Public International Law

Contemporary Principles and Perspectives

Gideon Boas

Associate Professor, Faculty of Law, Monash University, Australia

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

> The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law . . . Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.[162] [R]atification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention.[163]

The *Teoh* case is authority for the principle that ratification of a treaty is not a 'merely platitudinous or ineffectual act', and that a ratified treaty can and should be applied by domestic Australian courts, where appropriate. While this ruling seems to be a step away from the transformative approach that is generally adopted by Australia, it prompted a significant political backlash and led to a number of legislative attempts to reduce the impact of the *Teoh* decision in both 1995 and 1997, although both of these attempts failed.[164]

While *Teoh* has been endorsed in a number of international jurisdictions, including the United Kingdom,[165] it would appear that its potential scope has been reduced in light of subsequent High Court decisions, in particular *Lam*, in which a number of judges considered unfavourably the *Teoh* interpretation of a legitimate expectation and expressed strong reservations against it.[166]

As with its relationship with customary international law, Australia's approach to treaty law is perplexing. With the exception of *Teoh*, the Australian High Court has resisted intervention by international law in domestic law in the absence of a domestic incorporation of the relevant treaty. The combined effect of the approach taken by the High Court

---

162 Ibid., 286–7.

163 Ibid., 291.

164 See Boas, above note 89, 182–3.

165 *Teoh* was endorsed in principle by the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Ahmed and Patel* [1998] INLR 570. On this point see Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Yearbook of International Law* 105, 106.

166 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [140] (Callinan J), [81–106] (McHugh and Gummow JJ). Meanwhile, rulings in other jurisdictions within Australia seem to adhere more closely to the approach in *Teoh*, although they tend not to make direct reference to that case (see, e.g., *DPP v TY (No. 3)* [2007] VSC 489 (Victorian Supreme Court)).

and by successive Australian governments is to severely limit the effect of unincorporated treaties upon domestic law, in contrast to the UK and US, both of which have mechanisms through which unincorporated treaties can play a substantive role in the domestic sphere.

3.4.4.2 Civil law states

There is divergence among civil law states as to how treaty law is implemented. Generally, states with constitutional provisions will require treaties to be implemented by an Act of Parliament, unless they are construed as self-executing.

3.4.4.2.1 Germany In Germany, under the Basic Law, power to conduct treaties is granted to the President (executive) by Article 59(1).[167] With regard to the implementation of these treaties, they are regarded by German federal courts as taking precedence over domestic legislation, but must be in accord with the constitution.[168] Once the federal law has been passed, treaties that fall under Article 59(2) will be treated as incorporated but will only be given the status of a federal law (not a higher status).[169]

3.4.4.2.2 Japan Article 73(3) of the 1946 Japanese Constitution gives Cabinet the power to enter into treaties, with the prior or subsequent approval of the Diet (legislature).[170] Article 98 of the Constitution states that 'the treaties concluded by Japan . . . shall be faithfully observed'.[171] This is clearly a vague statement and does not provide a great deal of guidance. It has, however, been interpreted as incorporating international law (both customary law, as discussed above, and treaty law) into Japan's legal system.[172]

3.4.4.2.3 The Netherlands Article 91(1) of the 1983 Netherlands Constitution[173] requires Parliamentary approval before treaties become binding. Once approved, the treaty will take precedence over existing statute law. A treaty can generally not conflict with the Constitution, although if it does conflict it may be passed through a restrictive

---

167 Basic Law for the Republic of Germany, above note 137, Art. 59(1).
168 Shaw, above note 6, 172.
169 Ibid.
170 Constitution of Japan, above note 140, Art. 73(3).
171 Ibid., Art. 98.
172 H. Oda, *Japanese Law* (Oxford: Oxford University Press, 1999, 2nd edn), 49–50; Iwasawa, above note 141.
173 Constitution of the Netherlands, adopted 17 February 1983, Art. 91(1).

procedure, the requirement being a two-thirds majority in both chambers of parliament.[174]

3.4.4.3 Contemporary developments: automatic incorporation of treaty law into domestic law

The constitutions of a number of states, and especially those of Russia and East Timor, have adopted a less conventional transformation-based approach to the implementation of treaty law into domestic law. Whilst self-executing treaties traditionally do not require implementing legislation, and this position has not changed, it will be seen that in relation to non self-executing treaties, these states adopt a more progressive approach.

Under Article 15(4) of the Russian Constitution, and Article 5 of the Federal Law on International Treaties of the Russian Federation of 1995, ratified treaties are considered part of Russia's legal system.[175] If a treaty does not require 'the publication of intra-state acts' it will be directly imported into Russian law. If the treaty requires a legal act, Russia is under an obligation to implement the necessary legislation. This is a significant trend away from the traditional position, whereby states maintain a discretion to determine, after ratifying a treaty, whether or not they will then implement it into domestic law through an Act of Parliament. Under Russia's constitution, once ratified, treaties appear to have the scope to be incorporated directly into Russian law.

Similarly, the 2002 Constitution of East Timor allows for treaties to be automatically applied internally.[176] Considering the broad scope of its provisions, East Timor appears to be adopting a purely incorporation-based approach to both customary and treaty law.

Article 19(1) of the 2008 Kosovo Constitution[177] provides that, upon ratification, treaty law becomes part of the internal law of Kosovo.[178] Treaty law is directly applicable, except in the case of a non self-executing treaty, where application requires the promulgation of a law. In Article 19(2), it is stated that ratified international agreements, as well as norms of international law, take superiority over the laws of Kosovo. While this

---

[174] See generally J. Klabbers, 'The New Dutch Law on the Approval of Treaties' (1995) 44 *International and Comparative Law Quarterly* 629.

[175] Constitution of the Russian Federation, above note 144, Art. 15(4).

[176] Constitution of the Democratic Republic of East Timor, above note 146, s. 9(1–3).

[177] Constitution of Kosovo, ratified 9 April 2008, Art. 19(1).

[178] After their publication in the Official Gazette of the Republic of Kosovo.

Constitution is not as broad as that of East Timor, it nonetheless represents a highly progressive approach to international law.

Contemporary developments suggest an increasing challenge to the traditional approach to the implementation of treaty law by states. Particularly in the cases of Russia, East Timor and Kosovo, the automatic incorporation of treaty law upon ratification by the executive[179] sets a highly progressive precedent. It does appear, however, that widespread adoption of the approach taken by these states is unlikely. This is largely because of the constitutional interplay that exists between the legislature and the executive in English common law states, and the strong shift in power towards the executive that would result from allowing for the automatic incorporation of treaty law.

3.5 CONCLUSIONS

The theoretical debate between monism and dualism in many ways frames a key practical issue facing the international legal order today: where national and international law overlap, which should prevail? Before international fora, there is no question that international law is supreme. That is not to say that domestic law does not have a role to play; clearly it does, but it is a secondary role, to supplement international law where it is deficient, and to cast light on complex issues of fact upon which an international tribunal will pass judgment.

The real dilemma arises when considering the role that international law should play within the domestic sphere. The choice between incorporation or transformation, and how these models are implemented, varies considerably between states, and there is hardly uniformity of practice. With respect to customary international law, incorporation approaches seem predominant both in the common law and civil law states, but practice is by no means uniform.

With respect to treaty law, the variation of approach by states is even greater. However, to make sense of the divide, it may be helpful not to view the question as a choice between transformation and incorporation, but one involving the role of the executive. In states where the executive plays a largely ceremonial role, such as the UK, Australia and the Netherlands, a transformative approach tends to be adopted in order not to grant the executive substantive power by allowing it to enter into

---

[179] In the case of Kosovo this is stated expressly only to extend to self-executing treaties.

treaties unilaterally. In states where the executive plays a more substantive role, such as the USA and Germany, an incorporation approach tends to be preferred. This is, of course, subject to the distinction drawn in some states between self-executing and non self-executing treaties.

Contemporary developments suggest an interesting shift toward a greater supremacy of international law. In the most recently created or amended constitutions – Russia, East Timor and Kosovo, for example – the supremacy of international customary and treaty law over domestic law is explicitly emphasized. As in other areas of international law and relations (such as human rights, international criminal justice, and the developing power and number of international and regional organizations), the unilateral power of states within their own domains is shifting. This should not be seen as an 'assault on the citadel of state sovereignty',[180] for it is the states themselves, acting individually or collectively, that cede such authority. Nonetheless, the extent of this acknowledgement of international law, and its place in the internal fabric of a state's legal and social life, is not entirely clear, as is revealed by the varying practice between states in relation to these issues.

[180] To quote Orentlicher in a different context, see Dianne F. Orentlicher, 'The Law of Universal Conscience: Genocide and Crimes against Humanity', available at http://www.ushmm.org/genocide/analysis/details/1998-12-09-01/orentlicher.pdf, 11.

4. The subjects of international law: states

Who or what are the subjects of international law? What exactly is required to cross the threshold of legal personality and become a participant on the international legal plane? In what ways do the rights and obligations – capacities – differ as between those privileged participants in the international legal system? These questions are crucial to an understanding of how the international legal system functions, and they will be the subject of this and the following chapter.

When faced with the question of whether the United Nations possessed the requisite capacity to bring a claim for reparations before the International Court of Justice (ICJ) in 1949, the Court famously remarked that, to be an international person, an entity must be 'a subject of international law and capable of possessing international rights and duties'; it must also have 'the capacity to maintain its rights and duties by bringing international claims'.[1] While this formulation of international legal personality has stood the test of time and remains undisputed, its circular nature is striking. As Ian Brownlie observed: 'All that can be said is that an entity of a type recognized by customary law as capable of possessing rights and duties and of bringing international claims, and having these capacities conferred upon it, is a legal person.'[2] From this uncertainty, it might be said that the measure of international legal personality is the actual, rather than the potential, exercise of rights and duties. Indeed, to properly appreciate the nature of personality it is necessary to go further than merely comprehending that personality is concerned with the incidence of international legal rights and duties. In international law, personality is a relative phenomenon, and accordingly its measure in any given

[1] *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion) [1949] ICJ Rep 174, 179.

[2] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn), 57. See also Neyire Akpinarli, *The Fragility of the 'Failed State' Paradigm: A Different International Law Perspective of the Absence of Effective Government* (Leiden: Brill, 2010), 105.

case will depend on a variety of factors – only some of which are strictly legal in nature.

Legal personality is a *conditio sine qua non* for participation in a legal system. It is a threshold that must be crossed, for without legal personality entities do not exist in law.[3] As Kelsen notes, law cannot be considered only in terms of rights and duties – it must also be able to point to someone or something that possesses those rights and duties.[4] Even so, the concept of personality in international law is ambiguous; how does this decentralized legal system identify which entities can have rights or duties and under what conditions?

To begin at the beginning: states are the primary and universally accepted subjects of international law.[5] Since the Peace of Westphalia, signed in 1648, effectively legitimized the nation-state as the sole legal entity in international relations, the role of sovereign states as the masters of international law has not been profoundly challenged. Of course, the fact of the privileged position that states hold in international law tells only part of the story about its subjects, nature and content. The essence of legal personality, and the rights and responsibilities held by the myriad of entities in any legal system, vary and evolve – at times incrementally, at other times with a meteoric speed. The period since the creation of the United Nations in 1945 has heralded some extraordinary examples of this.

This and the following chapter will address both the traditional position of the subjects of international law, as well as contemporary developments in their nature and capacity. This chapter focuses on states. It begins by considering the international personality of states and the nature of sovereignty. The traditional criteria for statehood, set out in Article 1 of the Montevideo Convention on the Rights and Duties of States,[6] will be

---

[3] Jan Klabbers, 'The Concept of Legal Personality' (2005) 11 *Ius Gentium* 35.

[4] Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945), 93.

[5] See Christian Walter, 'Subjects of International Law', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Heidelberg: Max-Planck-Institut, 2010), 1; M.P. Vorster, 'The International Legal Personality of Nasciturus States' (1978) 4 *South African Year Book of International Law* 1, 2; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 39; Rebecca M.M. Wallace and Olga Martin-Ortgea, *International Law* (London: Sweet & Maxwell, 2009, 6th edn), 63; Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007), 14–15, 122–3.

[6] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 49 Stat. 3097; Treaty Series 881, Art. 1.

considered, as will examples of their application. Apart from the specific requirements for the creation of statehood, the process of recognition of a state by other states within the international community is a critical aspect of statehood, and the different elements and theories of recognition will be discussed.

The chapter will then consider the relevance of additional criteria to the process of statehood – the willingness to observe international law, in particular human and peoples' rights, and the impact of this on the evolution in the understanding of statehood. The importance of territory to the concept and operation of sovereignty is difficult to understate and the principles and operation of territorial sovereignty will be discussed. Finally, this chapter will address a fundamental aspect of statehood in the context of the post-Second World War period. The principle of self-determination, which has heralded an exponential growth in the number of states and a radical shift in the international legal and political landscape, will be given detailed attention.

In considering the creation and place of states within international law, certain recent developments since the break-up of the former Yugoslavia suggest a shift in the manner and circumstances in which states may manifest. Contemporary developments will be discussed, as will emergent themes that may suggest either a future direction – or simply some degree of confusion – in the complex realm of international law.

4.1 THE NATURE OF THE PERSONALITY OF STATES IN INTERNATIONAL LAW

As has always been the case in international law, it is only states that have international legal personality to the fullest extent.[7] They are the most obvious and universally accepted subjects of international law[8] and, as such, the conclusion that they have legal personality for the purposes of international law, giving them certain rights and duties, is uncontroversial.[9] While there is little doubt that the participants are diversifying, the position of states as sovereigns with primary control over the creation

---

[7] Higgins, above note 5, 39; Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), 16; Oleg I. Tiunov 'The International Legal Personality of States: Problems and Solutions' (1992–1993) 37 *St Louis University Law Journal*, 326–7; Vorster, above note 5, 2.

[8] Walter, above note 5, 1; Vorster, above note 5, 2.

[9] M.N.S. Sellers, 'International Legal Personality' (2005) 11 *Ius Gentium* 67; Tiunov, above note 7, 323.

and development of international law sets them apart from all other participants.

Since the establishment of the United Nations system, there has been a dramatic increase in the number of entities calling themselves states. This has largely been a consequence of the process of decolonization and the increasing recognition of new or reconstituted states based on the right of peoples to self-determination. The increase in the number of states, from 75 prior to the Second World War[10] to 192[11] today, has had a profound impact on the nature of modern international law.[12] The growth in the number of state-entities following the Second World War led the International Court of Justice as early as 1970 to note that, in this context, the interpretation of international law 'cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law'.[13]

To be sure, the law has developed considerably in this area over the past few decades such that the idea of statehood, as well as when and how it might arise, has become something of a changing dynamic.

4.2 SOVEREIGNTY

To appreciate the meaning of statehood and its relationship with international law, one must consider the fundamental principle of state sovereignty. The notion of sovereignty is one of the oldest concepts in

---

[10] James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006, 2nd edn), 4.

[11] There are currently 192 members of the United Nations. This does not include the Holy See or claims by the territories of Taiwan and Palestine to the right of statehood. Nor does it include the potentially new or developing states of Kosovo, South Sudan, Abkhazia, Nagorno-Karabakh or Northern Cyprus. Of these, certainly South Sudan and Kosovo seem most likely to be first to join the list of the world's states.

[12] Recent examples include the new statehood of Kosovo, Montenegro and East Timor.

[13] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 53. See generally Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Harlow, UK: Longman, 1992, 9th edn); Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger Inc., 1951); John Dugard, *Recognition and the United Nations* (Cambridge, UK: Grotius Publications, 1987); T.D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Westport, CT; London: Praeger, 1999).

international law. Article 2(1) of the Charter of the United Nations reflects the continued relevance of the principle to modern international law and the significance of the sovereign equality of all states.[14] However, the criteria necessary to make a state 'sovereign' – always the subject of some degree of confusion – has become increasingly complex, as a variety of stated and unstated indicia seem to have developed in recent years.

The principle of the sovereign equality of states in international law far predates the United Nations Charter. Its origins can be traced to the Peace of Westphalia, after which the hierarchical system organized around the Church and the Holy Roman Empire was disbanded in preference to a horizontal system based on the recognition of the equality of nation states. Emerich de Vattel, an eminent eighteenth-century international law scholar, famously stated: 'A dwarf is as much a man as a giant is; a small Republic is no less a sovereign state than the most powerful kingdom.'[15]

For Hans Kelsen, '[s]overeignty in its original sense means "highest authority"'.[16] As such, developments in the national organization of states and, as a corollary, the development of international law, have established the principle of the exclusive competence of the state with regard to its own territory. The Permanent Court of Arbitration noted in 1928 that sovereignty involves not only the exclusive right to display the activities of a state,[17] but 'sovereignty in the relations between states signifies independence'.[18]

Judge Shahabuddeen stated in the *Nauru* case, 'whatever the debates relating to its precise content in other respects, the concept of equality of states has always applied as a fundamental principle to the position of states before the Court'.[19] Indeed, in contemporary usage, the concept of sovereignty has both political and legal connotations. Despite sovereignty and equality representing a basic doctrine of the law of nations, in reality 'the history of the international system is a history of inequality *par*

---

[14] United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI.

[15] Emerich de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués a la conduite et aux affaires des Nations et Souverains* (Washington, DC: Carnegie Institution of Washington, 1916).

[16] Kelsen, above note 4, 189.

[17] *Island of Palmas* case *(or Miangas)* (*United States of America v Netherlands*) (1928) 2 RIAA 829, 9.

[18] Ibid., 8.

[19] *Certain Phosphate Lands in Nauru* (Preliminary Objections) [1992] ICJ Rep 240, 270–1; see also Ram P. Anand, 'New States and International Law', in *Max Planck Encyclopedia of International Law* (Heidelberg: Max-Planck-Institut, 2010), 1; Tiunov, above note 7, 327–9.

excellence'.[20] Formal equality exists only in a legal sense before the judicial organs in the international system.

Despite the legal fiction that all states possess sovereign equality, it is clear from history that the Great Powers (whoever they happen to be at a given time) 'impose limits on the application of the law' based on political decisions.[21] The 'haves' in the international system are not just materially advantaged, but have correspondingly greater capacity to influence and shape the content of the rules that govern all states.[22] The distinction between states referred to as the Great Powers and a large mass of middle and smaller powers (including those who have at times been referred to as 'rogue' or 'pariah' states) is that the Great Powers police the international order from a position of assumed cultural, material and legal superiority.[23] A key prerogative of this position has been a right to intervene in the affairs of other states in order to promote some proclaimed enlightened goal. This was illustrated most recently in the invasion of Iraq by the Coalition of the Willing led by the United States (as well, perhaps, as the use of force against Gaddafi's regime in Libya[24]), but also much earlier in history in the colonial projects of, amongst others, England, France, Germany and Italy, and earlier still in the religious quest of the Crusades. Indeed, whether one goes back as far as Rome, ancient Greece or Babylonia,[25] the story has been much the same.

While sovereign equality remains enshrined in international law as a quality possessed by all states, these examples illustrate that the vagaries of international politics render sovereign equality something of a compromised ideal. Sovereign equality is not necessarily reflected in international practice, at least not in the traditional sense that prevailed after the Peace of Westphalia. Arguably, political considerations weigh more heavily on the shoulders of states than do legal considerations, when states are

---

[20] R.W. Tucker, *The Inequality of Nations* (New York: Basic Books, 1977), 8. See also discussion concerning John Austin's conception of sovereignty in Chapter 1.

[21] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht; London: Martinus Nijhoff, 1991), 9.

[22] Ngaire Woods, 'Order, Globalization and Inequality in World Politics', in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization and World Politics* (Oxford: Oxford University Press, 1999), 21.

[23] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge; New York: Cambridge University Press, 2004), 5.

[24] See Security Council Resolution 1973 (2011).

[25] For a discussion of the place of international law in history, see Chapter 1, section 1.3.

required to reaffirm their 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.[26] The variety of responses from different states to different circumstances that engage these fundamental values certainly bears out this view.

Political double standards might be cited in the UN's response to apartheid in South Africa and white rule in Rhodesia (now Zimbabwe) beginning in 1966, where a link was first made between internal state practices and status in the international community. The forerunners of today's pariah states were South Africa and, to a lesser extent, Rhodesia. For example, as a response to the all-white minority Smith regime's Unilateral Declaration of Independence in the British colony of Southern Rhodesia in 1965, the Security Council called on states to break off relations with Rhodesia and applied a sanctions regime that became increasingly punitive.[27] In South Africa, clearly an independent state and member of the League of Nations, a similar process occurred.[28] These prohibitions had the enlightened goal of ending apartheid, deemed the most egregious form of racism in existence at the time. However, the failure to seriously sanction Pol Pot's Kampuchea, Idi Amin's Uganda or Guatemala, for example, reflects the vagaries of international politics.[29]

4.3 TRADITIONAL CRITERIA FOR STATEHOOD

In essence, for a state to be a state, it must be sovereign and characterized by the recognized features of statehood. As the Arbitration Commission of the European Conference on Yugoslavia rather blandly put it, a state may be defined as 'a community which consists of a territory and a population subject to an organized political authority . . . such a state is characterized by sovereignty'.[30] This tells an important part of the story – but not the whole story. While contemporary developments in this area of law have rendered opaque the circumstances in which statehood may be said to have been established (perhaps this has always been the case), the primary

---

[26] Charter of the United Nations, Preamble.

[27] SC Res. 221 (9 April 1966); SC Res. 232 (16 December 1966); SC Res. 277 (15 March 1970); Lowe above note 5, 159.

[28] SC Res. 418 (4 November 1977).

[29] Simpson, above note 23, 300.

[30] Cited in M. Craven, 'The EC Arbitration Commission on Yugoslavia' (1994) 65 *British Yearbook of International Law* 333.

legal basis for establishing a legitimate title to statehood remains the four main criteria set out in Article 1 of the 1933 Montevideo Convention:

- a permanent population;
- a defined territory;
- a government; and
- the capacity to enter into relations with other states.[31]

While it is not clear precisely at which point in history these four fundamental elements were first accepted as forming the basic test for statehood in international law, the signing of the Convention on 26 December 1933 is commonly viewed as amounting to a crystallization of the then prevailing and widely held practice. Article 1 has since been regarded as setting down '[t]he best known formulation of the basic criteria for statehood',[32] and – as Rosalyn Higgins has noted – '[n]o further serious attempts at definition have been essayed'.[33]

Strictly speaking, in order for a state to come into existence, all four criteria of the Montevideo Convention must be present to a certain extent. Legally these criteria are discrete requirements, although in practice it is helpful to view them as existing in an interconnected relationship where no element is mutually exclusive. For example, to have a permanent population, there must be a defined territory; in order to enter into relations with other states there must be a recognized government, in control of a permanent population, in a defined territory. Looked at in this way, the criteria become more than mere legal rhetoric and instead provide a concrete basis for determining a state's international legal capacity and legitimacy. The criteria are, perhaps, a rare happy marriage between formal legal requirements and the irresistible logic of the rational world; although, as we shall see, that is not to say the marriage is not at times considerably strained by the external forces of politics and other extralegal considerations.

4.3.1 First Criterion: Permanent Population

The first Montevideo criterion requires that the state entity exhibit a permanent population, and that this population can be defined as a 'stable

---

31 Montevideo Convention, above note 6, Art. 1.
32 Crawford, above note 10, 45.
33 Higgins, above note 5, 39.

community'.[34] As such, the population does not have to be homogeneous in nature, but it must be settled. This requirement illustrates the basic need for some form of stable human community capable of supporting the superstructure of the state. This means that the people must have the intention to inhabit a specific territory on a permanent basis. Mere occupation of a territory will not be sufficient to legally fulfil this criterion. The presence of inhabitants who are traditionally nomadic will not necessarily affect the requirement of permanence.[35] This point was reflected in the ICJ's Advisory Opinion on the Western Sahara where – while it was a territory sparsely populated mostly by people of a nomadic nature – it was still considered by the Court to have a permanent population, possessing the right to self-determination.[36]

Nonetheless, it seems logical that to fulfil this criterion, there remains a requirement for some permanence, if not in living arrangements then at least such as to suggest the viability of the community over time. This does not necessarily mean that any particular measure of longevity or extended pedigree is required before a population can form the basis of a state. There is also no requirement as to the size of the population, as evidenced by the existence of states with very small populations, such as the Vatican City (under 1000), Nauru and Tuvalu (both under 11000).[37]

4.3.2 Second Criterion: Territory

In order to satisfy the second Montevideo criterion, control must be exercised over a certain portion of territory. This criterion is a critical precondition for statehood.[38] Exclusive control of territory remains a fundamental prerequisite for the competence and authority required by any state to administer and exercise its state functions both in fact and in law. As Cassese puts it, states have paramountcy in international law by virtue of their stable and permanent control over territory.[39]

It is not a requirement that the precise delimitations of this territory be defined. The ICJ noted in the *North Sea Continental Shelf* cases:

---

[34] Brownlie, above note 2, 71–6.
[35] Aust, above note 7, 15–16.
[36] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 2, [70], [162]; GA Res. 3292 (XXIX).
[37] John H. Currie, *Public International Law* (Toronto: Irwin Law, 2008), 21.
[38] Ibid., 22.
[39] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005, 2nd edn), 74.

> The appurtenance of a given area, considered as an entity in no way governs the precise determination 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.[40]

Israel is one such example. It achieved statehood in 1948, even though the whole of its territory was in dispute.[41] Similarly, Kuwaiti sovereignty was restored and recognized before its borders were finally demarcated by the UN in 1992 in accordance with its 1963 agreement with Iraq.[42] The size or wealth of the territory is also not important. The Vatican City is considered a sovereign state despite, 'whatever domain it may have elsewhere', occupying less than 100 acres on earth.[43] Since 1990, despite their small size, Andorra, Liechtenstein, Monaco, Nauru, San Marino and Tuvalu have all joined the United Nations.[44]

What is important in relation to territory is that an exclusive right is established in that area to display state power – that is, effective government (the third Montevideo criterion). The 'obsession by states with territory'[45] is in this sense quite understandable, as territorial sovereignty is dependent upon territorial control over a certain portion of the globe to the exclusion of any other state.[46] During a civil war, for example, a state may lose effective control of a portion of its territory to a rebel government. Even so, while the conflict continues, and until the borders of the area under rebel control become static, the rebel group will not be able to show a sufficiently defined territory to support a claim to statehood.[47]

The ICJ, in its ruling in the *Military and Paramilitary Activities in Nicaragua* case, confirmed the link between a state's territorial integrity

---

[40] *North Sea Continental Shelf* cases (*Federal Republic of Germany v Denmark and the Netherlands*) [1969] ICJ Rep 3, [46].

[41] See Lawyers Committee for Human Rights, 'Comments Relating to the Combined Initial and First Periodic Report of the State of Israel before the UN Human Rights Committee' (1998); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 121; Lowe, above note 5, 156.

[42] Wallace and Martin-Ortgea, above note 5, 65.

[43] David Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004, 6th edn), 100.

[44] Crawford, above note 10, 52.

[45] Peter Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 *Chinese Journal of International Law* 58.

[46] *Island of Palmas* case, above note 17, 8.

[47] Lowe, above note 5, 156.

and its sovereignty.[48] In the case regarding South Africa's presence in Namibia, the Court was emphatic that it was the '[p]hysical control of territory, and not sovereignty or legitimacy of title' that formed the basis for a state's liability for acts affecting other states.[49]

4.3.3 Third Criterion: Government

The third Montevideo criterion requires that a state-entity must have a central government operating as a political body within the law of the land and in effective control of the territory.[50] The population in question must be constituted by a coercive, relatively centralized legal order; there must exist central organs for the creation and the application of the norms of that order, especially that organ which is called government.[51] The requirement for government is not tied to any particular form or style of government, but is instead concerned with a coherent, stable and effective political organization.[52] The mere existence of a government will not be sufficient to satisfy the requirement of an *effective government*. To do this it must be sovereign and independent, so that within its territory it is not subject to the authority of another state.[53] The importance of government as a criterion for statehood in international law is best understood by appreciating the need for stability and effectiveness both within a state and in a state's international relations.

The traditional example often referred to in relation to this is the 1920

---

[48] *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] 1CJ Rep 14, 106 ('*Nicaragua* case'); Jennifer L. Czernecki, 'The United Nations Paradox: The Battle between Humanitarian Intervention and State Sovereignty' (2002–03) 41 *Duquesne Law Review* 396.

[49] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, above note 13, 54; Jochen A. Frowein, 'De Facto Regime', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Heidelberg: Max-Planck-Institut, 2010), 1.

[50] Aust, above note 7, 16.

[51] Hans Kelsen, 'Recognition in International Law, Theoretical Observations' (1941) 35 *American Journal of International Law* 605, 607–8.

[52] *Nicaragua* case, above note 48, [263]; Letter of 20 November 1991 (issued as UN Doc. A/46/844 and S/23416) in which Libya emphasized that the Charter 'guarantees the equality of peoples and their right to make their own political and social choices, a right that is enshrined in religious law and is guaranteed by international law' (quoted in *Questions of Interpretation and Application of the Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libya v United Kingdom*) (Provisional Measures), Dissenting Opinion of Judge Oda, [30]).

[53] Aust, above note 7, 16.

Aaland Islands case, which concerned the claim to self-determination of a population living on a group of islands (the Aaland Islands) in the Baltic Sea. An International Committee of Jurists was entrusted by the League of Nations to give an Advisory Opinion on the legal aspects of the claim. The case turned on whether the Islanders were under the domestic sovereignty of Finland (in which case the principle of state sovereignty would render it an internal state matter), or whether at the relevant time Finland did not possess the relevant qualities of statehood (in which case the Islanders might have a right to claim self-determination[54]). The 1920 report of the Committee stated:

> It is . . . 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.[55]

In other words, for a state to come into being, the requirement for an effective government is closely associated with the notion of self-sufficiency and non-reliance, especially with respect to primary state functions such as the maintenance of internal peace and stability.

However, recent developments arguably contradict the principle set down in the *Aaland Islands* case. Scholars have pointed to state practice emerging from the break-up of the former Socialist Federal Republic of Yugoslavia that suggests the permissibility of entities to declare statehood *before* the criteria for an effective government has been substantially met.[56] In 1992, when Croatia and Bosnia and Herzegovina were both embroiled in a series of brutal armed conflicts, and when non-government forces and the forces of other state entities controlled substantial areas of their respective territories, both were admitted as independent Member States

---

[54] The relevance of this case to self-determination is discussed below at section 4.9.1.1.

[55] LNOJ Sp. Supp. No. 4 (1920), 8–9.

[56] Malcolm N. Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008, 6th edn), 200–201; Roland Rich 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 *European Journal of International Law* 36, 51. Consider also Afghanistan, Sierra Leone, Somalia and the Democratic Republic of the Congo, which have been classified at varying times as 'failed states' in that, in spite of possessing legal capacity on the international plane, they were unable to exercise it in the absence of an effective governing regime.

into the United Nations. This appears to reflect a shift in the traditional necessity for the effective exercise of control by a government throughout its territory. However, when considered in the context of the development and evolution of the principle of self-determination throughout the twentieth century, it is possible that the position with respect to Croatia and Bosnia and Herzegovina reflects a relaxation of the traditional requirement for effective control.[57]

4.3.4 Fourth Criterion: Capacity to Enter into Legal Relations

The final traditional criterion for statehood – the capacity to enter into legal relations with other states – is discrete, but in practice is often treated as being closely connected to the third requirement of effective government. This is because the capacity to enter into relations with other states is primarily concerned with the emergent entity having the relevant political and legal machinery with which to engage in the complex sphere of international relations. The critical consideration attaching to this criterion is one of the *capacity* to act independently in international legal relations, rather than proof of action.

For example, while 'states' or provinces within federated countries – such as Victoria (in Australia), Texas (in the USA) or Ontario (in Canada) – have permanent populations, defined territory and effective governments, they are not considered to be sovereign states. This is because the capacity to act on the international plane is the preserve of federal governments of these countries, and not of their provincial governments. As Article 2 of the Montevideo Convention stipulates, 'the federal state shall constitute a sole person in the eyes of international law'. Thus, although political subdivisions within a state may meet the first three criteria, they will not meet the fourth.[58] Of course, the fact that some provincial entities do, in fact, maintain international dealings only reinforces the vagaries of international law in this area. Examples of this include the government of Quebec, which maintains overseas delegations and has extensive dealings with foreign governments, as well as the present government of California's relations with other governments on the Pacific Rim, particularly in relation to its Renewable Energy Program.[59]

---

[57] This is discussed further below in relation to the break-up of the former Yugoslavia – see section 4.9.3.

[58] Lowe, above note 5, 158.

[59] The California Energy Commission, 'California's Renewable Energy Program'; available at http://www.energy.ca.gov/renewables/index.html (accessed on 7 November 2010).

4.4 RECOGNITION

In 1941, Hans Kelsen wrote that '[t]he problem of recognition of states and governments has neither in theory nor in practice been solved satisfactorily'.[60] Seventy years later, one could reasonably make precisely the same statement. Fulfilment of the Montevideo criteria tells only part of the story of the process of achieving statehood. Claims of statehood are inevitably affected by the greater number – and nature – of states prepared to treat a new entity as a state and enter into relations with it.[61] This is because, unless an entity is accorded recognition as a state by a sufficiently large number of other states, it cannot realistically claim to be a state with all the corresponding rights and obligations.[62] Participation in international organizations and regional groupings is also of considerable importance in the assertion of legal capacity,[63] and will often flow from broader recognition.

Recognition is a manifestation of the will of a state whereby it expresses the legitimacy of the existence of the nascent state entity.[64] Recognition is relevant if the legality of a title or situation is doubted.[65] In the past the term 'recognition' in international law has been used mainly in connection with the recognition by existing states of new states, of new heads of government of existing states, and of belligerent communities. A satisfactory, if general, articulation of the role of recognition is as a procedure 'whereby the governments of existing states respond to certain changes in the world community'.[66] Indeed, recognition has frequently been sought by both new state entities seeking admission to the family of nations as well as from states that have acquired, by occupation or annexation, some new piece of territory in the belief that the grant of recognition by important states will strengthen its title over the newly acquired territory.[67]

---

[60] Kelsen, above note 51, 605.

[61] Christopher J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 *Chicago Journal of International Law* 2, 15; Wallace and Martin-Ortgea, above note 5, 67.

[62] Aust, above note 7, 17; Lowe, above note 5, 157.

[63] Borgen, above note 61, 2.

[64] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 372.

[65] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 411.

[66] Grant, above note 13, xix.

[67] Arnold D. McNair, 'The Stimson Doctrine of Non-Recognition: A Note on its Legal Aspects' (1933) 14 *British Yearbook of International Law* 66; Higgins,

States seek recognition from other states of a change in the international order because legal recognition has the ability to confer legitimacy and make it a subject of international law.[68] This is because the legal status of state as a state is intimately tied to the willingness of other states to recognize and deal with it. Therefore, once the Montevideo criteria have been adequately established, appropriate recognition is the most straightforward means of achieving the required mantle of statehood. Despite the broadly held view that recognition is purely a question of policy and not of law,[69] in practice political and legal recognition work in unison, for unless an entity is accorded recognition as a state by a sufficiently large number of other states, it cannot participate as a state in international law.

While the formation, altered territorial status, dissolution or extinction, or changing control of states are on one view matters of fact, they are materially and invariably affected by the process by which the community of nations is prepared to recognize and accept such changes. As is shown by the differing responses to the Turkish Federated State of Cyprus, the dissolution of the former Yugoslavia and creation of the new states of Slovenia, Croatia and Bosnia-Herzegovina – and, more recently, Kosovo, South Ossetia and Abkhazia – the process of altering statehood is one very much dependent on whether such changes receive support and recognition, and by whom, within the international community.

4.4.1 Political Recognition of Statehood

A distinction must be made between recognition of states and recognition of governments. The recognition of a government is no more than an acknowledgement that it is the representative organ of the state, and has the consent or at least the acquiescence of its people.[70] The recognition of a state, however, is the establishment of the fact that a state is a subject

---

above note 5, 39–55; Q. Wright, 'Some Thoughts About Recognition' (1950) 44 *American Journal of International Law* 548–59.

[68] Kelsen, above note 51, 608; Merrie Faye Witkin 'Transkei: An Analysis of the Practice of Recognition – Political or Legal?' (1977) 18 *Harvard International Law Journal* 606.

[69] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion), 22 July 2010, ICJ General List No. 141, 26; McNair, above note 67, 66; Philip Marshal Brown, 'The Legal Effects of Recognition' (1950) 44 *American Journal of International Law* 617; M. Kaplan and N. Katzenbach, *The Political Foundations of International Law* (New York: Wiley, 1961), 109; Shaw, above note 56, 445.

[70] Stefan Talmon, *Recognition of Governments in International Law* (Oxford: Clarendon Press, 1998), 5–6.

of international law.[71] Recognition of a state may consist of a legal act or a political act. This means that an act of recognition can have purely political (and thus, non-legal) consequences, or recognition can have legal consequences by establishing the fact of the existence of a state in the sense of international law. Thus, recognition can be both political and legal in nature and effect.[72]

Political recognition occurs where a recognizing state or government expresses a *willingness* to enter into political and other relations with the recognized state or government.[73] A political act of recognition is 'declaratory' in the sense that it is an act without legal consequences.[74] The declaration of willingness by a state or government to enter into political relations with the recognized state or government in itself has no legal consequences, although it may be of great importance politically to the prestige of the nascent state or government seeking to be recognized.

Recognition of a new state of affairs in international relations can be established at any time regardless of the date on which, in the opinion of the state doing the recognizing, the new participant began to fulfil the Montevideo criteria.[75] Political recognition may hinge on certain conditions being fulfilled by the new entity, such as the degree of independence or an undertaking to adhere to international law.[76] However, this is unimportant from a legal point of view since the declaration of willingness to enter into political and other relations with a state or government does not constitute any legal obligation in itself.[77] Existing states are only empowered, not obligated, to perform the act of recognition. Refusal to recognize the existence of a new state is not a violation of international law and is often used as a persuasive political tool.[78]

With existing states, a political policy of non-recognition can be employed as a sanction and deterrent for preventing breaches of the international order. However, once a state has become a legal entity by virtue of its relations with other states, non-recognition has no legal effect on its statehood. This is illustrated in the case of the United States of America

---

71 Kelsen, above note 51, 607, 609.
72 Ibid., 605; see Shaw, above note 56, 445, 470–72.
73 Kelsen, above note 51, 605; Rich, above note 56, 36, 43, 65.
74 Kelsen, above note 51, 605.
75 Kelsen, ibid., 613.
76 McNair, above note 67, 67.
77 Kelsen, above note 51, 605; Wallace and Martin-Ortgea, above note 5, 76.
78 See, Lowe, above note 5, 164; Akpinarli, above note 2, 137. Examples include the non-recognition by many Arab states of the state of Israel, the non-recognition of Turkey's control over Northern Cyprus, or the non-recognition by the international community of Somaliland.

and the Islamic Republic of Iran which, since the Islamic Revolution in Iran in 1979 overthrowing the US-backed Shah Reza Pahlavi and replacing him with an overtly hostile Shi'a regime, have not conducted diplomatic relations. Further economic sanctions have been imposed recently in an attempt to dissuade Iran from its nuclear programme. On 19 March 2009, US President Barack Obama spoke directly to the Iranian people in a video saying that, '[t]he United States wants the Islamic Republic of Iran to take its rightful place in the community of nations. You have that right – but it comes with real responsibilities.'[79] As Obama suggests, Iran already has a rightful place among the community of nations as a result of its fulfilment of the Montevideo criteria and by virtue of its recognition by other states. He is also correct in stating that this right conveys certain responsibilities, in this case to abide by the Nuclear Non-Proliferation Treaty (NPPT). However, the diplomatic non-recognition of the Iranian government by the United States is purely political in nature and does not affect Iran's legality as a state.

Non-recognition, sometimes referred to as the Stimson doctrine,[80] can occur when the international community is faced with breaches of international law by one of its members, such as the case of Iran and the NPPT, the acquisition of the West Bank and East Jerusalem by force by the state of Israel, or the international isolation experienced by South Africa under the apartheid regime. The Stimson doctrine of non-recognition arises when the conduct of a state becomes so objectionable that a severe diplomatic response is considered necessary. Examples of this have included the possession of armaments in contravention of international agreements, acts of external aggression, or the resort to war or any other non-pacific means used for the solution of an international dispute.[81] Because political recognition is always accompanied by further and more concrete evidence of support,[82] non-recognition affects commercial treaties, extradition treaties, diplomatic protection, protection of industrial, literary and artistic property, etc.[83] It must be distinguished from cases where recognition is withheld for legal reasons, such as where the entity in question does not

---

[79] 'Obama offers Iran "new beginning"', *BBC News,* 20 March 2009, available at http://news.bbc.co.uk/2/hi/7954211.stm

[80] Named after US Secretary of State Henry Stimpson. The Stimpson Doctrine is a policy of the United States federal government, enunciated in an identic note of 7 January 1932, to Japan and China, of non-recognition of international territorial changes that were executed by force.

[81] McNair, above note 67, 67.

[82] Ibid., 69.

[83] Ibid., 72–3.

possess the attributes of statehood outlined in the Montevideo Convention and recognition of it as a state would be premature, as occurred with Palestine or Taiwan.[84]

4.4.2 Declaratory and Constitutive Theories of Recognition

Two distinct theories exist that explain the role of recognition in the formation of states: declaratory and constitutive. The *declaratory* theory of recognition treats recognition as a mere political or symbolic act, with no legal ramifications. To proponents of this theory, statehood can be achieved without recognition from other pre-existing states. The establishment of statehood in international law is regarded as a question of fact. Once certain facts come into existence (usually the criteria for statehood established by the Montevideo Convention although, as discussed below, at section 4.5, other criteria may be relevant), international personality and statehood are conferred on the newly emergent state. Thus, any decision to recognize a newly emerging state is merely an acknowledgement that the new state has already satisfied the requisite criteria of statehood. The state in question does not have to wait for recognition.[85]

In contrast, under the *constitutive* theory, recognition by existing states is a fundamental precondition for the attainment of statehood for a newly emerging state. Statehood, as a legal status, springs from the act of recognition itself.[86] Given the nature of general international law, it is the states that are empowered to determine violations of general international law. Thus, it is said the constitutive theory reflects the legal system itself determining its own subjects with certainty.[87] It is the recognition by an existing state of a newly emerging state that, according to the constitutive model, creates a state and determines its legal personality.[88] Jennings and Watts explain the constitutive theory of recognition as follows:

> [I]t is a rule of international law that no new state has a right as against other states to be recognised by them; that no state has a duty to recognise a new state; that a new state before its recognition cannot claim any right which a member of the international community has as against other members; and

---

[84] Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Dordrecht; London: M. Nijhoff, 1990) 275; Shaw, above note 56, 469–70.

[85] See generally Currie, above note 37, 31; Shaw, above note 56, 445–6; Wallace and Martin-Ortgea, above note 5, 75.

[86] Witkin, above note 68, 607.

[87] Crawford, above note 10, 20; Kelsen, above note 51, 607.

[88] Wallace and Martin-Ortgea, above note 5, 76.

> that it is recognition which constitutes the new state as a member of the international community'.[89]

One consequence of the constitutive theory is that the legal status of statehood is inherently relative in character.[90] The existence of a state is not absolute: a 'state exists only in its relations to other states'.[91] It is the legal act of recognition from existing states that enables the new state to exist on the international legal plane.[92]

In 2006, Crawford expressed the view that '[n]either theory of recognition satisfactorily explains modern practice' – the declaratory theory confuses fact with law, and the constitutive theory denies the possibility that new states may come into existence by virtue of general rules or principles, 'rather than on an ad hoc, discretionary basis'.[93] In 2008, however, Shaw noted that while states have, in the past, refused recognition to other states for political reasons, it is rarely contended that the unrecognized state is denied any rights or obligations under international law. This is regarded by Shaw to indicate that the declaratory theory is stronger.[94] Modern practice in 2011 suggests that a range of (sometimes variable) factual requirements impact upon the rules relating to whether statehood may be said to exist. The question of recognition (and by whom) continues to affect how the new state can demonstrate that it fulfils these rules as required, before it will be welcomed into the community of nations.

4.4.3 *De Facto* and *De Jure* Recognition

The significance of a *de jure* or *de facto* recognition in international law is not entirely clear. In general, it is believed that *de jure* recognition is final, whereas *de facto* recognition is only provisional and may be withdrawn.[95] From a juristic point of view, the distinction is of little importance.

In the 1970s, a number of states recognized the *de facto* incorporation of East Timor into Indonesia as a *fait accompli.* For example, believing that it was unrealistic to continue to refuse to recognize the effective control

---

89 Jennings and Watts, above note 13, 129.
90 Kelsen, above note 51, 609; Crawford, above note 10, 21.
91 Kelsen, ibid., 609.
92 See generally, Currie, above note 37, 30–31; Shaw, above note 56, 446–8; Wallace and Martin-Ortgea, above note 5, 5.
93 Crawford, above note 10, 5.
94 Shaw, above note 56, 447.
95 Kelsen, above note 51, 612; Wallace and Martin-Ortgea, above note 5, 79; Shaw, above note 56, 459–60.

Indonesia exercised over East Timor, the Australian government stated at the time that the incorporation of East Timor into Indonesia was a reality and that the Indonesian government was the authority in effective control.[96] However, Australia and other states remained sceptical of the legal validity or the method of East Timor's incorporation. They also maintained that the people of East Timor continued to possess the right to self-determination.[97] Whatever the pretext of recognition, the subsequent independence of East Timor confirms that *de jure* or *de facto* recognition of the incorporation into Indonesia was ultimately devoid of legal validity.[98]

4.4.4 Current Recognition Practice

The question of the legal effect of state recognition practice in international law has been a source of controversy and continuous debate in international law for much of the twentieth century. This unease was exemplified in an editorial comment in the *Washington Post* in 1992, stating that 'no element of international policy has gone more askew in the break-up of Yugoslavia than recognition – whether, when, how, under what conditions – of the emerging parts'.[99] In large part, this has stemmed from the divergence and often incongruous body of state practice on the matter. Those subscribing to the traditional positivist school in international law advanced the constitutive model. The emergence of new states into the international community meant that existing members of the international community would owe new obligations to them. Therefore, it was desirable that the consent of these existing states to be so bound was necessary in order for a new state to come into existence. This was to occur through the voluntary practice of state recognition.

However, with the rapid process of decolonization and the self-determination of so many states during the second half of the twentieth century, a new body of state practice began to form. Along with this, heavy criticism was pointed at the constitutive theory. Central to this criticism was the argument that the process of determining statehood in international law is so important that it should not be permitted to rest on the isolated,

---

[96] *Case concerning East Timor* (*Australia v Portugal*) *Counter Memorial of the Government of Australia* (1 June 1992) ICJ, Ch. 2, see http://www.icj-cij.org/docket/files/84/6837.pdf. See also Wallace and Martin-Ortgea, above note 5, 79; Shaw, above note 56, 445.

[97] C. Antonopoulos, 'Effectiveness v the Rule of Law Following the East Timor Case', (1997) 27 *Netherlands Yearbook of International Law*, 97.

[98] Alexander Orakhelashvili, above note 64, 381–2.

[99] Quoted in Rich, above note 56, 37.