to some degree, to the body of practice to be examined here; but this general ideal is too vague and ill-defined to constitute a legal principle, much less a positive legal rule applying of its own force to particular 'peoples' or to 'peoples' in general. Yet it is sometimes assumed

¹ *League of Nations Official Journal*, Special Supplement No. 3 at pp. 5–6; cf. Report of the Committee of Rapporteurs, L.N. Doc. B7/21/68/106 [vii], at pp. 27–8.

² Cf. *supra*, pp. 117–18.

³ Loc. cit. (above, n. 1).

⁴ For Fisher's proposal accepting the report (adopted without dissent), see *League of Nations Official Journal*, October 1920, p. 395. See also Barros, *The Aaland Islands Question* (1968).

⁵ *Post*, pp. 157–9. The issue was avoided, not very felicitously, in the *Right of Passage* case, *I.C.J. Reports*, 1960, p. 6.

⁶ See e.g., Cobban, *The Nation State and National Self-Determination* (rev. edn., 1969). For Soviet practice in this period see Carr, *The Bolshevik Revolution 1917–1923* (1950), pp. 414–35. The term was also given currency by President Wilson: see Hackworth, *Digest*, vol. 1, pp. 422–5. It is implicit in the Fourteen Points, and was included in the first American draft for the Covenant, though it was subsequently deleted.

⁷ *Post*, p. 160.

that proponents of a legal right or principle of self-determination are committed to just this view of the ambit of the right or principle. The distinction is the same as that between the general political value of 'sovereignty' which is often claimed to inhere in a particular group or polity, and the legal notion or principle of sovereignty, which has, as we have seen,¹ a considerably more restricted scope.

This comparison leads to the second point: there is a clear but not always articulated distinction between the identification of territories to which the legal principle of sovereignty applies, and the legal consequences of that principle in its application to territories already determined. In the present stage of development of international law, 'sovereignty' applies as a legal right (or more properly, a legal presumption) only to territories constituted or accepted as States under the criteria discussed here.² It is for that reason that we speak of a *principle* of sovereignty; since the notion of a right presupposes identification of the subject of the right, and that identification must be made *aliunde* the principle of sovereignty.³ Moreover it might be the case that the territories to be regarded as 'sovereign' would be determined in practice by political rather than legal considerations; and yet the consequences of the principle in its application to the territories so determined would be legal. This was Oppenheim's view of the sovereignty of States: sovereignty was a legal principle applying to entities identified by the purely political act of recognition.⁴ A legal principle of self-determination would present an almost exact analogy. In practice since 1945 there has been a considerable elaboration of the legal consequences of the principle of self-determination for particular territories; but the question of the ambit of self-determination, the territories to which it applies, has at least arguably remained as much a matter of politics as of law. In any discussion of the problem this distinction must be carefully observed.

(a) *The principle of self-determination in the United Nations Charter.* The Charter twice mentions self-determination expressly: in Article 1 (2), where one of the 'purposes of the United Nations' is stated to be the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples', and in Article 55, where the same formula is used to express the general aims of the United Nations in the fields of social and economic development and respect for human rights. By elaborating these rather cryptic references, the General Assembly has attempted in a very large number of resolutions to define more precisely the content of the principle. Thus, the Colonial Declaration (clause 2) stated that

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁵

¹ *Supra*, pp. 107-10.

² But cf. Arangio-Ruiz (*supra*, p. 94 n. 2); Seyersted, *Acta Scandinavica*, 34 (1964), pp. 3-112.

³ The problem of determining the territories to which self-determination applies is thus very similar to the problem of determining the criteria for statehood.

⁴ *Supra*, pp. 98-9.

⁵ G.A. Res. 1514 (XV), 14 December 1960 (89-0:9), 'Declaration on the Granting of

The principle has also been reaffirmed by the Security Council, for example by Resolution 183 of 11 December 1963, by ten votes to none with one abstention.¹ The status of self-determination as a 'fundamental obligation' was further emphasized by its being linked with the 'prohibition of the threat or use of force in international relations' in Resolution 2160 (XXI), which reaffirmed that

(b) Any forcible action, direct or indirect, which deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status and pursue their economic, social and cultural development constitutes a violation of the Charter of the United Nations. Accordingly, the use of force to deprive peoples of their national identity, as prohibited by the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty contained in General Assembly Resolution 2131 (XX), constitutes a violation of their inalienable rights and of the principle of non-intervention.²

And in its Declaration of Principles annexed to Resolution 2625 (XXV), the Assembly dealt in the following terms with 'The principle of equal rights and self-determination of peoples':

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter . . . all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter . . .

The territory of a colony or other non-self-governing territory has, under the 'Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter. . . . Every State shall refrain from any action aimed at the partial or total disruption of the national unity or territorial integrity of any other State or country.³

However, one difficulty that arises here is that the General Assembly has no general law-making capacity. Resolutions, with certain limited exceptions, have only recommendatory force, and the Assembly has no capacity to impose new customary legal obligations on States.⁴ Of course, the Assembly undoubtedly has some measure of discretion as to the way in which, for its purposes, it carries out its interpretative functions. But the resolutions cited do not seem to be interpretations of the Charter as such (or if they are so, are so only to a limited degree). The Charter mentions self-determination only twice, and in

Independence to Colonial Countries and Peoples'. For the status of the 'Colonial Declaration' see Asamoah, *The Legal Significance of the Declarations of the General Assembly* (1966), pp. 164-73. See also G.A. Resns. 1541 (XV); 2105 (XX); 2200A (XXI); 2625 (XXV), Annex.

¹ Other more recent examples include S.C. Resns. 301 (1971) (Namibia); 377 (1975) (Western Sahara); 384 (1975) (Portuguese Timor).

² 30 November 1966 (98-2:8).

³ 24 October 1970 (adopted without vote); see McWhinney, *American Journal of International Law*, 60 (1966), pp. 1-33.

⁴ See the authorities cited *infra*, p. 152 n. 4.

both cases it seems to mean something rather different from the usual understanding of 'self-determination'. That term has in fact two quite distinct meanings. It can mean the sovereign equality of existing States, and in particular the right of a State to choose its own form of government without intervention. It can also mean the right of a specific territory ('people') to choose its own form of government irrespective of the wishes of the rest of the State of which that territory is a part. Traditional international law recognized the first but not the second of these, from which it is said that it did not recognize the right of self-determination.¹ The Charter, in referring as it does to 'equal rights and self-determination' in Articles 1 (2) and 55, seems at least primarily to be referring to self-determination also in this first and uncontroversial sense.² Self-determination in the second sense is not mentioned, though it is implicit in Articles 73 (b) and 76 (b). In proclaiming a general right of self-determination, and in particular of immediate self-determination, the resolutions cited go beyond the terms of the Charter however liberally construed.

This does not, however, foreclose the status of self-determination as a matter of customary international law. State practice is just as much State practice when it occurs in the 'parliamentary' context of the General Assembly as in more traditional diplomatic forms. The practice of States in assenting to and acting upon law-declaring resolutions may be of considerable probative importance, in particular where that practice achieves reasonable consistency over a period of time. Where a resolution is passed by 'a large majority of States with the intention of creating a new binding rule of law'³ and is acted upon as such by States generally, then that action will have what can properly be called a quasi-legislative effect. The problem, as always, is one of evidence and assessment.⁴ But, as we have seen, such an assessment requires two distinct inquiries: whether there exist any criteria for the determination of territories to which a 'right of self-determination' is to be accorded; and whether, in its application to those territories, self-determination can properly be regarded as a legal right, and if so, to what effect. To these questions we must now turn.

(b) *Identifying the unit of self-determination: the problem of criteria.* It is a peculiarity of this area of practice that it is possible to be more certain about the 'consequences' of self-determination than about the criteria for the territories to which the principle is regarded as applying. Much of the emphasis, in practice, has been on the application of the principle to territories to which it had come

¹ See Parry, in Sørensen (ed.), *Manual of Public International Law* (1968), p. 1 at pp. 19-20.

² Cf. *United Nations Conference on International Organization*, vol. 6, p. 955; Kaur, *Indian Journal of International Law*, 10 (1970), pp. 479-502.

³ *Fisheries Jurisdiction case (Second Phase)*, *I.C.J. Reports*, 1974 p. 3, at p. 162 (Judge Petré).

⁴ See further, Castañeda, *The Legal Significance of Resolutions of United Nations Organs* (1969), pp. 120-1; Higgins, *Development*, pp. 1-10; Falk, *American Journal of International Law*, 60 (1966), pp. 782-91; Onuf, *ibid.*, 64 (1970), pp. 349-55; Johnson, *this Year Book*, 32 (1955-6), pp. 97-122; Sloan, *ibid.*, 25 (1948), pp. 1-33; Judge Tanaka, dissenting, *South West Africa cases (Second Phase)*, *I.C.J. Reports*, 1966, p. 6, at pp. 291-3. For a stricter view see Judge Fitzmaurice, dissenting, *Namibia opinion*, *I.C.J. Reports*, 1971, p. 6, at pp. 280-1, and in *Institut du Droit International, Livre du Centenaire* (1973), pp. 268-71. Cf. Judge Lauterpacht, separate opinion, *Voting Procedure case*, *I.C.J. Reports*, 1955, p. 67 at p. 116.

to apply either by a form of recognition or by agreement pursuant to conventional arrangements. The effect of this practice has been to elaborate sometimes cryptic references to the principle in the constituent documents, acting in some ways as a form of administrative law of the institutions in question. These institutions should first be mentioned.

(1) *The Mandate and Trusteeship systems.* The Mandate system, established by the Principal Allied and Associated Powers in conjunction with the League of Nations under Article 22 of the Covenant,¹ was replaced after the Second World War by the International Trusteeship System under Chapters XII and XIII of the Charter.² The two systems had the same general aims: in particular, encouragement of the 'well-being and development' of the peoples of the various territories, and of their 'progressive development towards self-government or independence',³ although this second aim was only implicit in the Covenant. Both accepted the principle of the international accountability of the administering State for carrying out these aims, 'securities for performance' being provided in the Covenant and the Charter, and in the various individual agreements. The systems thus constituted a rejection of annexation of former German, Turkish and Italian territories, and the assertion of international interest at a much earlier stage in the process towards independence than international law at the time otherwise allowed.⁴ In particular, the principle of self-determination, as the International Court has twice explicitly affirmed,⁵ was made applicable to Mandates and Trust Territories, which constitute, as it were, the primary type of self-determination territory.⁶

(2) *Non-self-governing territories: Chapter XI of the Charter.* A more significant extension of the principle, certainly in retrospect, was brought about in Chapter XI of the Charter, which applies to 'territories whose peoples have not yet attained a full measure of self-government'. Chapter XI was the result of a compromise between those seeking an extension of the Trusteeship system to all 'colonial' territories, and those resisting such change.⁷ The result was an acceptance, in more or less the same terms, of the substantive obligations of the Mandate and Trusteeship systems—acceptance in particular of 'the

¹ For details see Temperley (ed.), *A History of The Peace Conference at Paris* (1924), vol. 6, pp. 500–23.

² The literature on Mandates and Trust Territories is voluminous. See especially Wright, *Mandates under the League of Nations* (1930); Toussaint, *The Trusteeship System of the United Nations* (1956); Thullen, *Problems of the Trusteeship System* (1964); Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948); Veicopoulos, *Traité des territoires dépendantes* (1960, 1971, 2 vols.); Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (1955).
³ Charter, Art. 76(b).

⁴ *Status of South West Africa* opinion, *I.C.J. Reports*, 1950, p. 128 at p. 131.

⁵ *Post*, pp. 157–9.

⁶ There were in all fifteen Mandated territories. 'A' Mandates became independent as follows: Iraq (1932), Syria and Lebanon (1944), Jordan (1946). The Palestine Mandate was terminated in 1947. All other Mandated territories except South West Africa were transferred to the Trusteeship system. Only one further territory (Italian Somaliland) was added to the Trusteeship system. All Trust Territories have now reached 'independence or self-government' except the Strategic Trust Territory of the Pacific Islands. See further Marston, *International and Comparative Law Quarterly*, 18 (1968), pp. 1–40.

⁷ Cf. Russell and Muther, *A History of the United Nations Charter* (1958), pp. 813–24.

principle that the interests of the inhabitants of these territories are paramount', and of an obligation 'to develop self-government'¹—but with a much more attenuated form of international accountability.² In practice Chapter XI of the Charter has been subjected to a pronounced form of 'progressive interpretation'. In the *Namibia* opinion the Court stated that

the concepts embodied in Article 22 of the Covenant were not static but were by definition evolutionary, as also therefore was the concept of the sacred trust. . . .

The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half century, and its interpretation cannot remain unfettered by the subsequent development of law, through the Charter of the United Nations and by way of customary law. . . .³

This may be regarded as equally true of Article 73 of the Charter, based as it is on Article 22 of the Covenant; and indeed the Court explicitly affirmed the applicability of self-determination to non-self-governing territories under the Charter.⁴ In the *Western Sahara* case, after referring to this passage, the majority opinion reaffirmed 'the validity of the principle of self-determination':⁵ in its view, Spain, as an administering power, 'has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory . . .'.⁶ Thus the 'right of [the Spanish Sahara] population to self-determination' was 'a basic assumption of the questions put to the Court'.⁷ The Court's reply to those questions, equally, was based upon 'existing rules of international law'.⁸

In fact a considerable majority of non-self-governing territories have achieved self-government in some form or other.⁹

¹ Charter, Art. 73. Reference is also made to the 'sacred trust', in language borrowed from Article 22 of the Covenant. On the controversy at San Francisco about inclusion of 'independence' in Ch. XI, see Russell and Muther, *op. cit.* (previous note), p. 815; *United Nations Conference on International Organization*, vol. 10, pp. 677–8.

² The only form of accountability provided for is in Art. 73(e); an obligation 'to transmit regularly, for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions . . .'. No provision was made for petitions from or visits to Chapter XI territories, in contrast with Trust Territories (Art. 87 (b), (c)). However in practice something like a right of petition has developed: e.g. *Repertory of Practice of United Nations Organs*, Supplement No. 3, vol. 3, pp. 62–5; as well as a system of 'visiting missions' to territories, with the consent of the administering State: *ibid.*, pp. 59–62. See further Barbier, *Le Comité de Décolonisation des Nations-Unies* (1974), pp. 190–8.

³ *I.C.J. Reports*, 1971, p. 16 at p. 31.

⁴ *Ibid.*, cited *post*, pp. 157–8.

⁵ *I.C.J. Reports*, 1975, p. 12, at p. 33. The court referred to Res. 1514 (XV) as providing 'the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations'; *ibid.*, p. 32. For comment on the Opinion see Barbier, *Revue juridique et politique indépendance et coopération*, 30 (1976), pp. 67–103; Janis, *Harvard International Law Journal*, 17 (1976), pp. 609–22; Prévost, *Journal de droit international*, 103 (1976), pp. 831–62; Flory, *Annuaire français de droit international*, 1975, pp. 253–77.

⁶ *I.C.J. Reports*, 1975, p. 12 at p. 23 (emphasis added).

⁷ *Ibid.*, p. 36.

⁸ *Ibid.*, pp. 30, 37.

⁹ About four-fifths of approximately 100 Chapter XI territories in the period 1945–76 achieved

(3) *Other cases of application of the principle to particular territorial disputes or situations.* Finally, in quite a number of cases the principle of self-determination has been adopted by the parties as a criterion for settlement of a particular dispute or issue; for example, the use of plebiscites in determining boundaries.¹

It will be seen that in each of these cases the problem of identification has been solved in practice by processes of express agreement or, at least, acquiescence. Indeed for categories I and III this was necessarily so.² Early practice pursuant to Chapter XI of the Charter, which appears to apply to defined territories irrespective of the consent of the Members administering them, was also quasi-conventional in nature: Member States were asked to list territories to which, in their own assessment, Chapter XI applied, and no general examination has been made of the appropriateness or otherwise of their responses.³ However, practice since 1946, though predicated on a narrow interpretation of the term 'territories whose peoples have not yet attained a full measure of self-government',⁴ has been rather more searching; it is to this practice that one must look to find even rudimentary criteria for self-determination territories.

Thus the General Assembly listed, after some years of study,⁵ 'Principles which should guide Members in determining whether or not an obligation exists to transmit information called for under Article 73 (e) of the Charter'.⁶ Pursuant to those principles, the Assembly has on several occasions 'determined' that particular territories did qualify as territories to which Chapter XI applied, whether with⁷ or without⁸ the approval of the Member State administering

self-government in one form or another. See further Rigo Sureda, *The Evolution of the Right of Self-Determination* (1973); Sud, *The United Nations and Non-Self-Governing Territories* (1965); Ahmad, *The United Nations and the Colonies* (1974); El-Ayouty, *The United Nations and Decolonization. The Role of Afro-Asia* (1971); Rajan, *The United Nations and Domestic Jurisdiction* (2nd edn., 1961), pp. 133-222; Barbier, *op. cit.* (above, p. 154 n. 2); Nawaz, *Indian Yearbook of International Affairs*, 11 (1962), pp. 3-47; van Asbeck, *Recueil des cours*, 71 (1947), pp. 345-472.

¹ Cf. Bowett, *Proceedings of the American Society of International Law*, 60 (1966), p. 129 at pp. 130-1. See further the works cited *post*, p. 160 n. 3.

² Thus Charter, Art. 77 (2) made it clear that there was no automatic transfer of territories from Mandate to Trusteeship, and the International Court held that there was no obligation to negotiate Trusteeship agreements: *Status of South West Africa* opinion, *I.C.J. Reports*, 1950, p. 128 at pp. 139-40; cf. Judge de Visscher at pp. 187-90. Art. 77 (1) (c) provided for other territories to be 'voluntarily placed' under the system by States responsible for their administration: there have been no such territories.

³ Cf. G.A. Resns. 9 (I), 9 February 1946; 66 (I), 13 December 1946 (listing seventy-four territories under eight administering States). The only objections were made by States (sc., Guatemala, Panama, Argentina) with claims to certain of the territories.

⁴ Thus G.A. Res. 1541 (XV), Annex, Principle I ('territories, known as colonies at the time of the passing of the Charter'). Cf. Nawaz, *Indian Yearbook of International Affairs*, 11 (1962), p. 3 at p. 13.

⁵ Cf. G.A. Resns. 567 (VI), 18 January 1952; 648 (VII), 10 December 1952; 742 (VIII), 27 November 1953.

⁶ G.A. Res. 1541 (XV), Annex, 15 December 1960 (69-2:21).

⁷ In the case of the Spanish territories: G.A. Res. 1542 (XV), 15 December 1960 (68-6:17); *Repertory of Practice of United Nations Organs*, Suppl. 3, vol. 3, pp. 11-13.

⁸ In the cases of the nine Portuguese territories listed in G.A. Res. 1542 (XV), para. 1; *ibid.*, vol. 3, Art. 73, paras. 105-29; Wohlgenuth, *International Conciliation*, No. 545 (November

the territory in question. Other suggestions to the same effect have been made.¹

These excursions would seem to have been amply justified by the terms of Chapter XI, which is not expressed to depend on the consent of particular administering powers; but the absence of any more peremptory² or thorough delimitation of non-self-governing territories remains significant. Although there may be room for criticism of the General Assembly's record in this area, it may also be that the criticism should be directed at the relatively restrictive definition of 'non-self-governing territories' which has been adopted: that definition (at least as elaborated in Resolution 1541 (XV)) refers exclusively to the notion of 'colonial territories' in 1945,³ despite the fact that Chapter XI itself expressly includes after-acquired territories. But, given that definition, it is the case that (small islands apart) virtually all the territories which would, under the twin criteria of geographical separateness and political subordination, have qualified as non-self-governing have been treated as such, at least for a time. It is also significant that the principle of self-determination has continued to be regarded as relevant to those territories even when they were no longer reported on under Article 73 (e).⁴

(c) *The consequences of self-determination.* Where a territory is subjected to a particular regime predicated upon the principle of self-determination, the consequences of that subjection have of course been defined in the first place in the instruments themselves. The effect of subsequent practice has none the less been marked: the principle of self-determination has been regarded as having a number of significant legal effects on the institutions or territories in question. Only a brief and summary statement is possible here, but the following examples may be given.

It is arguable that traditional rules relating to the use of force and to neutrality in armed conflicts between a metropolitan or administering State and indigenous forces in a non-self-governing territory have been modified, even modified substantially.⁵ Despite significant qualifications in the original instruments, the principle of self-determination has come to be regarded as dominant.⁶ A most striking example is the case of 'C' Mandates, such as South West Africa: the

1963); and of Southern Rhodesia: G.A. Res. 1747 (XVI), 28 June 1962 (73-1:27), 2 n.p.). Cf. *British Practice in International Law*, 1962, pp. 103-9, 111-12, 248-56; Dugard, *Acta Juridica*, 1973, pp. 46-54.

¹ For Bangladesh see *post*, pp. 171-2. In the *Namibia* opinion, Judge Fitzmaurice stated that 'on any view S.W. Africa is a non-self-governing territory' under Chapter XI of the Charter: *I.C.J. Reports*, 1971, p. 6 at p. 296.

² The Annex to G.A. Res. 1541 (XV) refers to 'Principles which should guide *Members* . . .'. The Assembly's role is treated, at best, as secondary.

³ *Supra*, p. 155 n. 4. The *travaux* are not so emphatic: *United Nations Conference on International Organization*, vol. 6, p. 296; *ibid.*, vol. 10, pp. 495-8.

⁴ Whether because the principle of self-determination is written into the arrangements for self-government, as with Puerto Rico, or otherwise. As to the former see Reisman, *Puerto Rico and the International Process. New Roles in Association* (1975); Cabrañes, *International and Comparative Law Quarterly*, 16 (1967), pp. 531-9; Whiteman, *Digest*, vol. 1, p. 400.

⁵ *Post*, pp. 166-72.

⁶ Cf. *Namibia* opinion, *I.C.J. Reports*, 1971, p. 6 at p. 31; *post*, p. 158.

'C' Mandate was regarded by some as a form of disguised annexation,¹ but that view did not prevail.² Institutions based on self-determination have also been regarded as having a relatively permanent, or 'dispositive', status; for example, the Mandate regime survived the extinction of the League of Nations in 1946,³ with the result, *semble*, that United Nations membership effected a form of novation of reporting responsibilities from the League Council to the General Assembly.⁴ The principle has also been regarded as justifying the revocation or termination of rights to administer territory conferred by international agreement in the event of fundamental violation of the humanitarian interests sought to be protected by those agreements.⁵ Other examples might be given.⁶

(d) *Conclusions*. The issue then is whether there is sufficient State practice, carried out with a conviction that the activity is obligatory, to establish self-determination—at least as a principle capable of generating these types of consequences—as part of customary international law. Although this view has been denied by some writers,⁷ it was adopted by the International Court in two recent cases. In the *Namibia* opinion a majority of the Court held that

. . . the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of

¹ Cf. the dispute on the point between South Africa and the Permanent Mandates Commission; noted this *Year Book*, 12 (1931), p. 151.

² Cf. Wright, *Mandates under the League*, pp. 324–7; Whiteman, *Digest*, vol. 1, pp. 635–50 and references.

³ *Status of South West Africa* case, *I.C.J. Reports*, 1950, p. 128.

⁴ *Ibid.* Judges McNair (at pp. 159–62) and Read (at pp. 166–73) dissented on this point. See further the works cited *supra*, p. 153 n. 2.

⁵ *Namibia* opinion, *I.C.J. Reports*, 1971, p. 6; Dugard, *American Journal of International Law*, 62 (1968), pp. 78–97. It is of interest that revocation was contemplated as a legal possibility in the original proposal for a Mandate system: General Smuts, *The League of Nations—A Practical Proposal* (1919), reprinted in Hunter Miller, *The Drafting of the Covenant*, vol. 2, p. 32.

⁶ Thus Higgins argues that the principle of domestic jurisdiction does not operate to preclude discussion of self-determination situations in United Nations' organs: *Development*, pp. 90–106; cf. Brownlie, *Principles*, p. 577, and the *Aaland Islands* case, *supra*, p. 149 n. 1. It has even been argued that self-determination has developed into a norm of *jus cogens*, having the effect, *inter alia*, of depriving administering States of their sovereignty over such territories: Bedjaoui, *I.L.C. Yearbook*, 1975–I, p. 49; Calogeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes* (1973), p. 113; Rigo Sureda, *The Evolution of the Right of Self-Determination*, p. 353; but cf. p. 223. It is not at all clear either that Art. 73 purports to do this, or that subsequent developments could have this effect: cf. Jennings, *The Acquisition of Territory in International Law* (1963), pp. 78–87. See also *supra*, p. 154 n. 2. Some fairly extensive conventional development has also been attempted, e.g. Revised Single Negotiating Text on the Law of the Sea, A/Conf. 62/WP. 81 Rev. 1/Part II (1976), Transitional Provision; International Convention on the Elimination of All Forms of Racial Discrimination (1966), Art. 15; *United Nations Treaty Series*, vol. 660, p. 195. For the United Kingdom's reservation concerning Art. 15 see U.N., *Multilateral Treaties for which the Secretary-General acts as Depositary*, 1975, p. 93. Cf. Nathanson and Schwelb, *The United States and the United Nations Treaty on Racial Discrimination* (Washington, 1975), pp. 13–14.

⁷ Fitzmaurice, for example, calls it juridical nonsense: *Institut de Droit International, Livre du Centenaire* (1973), pp. 196–363 at p. 233. See also Verzijl, *International Law in Historical Perspective*, vol. 1, p. 324; Blum, *Israel Law Review*, 10 (1975), pp. 509–14; Emerson, *American Journal of International Law*, 65 (1971), pp. 459–75, and *Self-Determination Revisited in the Era of Decolonization* (1964); Devine, *Acta Juridica*, 1974, pp. 183–209; Jenks, in *Law in the World Community* (1967), pp. 134–49 at p. 141. Much of the dissent is based on the assumption that self-determination is asserted as a general right of 'peoples'.

self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not attained a full measure of self-government' (Art. 73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples . . . , which embraces all peoples and territories which 'have not yet attained independence'. Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.¹

This important passage was cited with approval by the Court in the *Western Sahara* opinion, in an opinion which strongly affirmed the right of the people of the territory to determine their future political status, notwithstanding claims to revindication on the part of Morocco and Mauritania.² Self-determination was also reaffirmed as the relevant juridical principle in several of the separate opinions;³ the most interesting of these, for our purposes, were those of Judges Dillard and Petrán.

Judge Dillard, after referring briefly to the contrasting opinions on the point, went on

. . . to call attention to the fact that the present Opinion is forthright in proclaiming the existence of the 'right' in so far as the present proceedings are concerned. This is made explicit in paragraph 56 and is fortified by calling into play two dicta in the *Namibia* case to which are added an analysis of the numerous resolutions of the General Assembly dealing in general with its decolonization policy and in particular with those resolutions centering on the Western Sahara (Opinion, paras. 60-65). The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations. It should be added that the force of these pronouncements is in no way diminished by virtue of the theoretically non-binding character of an advisory opinion.⁴

Later Judge Dillard referred to

the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient 'legal ties' of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.⁵

¹ *I.C.J. Reports*, 1971, p. 6 at p. 31; cf. Judge Ammoun at pp. 73-5; Judge Padilla Nervo at p. 115.

² *I.C.J. Reports*, 1975, p. 12 at pp. 31-3; cf. *supra*, p. 154.

³ *Ibid.*, pp. 99-100 (Judge Ammoun); pp. 30-1 (Judge Nagendra Singh); pp. 170-1 (Judge de Castro).

⁴ *Ibid.*, p. 121-2.

⁵ *Ibid.*, p. 122.

With this forthright view may be compared the nuances of Judge Petrán's separate opinion. He pointed out that

a veritable law of decolonization is in the course of taking shape. It derives essentially from the principle of self-determination of peoples proclaimed in the Charter of the United Nations and confirmed by a large number of resolutions of the General Assembly. But, in certain specific cases, one must equally take into account the principle of the national unity and integrity of States, a principle which has also been the subject of resolutions of the General Assembly. It is thus by a combination of different elements of international law evolving under the inspiration of the United Nations that the process of decolonization is being pursued . . . [H]owever . . . the wide variety of geographical and other data which must be taken into account in questions of decolonization have not yet allowed of the establishment of a sufficiently developed body of rules and practice to cover all the situations which may give rise to problems. In other words, although its guiding principles have emerged, the law of decolonization does not yet constitute a complete body of doctrine and practice. It is thus natural that political forces should be constantly at work rendering more precise and complete the content of that law in specific cases like that of Western Sahara.¹

There is here a certain studied ambiguity. The passage may simply mean that, although the guiding principles (and in particular the principle of self-determination) of the 'law of decolonization' have emerged, certain aspects of the application of those legal principles remain unclear and thus *de lege ferenda*. This is certainly the case, although the area of uncertainty can be exaggerated, and the Court did in fact, with a considerable degree of unanimity, provide an answer to a Request concerning just such an area of doubt. On the other hand, the passage might be interpreted as meaning that, since the application of the guiding principles remains in some cases unclear or uncertain, the principles themselves, and thus the whole 'law of decolonization' remain essentially *de lege ferenda*. This latter interpretation implies a somewhat cataclysmic view of the growth and creation of international law rules: until a suggested rule has become clear in principle and application, it is not a rule at all. That view would constitute a powerful solvent in many areas of customary law, but it is of doubtful validity, and it is equally doubtful that Judge Petrán in fact adopted it. 'Guiding juridical principles' can certainly co-exist with uncertainties as to their application in specific cases: so long as there exists a 'hard core' of reasonably clear cases, the status of the principle in question need not be doubted. On the other view, the emergence of a 'law of decolonization' must await the completion of the process of decolonization, since only then would no doubts or difficulties exist.

The principle of self-determination as a general principle of international law also commands substantial academic support.²

¹ Ibid., p. 110.

² Cf. Scelle, in *Spiropoulos Festschrift* (1957), pp. 385-92; Brownlie, *Principles*, pp. 575-8; Delupis, *International Law and the Independent State* (1974), pp. 13-18; Calogeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes* (1973); Rigo Sureda, *The Evolution of the Right of Self-Determination* (1973) (the best monograph); Umozurike, *Self Determination in International*

It would seem then that the following conclusions are supported by current practice.

1. International law recognizes the principle of self-determination.

2. It is, however, not a right applicable directly to any group of people desiring political independence or self-government. Like sovereignty, it is a legal principle: Fawcett calls it a 'directive principle of legislation'.¹ It applies as a matter of right only after the unit of self-determination has been determined by the application of appropriate rules.

3. The units to which the principle applies are in general those territories established and recognized as separate political units: in particular it applies to the following:

- (a) Trust and Mandated territories, and territories treated as Non-Self-Governing under Chapter XI of the Charter;
- (b) States, excluding for the purposes of the self-determination rule those parts of States which are themselves self-determination units as defined;
- (c) (Possibly) other territories forming distinct political-geographical areas, whose inhabitants do not share in the government either of the region or of the State to which the region belongs, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing;²

and

- (d) All other territories or situations to which self-determination is applied by the parties as an appropriate solution or criterion.

4. Where a self-determination unit is not already a State, it has a right of self-determination: that is, a right to choose its own political organization. Such a right, in view of its close connection with fundamental human rights, is to be exercised by the people of the relevant unit without coercion and on a basis of equality.³

Law (1972); Lachs, *Indian Journal of International Law*, 1 (1960-1), pp. 429-42; Higgins, *Development*, pp. 90-106; Bokor-Szegö, *New States and International Law*, pp. 82-101; Tunkin, *Theory of International Law* (1974), pp. 60-9 (and refs. to Soviet literature); Wright, *Proceedings of the American Society of International Law*, 48 (1954), pp. 23-37; Mustafa, *International Lawyer*, 5 (1971), pp. 479-87; Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), pp. 281-4; Šuković in Šahović (ed.), *Principles of International Law concerning Friendly Relations and Cooperation* (1972), pp. 323-74; Johnson, *Georgia Journal of International and Comparative Law*, 3 (1973), pp. 145-63; Kaur, *Indian Journal of International Law*, 10 (1970), pp. 479-502; Menon, *Revue de droit international, de sciences diplomatiques et politiques*, 53 (1975), pp. 183-200, 272-82; and cf. the more reserved account by Sinha, *Indian Journal of International Law*, 14 (1974), pp. 332-61.

¹ Fawcett, *Recueil des cours*, 132 (1971), pp. 386-91 at p. 387.

² In determining the territories in this category, G.A. Resolution 1541 (XV), Annex ('Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73(e) of the Charter of the United Nations') will provide useful, if not authoritative, guidance.

³ See Johnson, *Self-determination within the Community of Nations* (1967), and the early classic studies by Wambaugh, *A Monograph on Plebiscites* (1920); *Plebiscites since the World War* (1933).

5. Self-determination can result either in the independence of the self-determining unit as a separate State, or in its incorporation into or association with another State on a basis of political equality for the people of the unit.¹

6. Matters of self-determination cannot be within the domestic jurisdiction of the metropolitan State.²

7. Where a self-determination unit is a State, the principle of self-determination is represented by the rule against intervention in the internal affairs of that State, and in particular in the choice of the form of government of the State.

(ii) *Statehood and the operation of the principle of self-determination*

The relationship between the legal principle of self-determination and statehood must now be considered. It seems that, in situations such as the Congo, the principle of self-determination will operate to reinforce the effectiveness of territorial units created with the consent of the former sovereign.³ However, this only holds good where the new unit is itself created consistently with the principle of self-determination. Where, as with the *Bantustans* in South West Africa (Namibia), a local unit is created in an effort to prevent the operation of the principle to the larger unit, different considerations apply.⁴ The same principle holds good in cases of secession. The secession of a self-determination unit, where self-determination is forcibly prevented by the metropolitan State, will be reinforced by the principle of self-determination, so that the degree of effectiveness required as a precondition to recognition may be substantially less than in the case of secession within a metropolitan unit. The contrast between the cases of Guinea-Bissau⁵ and Biafra⁶ is marked, and may be explicable along these lines.⁷ As a consequence, the rules relating to intervention in the two cases are, it seems, different.⁸

¹ Cf. Principle VI of Annex to G.A. Res. 1541 (XV), cited with approval in the *Western Sahara* opinion, *I.C.J. Reports*, 1975, p. 12 at p. 32.

² Cf. *supra*, p. 157 n. 6. See also Rajan, *United Nations and Domestic Jurisdiction* (2nd edn., 1961), pp. 214–22, for an assessment of the earlier practice.

³ *Supra*, pp. 116–17.

⁴ On the 'bantustan' policy in South West Africa see Dugard, *The South West Africa/Namibia Dispute* (1973), pp. 236–8, 431–5; Umzurike, *op. cit.* (above, p. 159 n. 2), pp. 133–7; D'Amato, *Journal of Modern African Studies*, 4 (1966), pp. 177–92; cf. *Namibia* opinion, *I.C.J. Reports*, 1971, p. 6 at p. 57. For more recent developments see *Comparative and International Law Journal of Southern Africa*, 9 (1976), pp. 277–81; S.C. Res. 385 (1976), 20 August 1976.

⁵ Guinea-Bissau was widely recognized as a State before Portuguese recognition, despite the continued presence of Portuguese troops. See especially Rousseau, *Revue générale de droit international public*, 78 (1974), pp. 1166–71; Zorgbibe, *La guerre civile* (1975), pp. 140–1. Cf. G.A. Resns. 3061 (XXVIII), 2 November 1973, para. 1 (93–7:30); 3181 (XXVIII), 17 December 1973 (108–0:9); S.C. Res. 356 (1974), 12 August 1974 (15–0:0). Portuguese recognition was only accorded on 10 September 1974: *International Legal Materials*, 13 (1974), p. 1244.

⁶ Despite a lengthy insurgency, Biafra was only recognized by a few States, and then, it seems, on special grounds: cf. Nyerere, in Kirk-Greene, *Crisis and Conflict in Nigeria. A Documentary Source-Book 1966–1969* (1971), vol. 2, pp. 202–11, 429–39. The better view is that Biafra was never a State: Higgins, in Luard (ed.), *The International Regulation of Civil Wars* (1972), p. 175; Ijalaye, *American Journal of International Law*, 65 (1971), pp. 551–9; Elias, *Nigerian Law Journal*, 5 (1971), pp. 1–18. *Contra*, Okeke, *Controversial Subjects of Contemporary International Law* (1974), p. 165.

⁷ Cf. Brownlie, *Principles*, pp. 82–3. Zorgbibe, *op. cit.* (above, n. 5), pp. 136–40, is critical.

⁸ Cf. *infra*, pp. 166–72, and see Fujita, *Revue de droit international, de sciences diplomatiques*

These are, however, ancillary or rather peripheral applications of the principle. The question remains whether the principle of self-determination is capable of preventing an effective territorial unit, the creation of which was a violation of self-determination, from becoming a State. Practice in this area is not well developed, but in one case—Rhodesia—the problem has been raised squarely.

(iii) *Self-determination and effectiveness: the case of Rhodesia*

Since its unilateral declaration of independence on 11 November 1965, the minority government has exercised effective control within the territory of Southern Rhodesia, and it is the only government which has exercised such control, despite British claims to do so under the Southern Rhodesia Act 1965 and generally. There can be no doubt that, if the traditional tests for independence of a seceding colony were applied, Rhodesia would be an independent State.¹ However, Southern Rhodesia is not recognized by any State as independent, nor has it been regarded as a State by the United Nations.² The unilateral declaration of independence was immediately condemned by the General Assembly,³ and the Security Council, which decided 'to call upon all States not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime'.⁴ A further Council Resolution of 20 November 1965 stated that the declaration of independence had 'no legal validity' and referred to the Smith government as an 'illegal authority'.⁵ Partly, at least, on this basis various types of sanction have been authorized against Southern Rhodesia. The present position is that, despite the effectiveness of the government in Southern Rhodesia, the United Kingdom is regarded as the administering authority of the territory, which is still a non-self-governing territory under Chapter XI of the Charter.

Against this background, only three positions seem possible: that Rhodesia is in fact a State, and that action against it, so far as it is based on the contrary proposition, is illegal; that recognition is constitutive, and in view of its non-recognition Rhodesia is not a State; or that the principle of self-determination in this situation prevents an otherwise effective entity from being regarded as a State. In view of the consistent practice referred to, the first position is difficult

et politiques, 53 (1975), pp. 81-142; Dugard, *International and Comparative Law Quarterly*, 16 (1967), pp. 157-90; Ronzitti, *La guerre di liberazione nazionale e il diritto internazionale* (1974), for examination of the various issues.

¹ Fawcett, *Modern Law Review*, 34 (1971), p. 417; Coetzee, *The Sovereignty of Rhodesia and the Law of Nations* (1970).

² In 1966 the minority government forwarded communications to the Secretary-General and affirmed a right, as a 'state which is not a Member of the United Nations', to participate in proceedings under Article 32 of the Charter. The Secretary General stated that . . . 'the legal status of Southern Rhodesia is that of a Non-Self-Governing Territory under resolution 1747 . . . and Article 32 of the Charter does not apply . . .'. There was no dissent from this view, and the minority government was not invited to participate under Article 32 or otherwise: *Security Council Official Records*, 1280th mtg., 18 May 1966, p. 23. For criticism, see Stephen, *American Journal of International Law*, 67 (1973), pp. 479-90.

³ G.A. Res. 2024 (XX), 11 November 1965 (107-2:1).

⁴ S.C. Res. 216 (1965), 12 November 1965 (10-0:1), para. 2.

⁵ S.C. Res. 217 (1965) (10-0:1), para. 3.

to accept.¹ Moreover, it would appear that the Southern Rhodesian Government does not itself dissent from the view that the United Kingdom retains authority with respect to its affairs, since it apparently accepts that any settlement of the situation must be approved and implemented by the United Kingdom. The question of recognition has been discussed already, and the conclusion reached that recognition is in principle declaratory.² It may therefore be the case that Southern Rhodesia is not a State because the minority government's declaration of independence was and is internationally a nullity, as a violation of the principle of self-determination. In Fawcett's words,

... 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. This principle was affirmed in the case of Rhodesia by the virtually unanimous condemnation of the unilateral declaration of independence by the world community, and by the universal withholding of recognition of the new regime which was a consequence.

It would follow then that the illegality of the rebellion was not an obstacle to the establishment of Rhodesia as an independent State, but that the political basis and objectives of the regime were, and that the declaration of independence was without international effect.³

This view has been contested by Devine, who, significantly, was forced from a quasi-declaratory⁴ to a firmly constitutive view⁵ of recognition by his consideration of the Rhodesian affair. Devine's position is to some extent vitiated by his formulation of Fawcett's criterion as one of 'good government'.⁶ It is quite clear that good government is not a criterion for statehood, but the contrary is not contended.⁷ The position is a more limited one: that where a particular territory is a self-determination unit as defined, no government will be recognized which comes into existence and seeks to control the territory as

¹ To the same effect Brownlie, *Principles*, p. 101; Higgins, *The World Today*, 23 (1967), pp. 94-106 at p. 98; it is also the view of Harold Wilson, *The Labour Government 1964-1970* (1971), p. 966. *Contra* Marston, *International and Comparative Law Quarterly*, 18 (1969), p. 1 at p. 33; Verhoeven, *Reconnaissance*, p. 548.

² *Supra*, pp. 99-107.

³ *This Year Book*, 41 (1965-6), p. 103 at pp. 112-13, citing the Universal Declaration, the Colonial Declaration and G.A. Res. 648 (VI). Brownlie regards the status of Rhodesia as flowing from 'particular matters of fact and law' without further elaboration: *Principles*, p. 101. Marshall argues that, because Rhodesia remained a monarchy but the Queen refused to act, there was 'no legal entity which can be recognized': *International and Comparative Law Quarterly*, 17 (1968), pp. 1022-34 at p. 1033. But the proclamation of a Republic in 1970 has not been regarded as altering Rhodesia's international status—and certainly has not increased that status. Okeke, *Controversial Subjects of Contemporary International Law* (1974), p. 88 refers to Fawcett's position with apparent approval, but none the less concludes that 'Rhodesia ranks among the entities which are endowed with statehood under international law' (at pp. 104-5).

⁴ *Acta Juridica*, 1967, pp. 39-47.

⁵ *Acta Juridica*, 1973, pp. 1-171, at pp. 142-5; also McDougal and Reisman, *American Journal of International Law*, 62 (1968), pp. 1-19, at p. 17. Cf. Devine, *Comparative and International Law Journal of Southern Africa*, 2 (1969), pp. 454-66.

⁶ *Modern Law Review*, 34 (1971), p. 140; *Acta Juridica*, 1973, pp. 83-6.

⁷ Cf. Fawcett's reply, *Modern Law Review*, 34 (1971), p. 417.

a State in violation of self-determination.¹ This principle does not—at this stage of the development of international law and relations—constitute a principle of law with respect to existing States.² But the evidence in favour of this principle as it applies to self-determination units, and in particular to non-self-governing territories, though it may be restricted to the one case of Rhodesia,³ is consistent and uniform. It appears then that a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination.⁴ That this principle is capable of having very substantial effects if generally applied may be conceded. However, the relatively limited extent of the right of self-determination has been noted. Moreover it can hardly be regretted that a rule which merely ratifies the international position of effective but unrepresentative regimes is open to change.

3. ENTITIES CREATED BY THE ILLEGAL USE OF FORCE⁵

Article 2 paragraph 4 of the Charter prohibits 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. This prohibition does not affect the right to self defence against armed attack under Article 51.⁶ These rules concerning illegal use of force are the clearest case of *ius cogens* norms, although separate provision was made for them in the Vienna Convention.⁷ Moreover the principle that territory may not be validly acquired by the illegal use of force is well established.⁸ The principles of State succession

¹ Devine accepts the proposition that the Smith government came into existence in violation of self-determination in a political sense: *Acta Juridica*, 1973, p. 67. But he regards self-determination as 'too controversial, unaccepted and vague to be used by the Rhodesians as a shield or by anyone else as a sword against them': *ibid.*, p. 77; and cf. *Acta Juridica*, 1974, pp. 182–209.

² That is to say, it does not invalidate the position of unrepresentative governments in existing States. The analogue of self-determination in the case of existing States is the duty of non-intervention in internal affairs. The incidents of that duty are somewhat controversial: they are in any event essentially negative. But for the Transkei see *post*, pp. 176–80.

³ Cf. Devine, *Modern Law Review*, 34 (1971), p. 415, and Fawcett's reply, *ibid.*, p. 417. Rhodesia is undoubtedly the plainest instance, but the situation has analogues: e.g. Katanga and the Bantustans. The situation in Guinea-Bissau was an instance of the operation of the rule in the reverse situation: *supra*, p. 161 n. 5. Moreover it is quite possible for a rule to consolidate by virtue of consistent practice in one central, even if isolated, case: e.g. the development of neutrality in the American Civil War.

⁴ The Privy Council in *Madzimbamuto v. Lardner-Burke*, [1968] 3 W.L.R. 1229, at p. 1250 did not consider this position, arguing instead that Southern Rhodesia was not a State because the legitimate government was still trying to reassert itself. Cf. *In re James*, [1977] 2 W.L.R. 1 (C.A.).

⁵ The literature on statehood and the use of force is, to say the least, sparse. Hunnings, *Yearbook of the Association of Attenders and Alumni*, 32 (1962–3), pp. 58–65, does not consider the problem. There is a useful and characteristic contribution by Baty, *Yale Law Journal*, 36 (1926–7), pp. 966–84 (based of course on the old regime of rules relating to the use of force). The relationship between State extinction and the use of force has of course been considered extensively: *post*, 173–6.

⁶ See generally Brownlie, *International Law and the Use of Force by States* (1963); Higgins, *Development*, Pt. IV; Bowett, *Self-Defence in International Law* (1958).

⁷ Vienna Convention on the Law of Treaties, Arts. 52, 53. Art. 52 was reaffirmed in the *Fisheries Jurisdiction* case (*First Phase*), *I.C.J. Reports*, 1973, p. 3 at p. 19.

⁸ Whiteman, *Digest*, vol. 5, pp. 874–965, and authorities there cited.

do not, it seems, apply to cases involving the violation of the Charter, and in particular of Article 2 paragraph 4.¹ The protection accorded States by Article 2 paragraph 4 extends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness.² In summary, the prohibition of the threat or use of force in international relations is one of the most fundamental of international law rules: the international community has with considerable consistency refused to accept the legal validity of acts done or situations achieved by the illegal use of force. If ever effective territorial entities, not recognized as States, were to have their status regulated by international law, it would, one would think, be so regulated by the rules relating to the use of force.

Of course, quite apart from Article 2 paragraph 4, there is a presumption against the independence of entities created by the use of force or during a period of belligerent occupation.³ The question is whether modern law regulates the creation of States to any greater degree than this, in a situation involving illegal use of force. The difficulty of the problem is increased because, in most of the relatively few cases in which it has arisen, other factors have been determinative.

For example, in the Manchurian crisis the question whether Manchukuo could have become an independent State notwithstanding the illegal Japanese intervention was never really in issue, since the puppet nature of the Manchukuo regime was and remained evident. It is true that the League of Nations resolutions which proclaimed the duty of non-recognition referred not to lack of independence but to violation of the Covenant and the Pact of Paris.⁴ Recognition was stated to be 'incompatible with the fundamental principles of existing international obligations'.⁵ Despite these fairly categorical statements, League action was predicated on the Lytton Commission's finding that Manchukuo was not 'a genuine and spontaneous independence movement'. Given its total lack of independence the question whether, had it been effectively independent, it would have been deprived of statehood because of Japanese violations of the Covenant and the Pact of Paris did not really arise. The various entities created during the war by illegal use of force were also regarded as

¹ I.L.C., *Draft Articles on State Succession in respect of Treaties*, A/8710/Rev. 1, Art. 6. Cf. *I.L.C. Yearbook*, 1972-II, p. 60.

² *Post*, pp. 173-6.

³ *Supra*, p. 129.

⁴ Assembly Resolution, 11 March 1932: *League of Nations Official Journal*, Special Supplement No. 101/I, p. 87.

⁵ Assembly Resolution, 24 February 1933: *ibid.*, Special Supplement No. 112/II, p. 14. The language of the resolution is taken directly from the Lytton Commission's Report: C.663.M.320. 1932 [VII], p. 128. The Chinese position was that 'in pursuance of the obligations created by the Covenant . . ., it is incumbent upon the League to use, to the fullest extent necessary, its authority to prevent such a changed political situation from being created, or, if created *de facto*, from being recognized by the League or by its members as of a *de jure* character. Indeed, if brought into a *de facto* existence, in violation of the Covenant . . . it is the contention of the Chinese Government that the League should use its authority to break down that *de facto* situation in order that the political order existing prior to September . . . may be re-established' (*League of Nations Doc.*, A. (Extr.) 105.1932 [VII] (23 April 1932), p. 8).

puppets and thus not independent.¹ And the status of Taiwan has been determined, not by any illegality by which it has been enabled to survive as a separate entity, but by the insistence of both governments involved that Taiwan remains part of China—a view acquiesced in by all other States.²

The puppet-State situation illustrates the difficulty, almost the dilemma, involved in any consideration of the relationship between statehood and the illegal use of force. Either the entity owes its existence directly and substantially to the illegal intervention—in which case it is unlikely to be, and will be presumed not to be, independent—or it does not, in which case the normal criteria for statehood would presumably apply. This is not a true dilemma however, since it is conceivable that an entity created by external illegal force could be genuinely independent in fact. The situation most clearly relevant is that of Bangladesh. However, that case involved also a problem of self-determination, so that we must first consider the relationship between self-determination and the rules relating to the use of force.

(i) *The relationship between self-determination and the rules relating to the use of force*

The question of the relationship between self-determination and the rules relating to the use of force has been neglected:³ this discussion is therefore a tentative one. That there is, in all probability, a significant connection between the two legal principles is apparent from the Charter itself. Article 2 paragraph 4 includes an undertaking not to use force 'in any other manner inconsistent with the Purposes of the United Nations', and the development of relations 'based on respect for the principle of equal rights and self-determination of peoples' is one of those purposes. It might, however, be argued that the use of force contrary to the Purposes of the United Nations is only a subordinate aim of Article 2 paragraph 4 (cf. the word 'other'); that is, that the prevention of the use of force against the territorial integrity or political independence of States is the primary aim of the paragraph, and that the protection or advancement of the other purposes is legal only where it does not involve the use or threat of force against the territorial integrity or political independence of any State. To put it at its lowest, this is a plausible interpretation of Article 2 paragraph 4: moreover the development of Article 2 paragraph 4 in practice has tended to emphasize the prevention of overt aggression rather than, for example, the use of force by an incumbent against insurgents claiming for a territory a right of self-determination.⁴ In view of these uncertainties, the problem of the

¹ *Supra*, pp. 130–3. Another interesting example, which bears close comparison with Manchuria, was the Azerbaijan independence movement in 1945–6 in northern Iran under Soviet occupation: cf. *Foreign Relations of the United States, 1945–VIII*, p. 512.

² *Supra*, p. 93 n. 9.
³ See, however, Rigo Sureda, *op. cit.* (above, p. 159 n. 2), pp. 346–51; Žourek, *L'interdiction de l'emploi de la force en droit international* (1974), pp. 108–11; Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes* (1974), pp. 159–70; Dugard, *International and Comparative Law Quarterly*, 16 (1967), pp. 157–90; Šuković, *loc. cit.* (above, p. 159 n. 2), pp. 363–8.

⁴ In the *Corfu Channel* case, *I.C.J. Reports*, 1949, p. 4, the International Court condemned the threat of force in a self-help operation where the other party's behaviour was hardly consistent with Article 1 of the Charter.

relationship between self-determination and the use of force must be considered not under some general rubric but in relation to the various types of situation that may arise. In some areas practice is reasonably well developed; in others we are reduced to speculation on the basis of general principles.

The following situations may be envisaged:

1. A self-determination unit (other than a State) is prevented from exercising its right to self-determination by the use of force.
2. A self-determination unit is invaded and annexed by force without being allowed to opt for annexation or any alternative status.
3. An effective self-governing entity is created in violation of an applicable right of self-determination by external illegal force.
4. An effective self-governing entity is created in accordance with an applicable right of self-determination by external illegal force.

It should be noted that the much debated problem of the legitimacy of rebellion, or of a local insurgent's 'right to self-defence against colonial domination' is not really in point here. Debate on the lawfulness or otherwise of the use of force by a non-State entity presupposes at least some degree of legal personality of that entity. Assuming that the legal personality derives from the legal right of the entity in question to self-determination, it seems most unlikely that the use of force to assert that right should be illegal. On that view, the existence of a right would be precisely what made its exercise illegal.¹ It is probably the case that the use of force by a non-State entity in exercise of a right of self-determination is legally neutral, that is, not regulated by law at all.² *A fortiori*, the question of a legal right to self-defence is not in point either. What is relevant is the legality or otherwise of action by other States in assisting or opposing the self-determination unit.

Before discussing the particular situations enumerated above, it is necessary to refer to the most important statement of principles in this area, the Declaration on Principles of International Law approved by Resolution 2625 (XXV). In its elaboration of Article 2 paragraph 4, the Declaration states that

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

The elaboration of the principle of equal rights and self-determination repeats this formulation, and goes on to state that

In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.³

¹ Cf. Devine, *Acta Juridica*, 1973, pp. 72-8; Okeke, *Controversial Subjects of Contemporary International Law* (1974), p. 86.

² On the applicability of the laws of war to self-determination conflicts see Graham, *Washington and Lee Law Review*, 32 (1975), pp. 25-63; Forsythe, *American Journal of International Law*, 69 (1975), pp. 77-91.

³ Cf. Art. 7 of the Definition of Aggression, adopted without vote by G.A. Res. 3314 (XXIX), 14 December 1974; G.A. Res. 3103 (XXXIII), 12 December 1973 (83-13:19).

Taken literally, these propositions establish a close relationship between the two relevant principles, with the principle of self-determination taking priority over the prohibition of the use of force against the territorial integrity of a State. That primacy can perhaps best be expressed in the proposition that the phrase 'territorial integrity of any State' in Article 2 paragraph 4 excludes, so far as action in furtherance of self-determination is concerned, the territory of any self-determination unit as defined. The question is whether this, rather formidable, proposition, which has a certain amount of doctrinal support,¹ is also supported by relevant State practice.

Perhaps the most straightforward situation to be looked at is that where a self-determination unit (other than a State) is prevented from exercising its right to self-determination by the use of force. Examples of such a situation were the Portuguese African colonies prior to 1974. Military action taken by an administering power to suppress widespread popular insurrection in a self-determination unit is quite clearly capable of being a denial of self-determination and is therefore illegal on that ground. Both the General Assembly and the Security Council² have repeatedly condemned what they have described as 'colonial wars' and 'acts of repression' in the Portuguese territories, but they have refrained from characterizing the situations as aggressive war for the purposes of Article 2 paragraph 4. The contrast is demonstrated, more or less conclusively, by General Assembly Resolution 3061 (XXVIII) which, pursuant to the thesis of the independence of Guinea-Bissau,³ condemned Portugal for 'illegal occupation . . . of certain sectors of the Republic . . . and acts of aggression committed against the people of the Republic'.⁴ The difference between this language and that used in the case of Angola and Mozambique is significant. It is also consistent with the primary emphasis in Article 2 paragraph 4 on prevention of overt use of military force against the territory of another State. It is—to say the least—unlikely that the principle of self-determination deprives an administering State of its sovereignty with respect to a self-determination territory.⁵ The use of force by a metropolitan power against a self-determination unit is not a use of force against the territorial integrity and political independence of a State, though it will of course be in another manner inconsistent with the purposes of the United Nations.

The second situation—that is, invasion and annexation of a self-determination unit by external force without according the people of the invaded territory any right to choose their future status—is also relatively straightforward. Invasion and annexation of territory is quite generally illegal, and the separate status of a territory for the purposes of the self-determination rule would, if anything,

¹ *Supra*, p. 166 n. 3; Bedjaoui, *I.L.C. Yearbook*, 1975-I, pp. 48-9. But neither Umozurike nor Calogeropoulos-Stratis refers to the problem at all.

² e.g., S.C. Res. 322 (1972); Anderson, *Denver Journal of International Law and Politics*, 4 (1974), pp. 133-51.

³ Cf. *supra*, p. 161 n. 5.

⁴ G.A. Res. 3061 (XXVIII), 2 November 1973 (97-7:30).

⁵ In the *Western Sahara* opinion, the court held that the request, relating to the future status of a non-self-governing territory, did not relate to 'existing territorial rights or sovereignty over territory': *I.C.J. Reports*, 1975, p. 12 at p. 28. Cf. *supra*, p. 157 n. 6.

reinforce the illegality. The only difficulty that might arise is in the case of annexation of a territory which is not, in the full sense, a self-determination unit but rather a 'colonial enclave'. The distinction between those two types of territory is a troublesome aspect of United Nations practice.¹ But even if one were to accept its validity, it is none the less the case that forcible annexation by the surrounding ('enclaving') State is probably illegal, for the reasons stated above. When India invaded and annexed Goa in January 1961, a majority of the Security Council took the view—it is submitted correctly—that the Indian action was illegal.² India claimed that Goa was historically and legally Indian territory and that Article 2 paragraph 4 did not, therefore, apply.³ However, India had on several occasions expressly recognized Portuguese sovereignty over its Indian territories, whilst claiming their restitution. Bearing in mind the predominant Charter emphasis on peaceful change, the better opinion would appear to be that Article 2 paragraph 4 applies to any established *de facto* political boundary, and that the international interest in peaceful settlement of disputes takes priority over specific territorial claims of third States.⁴ The significance of self-determination in this context may be not so much that it cures illegality as that it may allow illegality to be more readily accommodated through the processes of recognition and prescription, whereas in other circumstances aggression partakes of the nature of a breach of *jus cogens* and is not, or not readily, curable by prescription, lapse of time or acquiescence.

The third and fourth situations (see p. 167 above) are considerably more difficult. The fourth situation is that in which an effective self-governing entity is created in pursuit of an applicable right of self-determination by external force which would, apart from any considerations arising from the principle of self-determination, be illegal under Article 2 paragraph 4. This type of case in practice involves two distinct problems: external aid to insurgents in a self-determination situation; and the large-scale use of force by another State aimed directly at 'liberating' a self-determination territory.

(ii) *Assistance to established local insurgents*

On numerous occasions General Assembly resolutions have encouraged or enjoined assistance, civil or military, to local insurgents either in general terms or in relation to specific territories. For example, Resolution 2795 (XXVI) ('Question of Territories under Portuguese Administration'), by clause 13,

Request[ed] all States . . . in consultation with the Organization of African Unity, to render to the peoples of the Territories under Portuguese domination, in particular

¹ See esp. Rigo Sureda, *op. cit.* (above, p. 159 n. 2), pp. 214–19; Franck and Hoffman, *New York University Journal of International Law and Politics*, 8 (1976), pp. 331–86, for discussion of the practice.

² S/5033; *Security Council Official Records*, 988th mtg., 18 December 1961, pp. 26–7 (7-4:0).

³ *Ibid.*, 987th mtg., 18 December 1961, p. 89; 988th mtg., 18 December 1961, pp. 14–19.

⁴ On Goa see Brownlie, *International Law and the Use of Force by States*, pp. 349, 379–83; Higgins, *Development*, pp. 187–8; Wright, *American Journal of International Law*, 56 (1962), pp. 617–32. By a treaty of 31 December 1974, Portugal recognized Indian sovereignty over the former Portuguese territories in India: *Keesing's Contemporary Archives*, 1975, p. 26922B.

the population in the liberated areas of those Territories, all the moral and material assistance necessary to continue their struggle for the restoration of their inalienable right to self-determination and independence.¹

Resolutions in this form request what would seem to be illegal intervention against the established government in civil wars. Does the traditional rule of neutrality in civil wars apply in the case of colonial wars? Certainly that has been the contention of many of the newer States in the Assembly. For present purposes, however, the question of the legality of aid to insurgents in non-self-governing or other self-determination territories is of peripheral importance. What is quite clear is that the receipt of such aid is not regarded as relevant where the local unit achieves effective self-government, whether by military or other means. For example, the fact that large amounts of aid were given to the P.A.I.G.C. in Guinea-Bissau did not prevent general recognition of Guinea-Bissau as a State prior to Portuguese recognition.²

(iii) *Military intervention in aid of self-determination*

Where, on the other hand, the emergence of local self-government in a self-determination unit is the result not of insurgency but of external military intervention, the situation would appear to be quite different. With this situation must be considered the third case enumerated above; that is, the emergence of an effective self-governing entity as a result of military intervention in violation of self-determination. The two cases most closely relevant are Manchukuo and Bangladesh. Three possibilities exist. It may be that the effectiveness of the emergent entity is in all situations to be regarded as paramount, so that its illegality of origin—however serious—will not impede recognition as a State. It may be that, in both cases, the illegality of origin should be regarded as paramount in accordance with the maxim *ex injuria non oritur jus*. Or, thirdly, it may be that, in the self-determination situation, the status of the local entity and the legality of the use of force ought to be regarded as separate issues so that the illegality of the intervention should not prejudice the pre-existing right of the local unit to self-determination.

Any discussion of this problem will be of necessity tentative. Practice is undeveloped,³ and the conflicts of political interest in situations of this type threaten to overwhelm considerations of principle. On the other hand, very many areas of State practice which are in principle regulated by international law are also highly politicized. Moreover there do exist accepted principles of legality which regulate the legal effects of State conduct in areas closely related to the situation under discussion. For example, if State personality is preserved despite effective but illegal annexation by force,⁴ it is not *a priori* impossible that statehood should be denied an entity created by external illegal force. If the

¹ G.A. Res. 2795 (XXVI), 10 December 1971 (105-8:5).

² *Supra*, p. 161 n. 5.

³ Manchukuo apart, there is no case where an effective entity illegally created by the use of external force has claimed statehood—that is, there is no analogue to the Rhodesian situation. But for Bangladesh see *infra*, pp. 171-2.

⁴ *Post*, pp. 173-6.

rule regulating the use of force in international relations is sufficiently important to outweigh the principle of effectiveness in the one situation, there seems to be no reason why it should not have a similar effect in the other situation. Equally, if a State cannot acquire territory by the use of force, it should not be able to achieve the same result in practice by fomenting, and then supporting, insurrection.¹ This latter consideration was an important one in the Manchurian crisis, although, as we have seen, the lack of independence of 'Manchukuo' enabled the situation to be dealt with, at least in form, within the structure of the legal rules deriving from the principles of effectiveness and *de facto* independence.

An analysis of this problem must then centre on an assessment of the Bangladesh case.² It is clear that Indian intervention was decisive, in the events which occurred, in effecting the emergence of Bangladesh. There was substantial local support for autonomy, or, if that could not be obtained, for independence; there was also a reasonably substantial local insurgency. But there can be no doubt that Indian intervention was the dominant factor in the success of the independence movement. Yet Bangladesh, despite the Indian intervention, was rapidly and widely recognized as a State.³ Indian intervention was criticized by many governments as a violation of the Charter,⁴ but that illegality was not regarded as derogating from the status of East Bengal, or as affecting the propriety of recognition. Indeed, not even the fact that Indian troops remained in Bangladesh was regarded as detracting from independence, despite the presumption against independence in such circumstances, which has been consistently applied elsewhere.⁵

The question whether East Bengal was, in 1971, a self-determination unit thus becomes important since, if it were not, or if recognition was given simply on the basis of effectiveness without regard to the legality of Indian intervention or to any denial of right to the people of East Bengal, then there would appear to be no criterion of legality regulating the creation of States by the use of external illegal force.

East Pakistan was not at any time after 1947 formally a non-self-governing territory. It would have been classified as 'metropolitan' and so outside the ambit of Chapter XI of the Charter and thus (apart perhaps from exceptional circumstances) of the customary right of self-determination. However, its status, at least as at 1971, was not quite so clear, for several reasons. In the first place,

¹ Baty, *Yale Law Journal*, 36 (1926-7), p. 966, at pp. 979-82; Hsu, *I.L.C. Yearbook*, 1949, pp. 112-13.

² There is a useful, though hardly impartial, study by Chowdhury, *The Genesis of Bangladesh* (1972). The factual material presented by Chowdhury is corroborated, in large part, in the *I.C.J. Review*, No. 8 (June 1972), pp. 23-62. The best analysis is that by Salmon, in *Multitudo legum, ius unum. Mélanges en honneur de Wilhelm Wengler* (1973), vol. 1, pp. 467-90. See also Franck and Rodley, *Israel Yearbook of Human Rights*, 2 (1972), pp. 142-75; Salzberg, *International Organization*, 27 (1973), pp. 115-28.

³ Salmon, *loc. cit.* (previous note), pp. 478-9; *Revue générale de droit international public*, 78 (1974), pp. 1172-4.

⁴ Okeke, *Controversial Subjects of Contemporary International Law* (1974), pp. 142-57.

⁵ *Supra*, p. 129. Cf. *Revue belge de droit international*, 1974, pp. 348-50.

East Bengal probably qualified as a Chapter XI territory in 1971, if one applies the principles accepted by the General Assembly in 1960 as relevant in determining the matter.¹ According to Principle IV of Resolution 1541 (XV), a territory is *prima facie* non-self-governing if it is both geographically separate and ethnically distinct from the 'country administering it'. East Pakistan was both geographically separate and ethnically distinct from West Pakistan; moreover the relationship between West and East Pakistan, both economically and administratively, could be described as one which 'arbitrarily place[d] the latter in a position or status of subordination'.² It is scarcely surprising then that the Indian representative described East Bengal as, in reality, a non-self-governing territory.³ In any case, in view of the denial of fundamental rights to the people of East Bengal together with its territorial and political coherence, East Bengal may have qualified in 1971 as a self-determination unit within the third, exceptional, category referred to above,⁴ even if it was not, strictly speaking, a non-self-governing territory. The view that East Bengal had, in March 1971, a right to self-determination has received some juristic support.⁵ In any event the particular, indeed the extraordinary, circumstances of East Bengal in 1971-2 were undoubtedly important factors in the decisions of other governments to recognize, rather than oppose, the secession. The comparison with international opposition to secession in other cases is marked.⁶

Thus, Salmon, after a cautious and reasoned assessment, concludes:

La même idée que si l'acte de force créant le Bangla-Desh fut illicite, le résultat ne l'est pas—car il fait suite à une autre violence qui empêchait ce peuple à disposer de lui-même—explique que n'ont point joué ici les règles qui interdisent de reconnaître une situation lorsque la reconnaissance constitue une intervention dans les affaires intérieures des autres Etats ou lorsqu'il s'agit d'une acquisition territoriale obtenue par la menace ou l'emploi de la force.⁷

(iv) *Conclusions*

The position which would appear to be most consistent with general principle, as well as supported by such practice as there has been, seems then to be as follows.

1. The use of force against a self-determination unit by a metropolitan State is a use of force against one of the Purposes of the United Nations, and a violation of Article 2 paragraph 4 of the Charter. Such a violation cannot of course effect the extinction of the right.

2. The annexation of a self-determination unit by external force in violation

¹ G.A. Res. 1541 (XV), 15 December 1960 (89-2:21). India and Pakistan both voted in favour.

² Res. 1541 (XV), Annex, Principle V.

³ *Security Council Official Records*, 1606th mtg., 4 December 1971, para. 185.

⁴ *Supra*, p. 160.

⁵ Chowdhury, *op. cit.* (above, p. 171 n. 2), pp. 188 sqq.; Okeke, *op. cit.* (above, p. 163 n. 3), pp. 131-41; Mani, *Indian Journal of International Law*, 12 (1972), pp. 83-99; Nawaz, *ibid.*, 11 (1971), pp. 251-66; Nanda, *American Journal of International Law*, 66 (1972), pp. 321-36, cf. *Denver Law Journal*, 49 (1972), pp. 53-67. *Contra*, *I.C.J. Review*, No. 8 (1972), at pp. 51-2.

⁶ This is not to say that Indian intervention was necessarily legal: cf. Franck and Rodley, *American Journal of International Law*, 67 (1973), pp. 275-305.

⁷ Salmon, *loc. cit.* (above, p. 171 n. 2), at p. 490.

of self-determination will also not extinguish the right, except, possibly, in the controversial case of the 'colonial enclave', where the annexing State is the enclaving State and (probably) where the local population acquiesces in the annexation.

3. Assistance by States to local insurgents in a self-determination unit may, possibly and exceptionally, be permissible. In any event, local independence will not, as a matter of law, be impaired by the receipt of such external assistance.

4. Any entity claiming statehood but created during a period of foreign military occupation will be presumed not to be independent. The presumption, where the military occupation is the result of illegal invasion, is particularly rigorous (but see paragraph 6, below).

5. However, where the local unit is a self-determination unit, the presumption against independence in the case of foreign military intervention may well be dispelled. There is no prohibition against recognition of a new State which has emerged in such a situation. The normal criteria for statehood—predicated on a qualified effectiveness—apply.

6. Illegality of intervention in aid of independence of a self-determination unit does not then, as a matter of law, impair the status of the local unit. On the other hand, *semble*, where a State illegally intervenes in and foments the secession of part of a metropolitan State, other States are under the same duty of non-recognition as in the case of illegal annexation of territory.¹ An entity created in violation of the rules relating to the use of force in such circumstances will not be regarded as a State. To this extent it is suggested that the presumption referred to in paragraph 4 above has become an (irrebuttable) rule of law.

7. Finally, these conclusions are to some extent *de lege ferenda*. In particular situations, and especially those in which the application of self-determination to non-colonial territories is in issue, questions of acquiescence, consent and recognition remain important.

4. ILLEGALITY AND EXTINCTION OF STATEHOOD

The practice under this rubric since 1945 has, fortunately, not been extensive. But the various States (Ethiopia,² Austria,³ Czechoslovakia,⁴ Poland,⁵ and

¹ The situation in Cyprus after the Turkish intervention in 1974 is illustrative. It is not thought that a 'Turkish State' on Cyprus created as a result of the intervention would have been recognized or accepted: indeed, despite their support of partition, the Turkish government appears to have accepted in practice the formal requirement of a unified Cypriot State. Cf. A. V. W. and A. J. Thomas, *Southwestern Law Journal*, 29 (1975), pp. 513-46, at pp. 526-7, 543-5; *Revue générale de droit international public*, 80 (1976), pp. 1109-11; Evriviades, *Texas International Law Journal*, 10 (1975), pp. 227-64.

² Marek, *Identity and Continuity*, pp. 263-82; Langer, *Seizure of Territory*, pp. 132-54; Bentwich, *this Year Book*, 22 (1945), pp. 275-8.

³ Whiteman, *Digest*, vol. 3, pp. 425-77; Clute, *The International Legal Status of Austria 1938-1955* (1962); Lemkin, *Axis Rule in Occupied Europe* (1944), pp. 108-16; Langer, *op. cit.* (previous note), pp. 155-206; Marek, *op. cit.* (previous note), pp. 338-68; H. Wright, *American Journal of International Law*, 38 (1944), pp. 621-37; Brandweiner, in Lipsky (ed.), *Law and Politics in the World Community* (1953), pp. 221-42.

⁴ Marek, *op. cit.* (above, n. 2), pp. 283-330; Langer, *op. cit.* (above, n. 2), pp. 207-44; *Valk v. Kokes*, I.L.R., 17 (1950), No. 114.

⁵ *Supra*, p. 102 n. 2.

Albania¹) effectively submerged by external illegal force in the period 1935-40 were reconstituted by the Allies during, or at the termination of, hostilities. Despite a considerable degree of at least *de facto*, and in some cases *de jure*, recognition of annexation, the view was on the whole taken that the legal existence of these States was preserved from extinction: the maxim *ex injuria jus non oritur* was regarded, at least retrospectively, as more cogent than the competitive maxim *ex factis jus oritur*; and this despite the inconsistency of non-recognition practice in this period.² Indeed, the illegality of the extinction seems to have been regarded as constituting grounds for withdrawal of recognition (as with Austria in 1943). It is necessary however to distinguish between the States effectively submerged prior to the outbreak of the Second World War (Ethiopia, Austria, Czechoslovakia and Albania), and those occupied and annexed during the war (in particular Poland).³ In the latter case, even the traditional law, based as it was more or less exclusively on the notion of effectiveness,⁴ allowed belligerency on behalf of a subjugated State by an ally to prevent the extinction of the former.⁵ On the other hand, *debellatio*, on the traditional view, occurred when all effective organized resistance to the invader had ceased. State practice in the cases of Ethiopia, Austria, Czechoslovakia and Albania was on the whole inconsistent with that view;⁶ the legal personality of the State was subsequently regarded as having been preserved, so as to form the basis for the reconstruction of the State, which was not required to await a peace treaty with the defeated belligerent.

Perhaps the most interesting such case was that of Austria. The annexation of Austria by Germany in 1938 was a clear violation of Article 80 of the Treaty of Versailles;⁷ none the less, at least *de facto* recognition of the *Anschluss* was quite general.⁸ This general recognition notwithstanding, the Moscow Declaration of 1 December 1943 affirmed that the *Anschluss* was 'null and void', and declared a joint 'desire to see re-established a free and independent Austria'.⁹ Austria in the period 1938-45 thus appears to have been regarded as in the same legal position as Ethiopia and Albania; its 'sovereignty . . . not . . . destroyed but only suspended'.¹⁰ In the absence of any claimant Austrian government or government-in-exile, the collapse of the German government in

¹ Lemkin, *op. cit.* (above, p. 173 n. 3), pp. 99-107; Langer, *op. cit.* (above, p. 173 n. 2), pp. 245-53; Marek, *op. cit.* (above, p. 173 n. 2), pp. 331-7.

² Cf. Green, in Schwarzenberger (ed.), *Law, Justice and Equity* (1967), pp. 152-67 at pp. 153-8.

³ *Quaere* as to the present legal status of the Free City of Danzig. Turack, this *Year Book*, 43 (1968-9), pp. 209-16, at p. 212 states, without argument, that the 'City State still exists in law'. But Skubiszewski (*loc. cit.* (above, p. 139 n. 1), at pp. 480-5) argues convincingly for Polish title over Gdansk by consolidation.

⁴ Cf. de Visscher, *Théories et réalités en droit international public* (4th rev. edn., 1970), pp. 188-91.

⁵ Cf. Vattel, *Le droit des gens*, Ch. xiv, especially §§ 212-13.

⁶ Cf., however, Lauterpacht, *Recognition*, p. 356.

⁷ *British and Foreign State Papers*, vol. 112, p. 1; and see the works cited *supra*, p. 173 n. 3.

⁸ Marek, *op. cit.* (above, p. 173 n. 2), pp. 343-6; Clute, *op. cit.* (above, p. 173 n. 3), pp. 8-12.

⁹ *American Journal of International Law*, 38 (1944), *Supplement*, p. 7.

¹⁰ Lemkin, *op. cit.* (above, p. 173 n. 3), p. 115.

June 1945 necessitated the assumption by the Allies of governmental authority in Austria,¹ leading eventually to the Austrian State Treaty of 1955, terminating control machinery in Austria, and recognizing 'that Austria is re-established as a sovereign, peaceful, independent and democratic State'.² Austria was not regarded as a Second World War belligerent,³ and Article 21 provided that reparations would 'not be exacted from Austria arising out of the existence of a state of war after 1st September 1939'.⁴

On the view taken by the Allies after 1943, it seems then that Austria was a State throughout.⁵ On that view, governmental authority with respect to Austria was divided between the Austrian Government and the Allied Commission for Austria. It was not that, after 1945, Austria *qua* State was 'limited in her capacity for action under international law';⁶ rather that the government of Austria was shared between different instrumentalities.

Ethiopia, also, had been invaded and annexed in violation of the Covenant and the Kellogg-Briand Pact.⁷ The annexation had received some degree of recognition, but its nullity was in effect affirmed by the Peace Treaty with Italy.⁸ Albania, where a puppet government had been established in union with Italy,⁹ was also restored to independence, acts of the puppet government between 1939 and 1943 being recognized as null and void.¹⁰

However in each of these cases reconstitution of the State, under whatever auspices,¹¹ followed more or less directly upon the defeat of the Axis powers. The annexations of 1936-40 could only be regarded as effective *sub modo* while the conflict arising from the events of that period remained undecided. The difficulty then remains: how long could it be said that the legal identity of the State was preserved, despite its lack of effective control, in face of fully effective but illegal annexation? Post-1945 practice has been of little assistance in determining this issue, since illegal invasion of a State for the purpose of its annexation has not occurred with any frequency.¹² The most significant case, that of the Baltic States, sheds little light on the problem either.¹³ On the whole, few

¹ *British and Foreign State Papers*, vol. 145, pp. 846, 850; *ibid.*, vol. 146, p. 504; Mair, in Royal Institute of International Affairs, *Four Power Control in Germany and Austria* (1956), Pt. II; Wheeler-Bennett and Nichols, *The Semblance of Peace. The Political Settlement after the Second World War* (1972), pp. 456-86.

² *United Nations Treaty Series*, vol. 217, p. 223, Art. 1. For the negotiations see Whiteman, *Digest*, vol. 3, pp. 437-68.

³ Lemkin, *op. cit.* (above, p. 173 n. 3), p. 116 n. 36.

⁴ Potsdam Proclamation, Pt. VII; *British and Foreign State Papers*, vol. 145, p. 852; Feis, *Between War and Peace. The Potsdam Conference* (1960), pp. 65-9, 274-9.

⁵ Cf. 1946 Agreement, Art. 3; Clute, *op. cit.* (above, p. 173 n. 3), pp. 130-8.

⁶ Brandweiner, in Lipsky (ed.), *Law and Politics in the World Community* (1953), pp. 221-42 at p. 225, describing Austria as a 'protected State'.

⁷ *Supra*, p. 173 n. 2.

⁸ *United Nations Treaty Series*, vol. 49, p. 747, Arts. 33-8, 74.

⁹ *Supra*, p. 174 n. 1. Cf. *Case of Gold Looted by Germany from Rome in 1943*, I.L.R., 20 (1953), p. 441 at pp. 450-1; *Monetary Gold Removed from Rome*, I.C.J. Reports, 1954, p. 19.

¹⁰ *United Nations Treaty Series*, vol. 49, p. 47, Arts. 27, 31, 74.

¹¹ For Poland after 1945 see *supra*, pp. 132 nn. 4, 5.

¹² Cf. Bot, *Non-Recognition and Treaty Relations* (1968), pp. 60-4. Hyderabad is probably the only instance: *supra*, p. 128 n. 2.

¹³ On the Baltic States see Marek, *op. cit.* (above, p. 173 n. 2), pp. 369-416; Langer, *op. cit.*

States have so far recognized the annexation of the Baltic States; on the other hand, it is difficult to deny that their continued 'existence' is as much a matter of 'cold-war politics' as law.¹ Marek's conclusion would appear to be to similar effect: after referring to 'the survival of those States, whose physical suppression, although not assuming the orthodox form of belligerent occupation, proved equally temporary or transient', she states that

At the same time, the final loss of independence, either by way of a legal settlement or by way of a total obliteration of the entire international delimitation of a State, signified its extinction.²

If, on the other hand, it is concluded that continued recognition of Latvia, Lithuania and Estonia signifies their continued existence as States,³ then it may be that the rule protecting State personality against illegal annexation has achieved relatively peremptory, permanent, force: the character as *jus cogens* of the rules relating to the use of force is no doubt relevant here.⁴ The absence of more recent and explicit State practice is hardly regrettable; but it would seem to preclude any more conclusive assessment of the effect of continued effective but illegal annexation upon statehood. It may be said that the uncertainty of this position is common to that of prescription in general international law.⁵ Equally, in view of the uncertainty of the position, the recognition practice assumes considerable importance.

5. OTHER CASES

(i) Apartheid and the Bantustan policy

The question of the limits, if any, on the power of a State to grant independence to a portion of its territory—which power has hitherto been regarded as more or less unfettered—was raised squarely by the purported grant of independence by South Africa to the Transkei, on 26 October 1976.

(a) *Origins of the Transkei: The Bantustan policy.* The policy of 'separate development' of racial groups within South Africa is long-established: its ultimate extension was the dismemberment of areas of the Republic by the creation of self-governing 'Bantustans' which would then be granted independence. Such a process, it was thought, would justify the denationalization of those South Africans who historically belonged or were thought to belong to the

(above, p. 173 n. 2), pp. 262–70, 284; *Revue générale de droit international public*, 80 (1976), pp. 890–1.

¹ Cf. Jessup, *Transnational Law* (1956), p. 62; *In re De-Sautels*, 307 N.E. 2d. 576 (1974); *British Practice in International Law*, 1966, p. 82.

² *Identity and Continuity*, p. 589.

³ Cf. Brownlie, *Principles*, pp. 82–3: 'illegal occupation cannot of itself terminate statehood . . . [W]hen elements of . . . *jus cogens* are involved, it is less likely that recognition and acquiescence will offset the original illegality'.

⁴ Cf. *supra*, pp. 146–8.

⁵ Cf. Johnson, *this Year Book*, 27 (1950), pp. 332–54; Radojkovic, in *Mélanges Andrassy* (1968), pp. 225–36.

ethnic group for which the Bantustan was formed.¹ The Transkei, for example, was accorded 'self-government' in 1963.² The South African Status of the Transkei Act, 1976³ purported to grant independence to the Transkei. It provided:

(1) The territory known as the Transkei and consisting of the districts mentioned in Schedule A, is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa.

(2) The Republic of South Africa shall cease to exercise any authority over the said territory.⁴

The Act contains rather unusual provisions purporting to determine the citizenship of the Transkei,⁵ and including in that 'grant' broad categories of former South African citizens with little or no effective link with the Transkei.⁶ Quite apart from the doubtful legality of this form of mass deprivation of nationality, these provisions of the Act demonstrate with some clarity the racially discriminatory nature of the Bantustan policy, which is aimed at preserving the bulk of South Africa for its minority white population.⁷ The South African Act also provides a procedure for resolution of disputes over the citizenship provisions.⁸

The South African Act, and the local Republic of Transkei Constitution Act, appear then, with one qualification, to vest full formal independence in the local authorities in the Transkei. That qualification relates to the citizenship provisions of the South African Act; it is a derogation from formal independence for another State to control the grant of nationality of a putative State. However, as a matter of local (Transkeian) law it is uncertain whether the South African

¹ For background to the Bantustan policy see Barber, *South Africa's Foreign Policy 1945-70* (1973), pp. 231-42; 'Report of the Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa', *General Assembly, Official Records*, 18th Sess., A/5497 (1963), pp. 52-4; Hill, *Bantustans: the Fragmentation of South Africa* (1964). For discussion in the context of the 'independence' of the Bantustans see R. F. and H. J. Taubenfeld, *Race, Peace, Law, and Southern Africa* (New York, 1968), pp. 156-8. See also Sanders, *Comparative and International Law Journal of Southern Africa*, 9 (1976), pp. 356-64; and cf. *ibid.*, pp. 428-9.

² Transkei Constitution Act No. 48 of 1963; see Kahn, *South African Law Journal*, 80 (1963), pp. 473-82; Richings, *ibid.*, 93 (1976), pp. 119-126.

³ *International Legal Materials*, 15 (1976), p. 1175.

⁴ *Ibid.*, s. 1; and see *Keesing's Contemporary Archives*, 1976, pp. 28061-3.

⁵ *Ibid.*, s. 6 (1), Schedule B.

⁶ Paras. (f) and (g) of Schedule B purport to revoke the South African citizenship of, and to confer Transkeian citizenship on, anyone who 'speaks a language used by the Xhosa or Sotho speaking section of the population of the Transkei . . .' or who 'is related to any member of the population contemplated in paragraph (f) or has identified himself with any part of such population or is culturally or otherwise associated with any member or part of such population'.

⁷ The Constitution of the Republic of Transkei (*International Legal Materials*, 15 (1976), p. 1136), Ch. 7, does not apparently confer automatic local nationality on all the persons referred to in Schedule B of the South African Act. S. 58 (2) provides that 'Any person, who has been found in the manner to be prescribed by or under an Act of Parliament, to be predominantly Xhosa-speaking or Sotho-speaking and to be a member of, or descended from, or ethnically, culturally or otherwise associated with, any tribe resident in a district of Transkei shall be registered as and become a citizen of Transkei.' This is ambiguous, but is apparently regarded as providing an option to register. Those not exercising the option, apparently, become stateless.

⁸ S. 6 (2). Ss. 4, 5 provide in apparently peremptory form for devolution and continuation in force of various treaties and agreements with South Africa or other States.

Act has this effect: the Transkeian Legislative Assembly has plenary authority,¹ the validity of its legislation cannot be impugned in any court,² and the Constitution itself may be freely amended in the ordinary manner and form.³ Whatever the correct interpretation of section 58 (2) of the Constitution, therefore, the local authorities seem to retain eventual control over who will be regarded as Transkeian nationals under Transkeian law.

The General Assembly has consistently condemned the Bantustan policy and asserted that no independent Bantustan would be recognized as a State. Thus Resolution 2775E (XXVI) of 29 November 1971 condemned

The establishment by the Government of South Africa of Bantu homelands (Bantustans) and the forcible removal of the African people of South Africa and Namibia to those areas as a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to the territorial integrity of the countries and the unity of their peoples.⁴

Resolution 3411D (XXX) of 28 November 1975 reaffirmed this position and 'Call[ed] upon all Governments and organizations not to deal with any institutions or authorities of the Bantustans or to accord any form of recognition to them'.⁵ On 27 October 1976 the Assembly again condemned the Bantustan policy and rejected the 'independence' of the Transkei as 'invalid'.⁶ Meanwhile the Organization of African Unity in July 1976 had invited 'all States . . . not to accord recognition to any Bantustan, in particular, the Transkei whose so-called independence is scheduled for the 26 October 1976'.⁷ In fact no third State has, at the time of writing, recognized the Transkei.⁸

(b) *The status of the Transkei.* The status of the Transkei as an entity granted formal independence by the previous sovereign and claiming to be a State is thus squarely raised. The various resolutions and statements referred to, although unanimous in effect, are somewhat indistinct in their justification of the non-recognition of the Transkei—assuming, as seems clear, that such non-recognition goes to the status, or lack of it, of the entity in question. For example, Resolution 2775E (XXVI) refers to the principle of self-determination and to 'the territorial integrity of the countries and the unity of their peoples'. But self-determination, as we have seen,⁹ has only a very limited and disputable application to independent metropolitan States: the incidents of the principle in such cases are negative—the duty of non-intervention—and hardly peremptory. Nor does practice demonstrate any general requirement that the government

¹ Constitution, s. 21.

² *Ibid.*, s. 21 (4).

³ *Ibid.*, s. 75.

⁴ Para. 1 (105-2:2). See also G.A. Resns. 2923E (XXVII), 15 November 1972, para. 2 (100-4:21); 3151G (XXVIII), 14 December 1973, para. 14 (88-7:28); 3324E (XXIX), 16 December 1974, para. 10 (95-13:14).

⁵ G.A. Res. 3411D (XXX) (99-0:8).

⁶ G.A. Res. 31/6A, para. 2 (134-0:1 (U.S.A.)). Para. 3 recommended that Governments 'deny any form of recognition to the so-called independent Transkei and . . . refrain from having any dealings with the so-called independent Transkei or other Bantustans'.

⁷ O.A.U. Res. 493 (XXVII); *International Legal Materials*, 15 (1976), p. 1221.

⁸ See, e.g., *Australian Foreign Affairs Review*, November 1976, pp. 591-5.

⁹ *Supra*, pp. 152, 161.

of a metropolitan State be representative of its people (although it is of course for almost all purposes *the* representative of that people), or that it should act with respect to its population in accordance with the principle of self-determination.¹ The principle of 'territorial integrity' does not provide a permanent guarantee of present territorial divisions, nor does it preclude the granting of independence to a portion of the metropolitan territory, even where such a grant is contrary to the wishes of the majority of the people of the metropolitan State.²

The second justification for non-recognition generally given is that the Transkei lacks independence in view of its economic and political reliance on South Africa: thus the Organization of African Unity resolution referred to its 'fraudulent pseudo-independence'.³ Where the creation of an entity is attended by serious illegalities, as seems to be the case here, it may be that the presumption in favour of the independence of entities granted full formal independence by the metropolitan State is displaced.⁴ None the less, in cases of devolution the criterion of independence is predominantly formal, and there have been other cases of small States very substantially dependent on a former metropolis or third State.⁵ It seems doubtful whether the difference in degree of actual dependence is very much greater in the present case.

But on balance it may be concluded that, as an entity the creation of which was attended by serious illegalities, which is not supported (as were the Congo,⁶ Lesotho and so on) by the principle of self-determination, and which remains substantially dependent on South Africa for its subsistence, Transkei would seem not to be independent for the purpose of statehood in international law. However, in view of the relatively formal nature of the criterion of independence in these types of case, this judgment remains somewhat precarious; and it certainly could not justify the *permanent* and unequivocal non-recognition which the resolutions cited appear to contemplate.

The third possible justification for non-recognition is that the Transkei, as an entity created directly pursuant to a fundamentally illegal policy of *apartheid*, is for that reason, and irrespective of its degree of formal or actual effectiveness, not a State. As we have seen, some such rule as this may be justifiable with respect to self-determination,⁷ and the illegal use of force.⁸ The relevance of the concept of *jus cogens* in this context has also been referred to.⁹ *Apartheid* as such, a particular institution adopted in one country, is

¹ *Supra*, pp. 149-50.

² This was probably so with the Irish Free State: *supra*, p. 135 n. 3. Many other examples might be given.

³ O.A.U. Res. 493 (XXVII), para. 4. G.A. Res. 31/6A also referred to its independence as 'sham'.

⁴ *Supra*, p. 135.

⁵ The Transkei is 43,798 square km. in area. It imports about 90 per cent of its food supplies, and is heavily reliant on remittances from workers in the Republic of South Africa for its national income. But it has a sea-coast, and unlike some of the Bantustans has a relatively coherent territory.

⁶ *Supra*, pp. 106-7.

⁸ *Supra*, pp. 172-3.

⁷ *Supra*, pp. 161-4.

⁹ *Supra*, pp. 144-8.

probably not illegal as a matter of customary international law;¹ but it provides a clear case of a policy predicated on a fundamental denial of equality on the grounds of race or ethnic origin.² There is considerable support for the principle of racial equality and non-discrimination as a principle of general international law and even of *jus cogens*.³ It is clear (and apparent from Schedule B of the South African Act itself) that the creation of the Transkei was an integral part of a policy which violates this fundamental principle.⁴ It may therefore be that a further fundamental criterion of legality regulating the creation of States has been added to those discussed earlier in this study; although in view of the rather generalized formulations of the non-recognition policy so far, and of the availability of another ground of non-acceptance of the Transkei as a State, this conclusion is necessarily tentative.

(ii) *Puppet States and the 1949 Geneva Convention*

Article 47 of the Third Convention relative to the Protection of Civilian Persons in Time of War (concluded to remedy evasion of the previous law through the use of puppet local authorities) provides that

Protected Persons who are in occupied territory shall not be deprived . . . of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions of government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power . . .⁵

Marek accordingly argues that 'the Geneva Convention has positively outlawed the creation of puppets as a means of indirectly violating the international occupation regime. It has branded them as illegal'.⁶ This seems rather too categorical. Although such puppets (whether 'States' or 'governments') have no more governmental authority than the belligerent occupant itself, that does not mean that, within the limits of the Hague and Geneva Conventions, the action of such a regime as an organ or agent of the occupant may not be valid.

It is thus doubtful whether Article 47 establishes any categorical rule prohibiting

¹ For the International Convention on the Suppression and Punishment of the Crime of Apartheid, annexed to G.A. Res. 3068 (XXVIII), 30 November 1973 (91-4:26), see *International Legal Materials*, 13 (1974), p. 50. The Convention came into force on 18 July 1976: *International Legal Materials*, 15 (1976), p. 983. It makes no express reference to the Bantustans: but cf. Art. 2 (c).

² The important International Convention on the Elimination of all Forms of Racial Discrimination, 1966 (*United Nations Treaty Series*, vol. 660, p. 195) expressly and particularly prohibits 'racial segregation and apartheid' (Art. 3). As at 31 December 1975 there were eighty-seven parties to the Convention.

³ See especially Judge Tanaka, dissenting, *South West Africa cases (Second Phase)*, *I.C.J. Reports*, 1966, p. 6 at pp. 284-316; Brownlie, *Principles*, pp. 578-80 and works there cited. See also the interesting account by Dugard, *Acta Juridica*, 1974, pp. 220-7.

⁴ That racial equality and non-discrimination is observed *within* the Transkei is, of course, not to the point: the illegality relates to the non-observance of the principle within South Africa as a whole, and in the very act of creation of the Transkei which was an aspect of that non-observance. And see further Norman, *New England Law Review*, 12 (1977), pp. 585-646.

⁵ *United Nations Treaty Series*, vol. 75, p. 287.

⁶ *Identity and Continuity*, p. 120.

puppet entities from being created, or from achieving real independence over a period of time. And this view is confirmed by the commentators on the Conventions.¹

(iii) *Violation of conventional stipulations providing for independence*

Multilateral treaties, whether peace or armistice agreements or international 'constitutional' treaties such as the Covenant and the Charter, frequently provide for the independence of certain territories either immediately or contingently. Where the territory concerned claims independence but the relevant treaty provisions are not complied with, complex problems arise. In general, a distinction must be made between formal or procedural violations, and violations of material provisions, and in particular of the purposes for or basic conditions upon which independence is to be granted. In the former case it seems that violations will not affect statehood provided genuine independence is attained.² In the latter case, the presumption may well be against statehood in the absence of compliance with the relevant provisions. Moreover, where the treaty is of such a kind that it creates a form of regime extending beyond the immediate parties, it may even be that no entity created in violation of material provisions of the treaty will be recognized as a State. For example, South Africa could not on this view evade its responsibilities towards Namibia by the grant of independence to a minority regime there. However, the matter depends to a considerable extent upon the relevant instruments in each case.

(iv) *Entities not claiming to be States*

Statehood can be described as a claim of right based on a certain factual situation. The case of Formosa raises the interesting possibility that an entity which does not claim to be a State, even though it might otherwise qualify for statehood in accordance with the basic criteria, will not be regarded as a State.³

6. CONCLUSION

It has been argued that international law does contain workable rules for determining whether a given entity is or is not a State. Of course, these rules are not, so to speak, self-executing: as with rules in other areas of international law, their application by international lawyers, or by States and other international persons, requires the exercise of judgment in each case. But to say

¹ International Committee of the Red Cross, *Commentary* (1958), vol. 4, pp. 272-4; Draper, *The Red Cross Conventions* (1958), pp. 38-9; U.S., Dept. of the Army, *Field Manual FM 27-10* (1956), § 366.

² Cf. the cases of Syria and Lebanon in 1944: *supra*, pp. 135-7. Non-observance of the procedures for termination of the Mandate regime was not regarded as relevant, provided effective independence had been granted to the people of the territories concerned, in accordance with the basic principles of the Mandate system. Cf. *Foreign Relations of the United States, 1942-IV*, pp. 647-8, 665; *ibid.*, 1943-IV, pp. 966, 987, 1007; *ibid.*, 1944-V, pp. 774, 782, 785, 795-7; *ibid.*, 1945-VIII, p. 1197.

³ On Formosa see the works cited *supra*, p. 93 n. 9. Andorra is another possible case of an entity not claiming statehood: *supra*, p. 129 n. 6.

this is not to assert that any process of 'recognition', whether the formal usage of diplomatic practice or some more informal act, is creative of the legal personality of the entity in question. The point is that under the criteria discussed here there *are* clear, central cases. It is the chief perception of the 'declaratory' school of recognition that the alternative view reduces every case to being marginal and thus, in a very fundamental way, has a destabilizing effect in international relations and is destructive of the coherence of international law. On the other hand, the more subtle adherents of the 'constitutive' theory saw that the equation of statehood with 'fact' was a serious oversimplification, and that in any case the international community need not necessarily be bound to accept every effective territorial entity as a State, with all that that implies, no matter how violative of fundamental rules of law the creation of the entity in question.¹ It is submitted that recent developments, divorced from the polemics of the doctrinal dispute over 'recognition', have to some degree at least incorporated the basic insights of both positions, and have thus contributed to the progressive development of international law.

¹ Cf. Lauterpacht, cited *supra*, p. 148 n 2.