

Chapter 1

STATEHOOD AND RECOGNITION

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The formation of a new State is . . . a matter of fact, and not of law.¹

[T]he existence of a State is a question of fact and not of law. The criterion of statehood is not legitimacy but effectiveness . . .²

[N]otre pays s'est toujours fondé, dans ses décisions de reconnaissance d'un État, sur le principe de l'effectivité, qui implique l'existence d'un pouvoir responsable et indépendant s'exerçant sur un territoire et une population.³

¹ Oppenheim (1st edn), vol 1, 264, §209; (8th edn), vol 1, 544, §209. See also 9th edn vol 1, 677, §241.

² Foreign Minister Eban (Israel), arguing against a request for an advisory opinion of the International Court on the status of Palestine: *SCOR* 340th mtg, 27 July 1948, 29–30.

³ President Mitterand (France), with respect to Palestinian statehood, reported in *Le Monde*, 24 November 1988, 7, col 1.

1.1 Introduction

At the beginning of the twentieth century there were some fifty acknowledged States. Immediately before World War II there were about seventy-five. By 2005, there were almost 200—to be precise, 192.⁴ The emergence of so many new States represents one of the major political developments of the twentieth century. It has changed the character of international law and the practice of international organizations. It has been one of the more important sources of international conflict.

But the fact that some development is of importance in international relations does not entail that it is regulated by international law. And it has long been asserted that ‘The formation of a new State is . . . a matter of fact, and not of law.’⁵ This position was supported by a wide spectrum of legal opinion. For example, one of the most common arguments of the declaratory theory (the theory that statehood is a legal status independent of recognition) is that, where a State actually exists, the legality of its creation or existence must be an abstract issue: the law must take account of the new situation, despite its illegality.⁶ Equally, so it is said, where a State does not exist, rules treating it as existing are pointless, a denial of reality. The criterion must be effectiveness, not legitimacy. On the other hand, according to the constitutive theory (the theory that the rights and duties pertaining to statehood derive from recognition by other States), the proposition that the existence of a State is a matter of fact seems axiomatic. If ‘a State is, and becomes, an International Person

⁴ That is to say, 191 UN Members plus the Vatican City. This does not include Taiwan, Palestine or various claimant entities discussed in Chapter 9. See Appendix I, p 725 for a complete list.

⁵ Oppenheim (1st edn), vol 1, 264, §209(1); cf Erich (1926) 13 *HR* 427, 442; Jones (1935) 16 *BY* 5, 15–16; Marston (1969) 18 *ICLQ* 1, 33; Arangio-Ruiz (1975–6) 26 *OzfoR* 265, 284–5, 332. See also the formulation in Willoughby, *Nature of the State*, 195: ‘Sovereignty, upon which all legality depends, is itself a question of fact, and not of law.’ See also Oppenheim (8th edn), vol 1, 544, §209; and the somewhat different formulation in Oppenheim (9th edn), vol 1, 120–3, §34.

⁶ Cf Chen, *Recognition*, 38 (‘a State, if it exists in fact must exist in law’). This proposition is a tautology, and the problem of separate non-State entities was not in issue in the passage cited. Elsewhere Chen accepts the view that statehood is a legal concept not a ‘physical existence’ (ibid, 63), as well as the possibility of the illegality of the creation or existence of a ‘State’ (ibid, 8–9). Cf Charpentier, *Reconnaissance*, 160–7. Lauterpacht’s formulation is preferable: ‘The guiding juridical principle applicable to all categories of recognition is that international law, like any other legal system, cannot disregard facts and that it must be based on them provided they are not in themselves contrary to international law’ (*Recognition*, 91). But in view of the gnomic character of this proposition, it can hardly be regarded as a ‘guiding juridical principle’. For Lauterpacht’s interpretation of the formula that the existence of a State is a matter of fact only see ibid, 23–4. ‘To predicate that a given legal result is a question of fact is to assert that it is not a question of arbitrary discretion . . . The emphasis . . . on the principle that the existence of a State is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty’.

through recognition only and exclusively',⁷ and if recognition is discretionary, then rules granting to an unrecognized community a 'right to statehood' are excluded.

Neither theory of recognition satisfactorily explains modern practice. The declaratory theory assumes that territorial entities can readily, by virtue of their mere existence, be classified as having one particular legal status: it thus, in a way, confuses 'fact' with 'law'.⁸ For, even if effectiveness is the dominant principle, it must nonetheless 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 a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.⁹ And the declaratory theorist's equation of fact with law also obscures the possibility that the creation of States might be regulated by rules predicated on other fundamental principles—a possibility that, as we shall see, now exists as a matter of international law. 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 in accordance with general rules or principles rather than on an ad hoc, discretionary basis.

Fundamentally the question is whether international law is itself, in one of its most important aspects, a coherent or complete system of law.¹⁰ According to predominant nineteenth-century doctrine there were no rules determining what were 'States' for the purposes of international law; the matter was within the discretion of existing recognized States.¹¹ The international law of that

⁷ Oppenheim (1st edn), vol 1, 109, §71; (8th edn), vol 1, 125–7, §71 (modified with emphasis on limits to the discretion of the recognising State). Cf Jennings and Watts, *Oppenheim*, 130–1, §40.

⁸ Cf Lauterpacht, *Recognition*, 45–50 for an effective critique of the 'State as fact' dogma. His dismissal of the declaratory theory results in large part from his identifying the declaratory theory with this dogma.

⁹ Cf Kelsen (1929) 4 *RDI* 613, 613. Waldock (1962) 106 *HR* 5, 146 correctly describes the problem as a 'mixed question of law and fact'.

¹⁰ Cf Chen, *Recognition*, 18–19: 'to argue that a State can become a subject of international law without the assent of the existing States, it is necessary to assume the existence of an objective system of law to which the new State owes its being.' The point is that if the State owes its existence to a system of law, then that existence is not, or not only, a 'fact'.

¹¹ Cf Oppenheim (1st edn), vol 1, 108, §71; *contra* (8th edn), vol 1, 126, §71: 'Others hold the view that it is a rule of International Law that no new State has a right towards other States to be recognized by them, and that no State has the duty to recognize a new State . . . [A] new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members.' Cf the heavily qualified statement in the 9th edn, vol 1, 132–3, §40.

period exhibited a formal incoherence that was an expression of its radical decentralization.¹²

But if international law is still, more or less, decentralized in terms of its basic structures, it is generally assumed that it is a formally complete system of law. For example this is taken to be the case with respect to the use of force¹³ and nationality,¹⁴ fields closely related to the existence and legitimacy of States. This work investigates the question whether, and to what extent, the formation and existence of States is regulated by international law, and is not simply a 'matter of fact'.

1.2 Statehood in early international law

(1) Doctrine¹⁵

It is useful to review the changing opinions on the topic since the seventeenth century. Grotius, for example, defined the State as 'a complete association of free men, joined together for the enjoyment of rights and for their common interest'.¹⁶ His definition was philosophical rather than legal: the existence of States was taken for granted; the State, like the men who compose it, was automatically bound by the law of nations which was practically identical with the law of nature: 'outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations.'¹⁷ So the existence of States as distinct subjects of that universal law posed no problem. Much the same may be said of Pufendorf, who defined the State as 'a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.'¹⁸ Pufendorf agreed both with Grotius and Hobbes¹⁹ that natural law and the law of nations were the same:

Nor do we feel that there is any other voluntary or positive law of nations which has the force of law, properly so-called, such as binds nations as if it proceeded from a

¹² The same incoherence has been noted in respect of the legality of war: Lauterpacht, *Recognition*, v–vi, 4–5; and the discretionary character of nationality: Brownlie (1963) 39 *BY* 284, 284; *Principles* (2nd edn), 73; (6th edn), 69. Cf Briggs (1950) 44 *PAS* 169, 172.

¹³ Cf Charter Art 2(4); *Corfu Channel Case*, ICJ Rep 1949 p 4, 35.

¹⁴ Cf *Nottebohm Case*, ICJ Rep 1955 p 4.

¹⁵ Cf Guggenheim (1971) 3 *U Tol LR* 203.

¹⁶ *De Iure Belli ac Pacis* (1646), Bk I, ch I, §xiv.

¹⁷ *Ibid.* Grotius excepts certain regional customs. For discussion of State sovereignty in Grotius see Dickinson, *Equality of States*, 55–60; Kennedy (1986) 27 *Harv ILJ* 1, 5; Tuck, *Rights of War and Peace*, 82–96.

¹⁸ *De Iure Naturae et Gentium Libri Octo*, Bk VII, ch 2, §13, para 672.

¹⁹ *De Cive*, ch 14, paras 4–5.

superior . . . [Convergences of State behaviour] belong either to the law of nature or to the civil law of different nations . . . But no distinct branch of law can properly be constituted from these, since, indeed, those laws are common to nations, not because of any mutual agreement or obligation, but they agree accidentally, due to the individual pleasure of legislators in different states. Therefore, these laws can be and many times are changed by some people without consulting others.²⁰

By contrast Vitoria, lecturing a century earlier, gave a definition of the State much more legal in expression and implication than either Grotius or Pufendorf, though one still based on scholastic argument:

A perfect State or community . . . is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castile and Aragon and the Republic of Venice and the like . . . Such a state, then, or the prince thereof, has authority to declare war, and no one else.²¹

Here we can detect the criteria of government and independence. Moreover, Vitoria is writing not a general moral–theological treatise but one with a specific purpose; his definition is also for a purpose, that is, to determine which entities may declare war. Nevertheless, it is fair to say that the writers of the naturalist school were not concerned with the problem of statehood: any ruler, whether or not independent, was bound by the law of nations, which was merely the application of the natural law to problems of government.

The same may be said, although with some reservations and for different reasons, of the writers of the early positivist period, of which Vattel was the most influential. His *Le Droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* is an extraordinary amalgam of earlier views with deductions from the sovereignty and equality of States that tended to overturn those views. For Vattel, ‘Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.’²² The basic criterion is that such nations be ‘free and independent of one another’.²³ But a distinction is now drawn between States, as defined, and ‘sovereign States’, even if the difference is still largely terminological:

Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State*. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together

²⁰ Bk II, ch 3, §156.

²¹ *De Indis ac de Iure Belli Relectiones* (publ 1696, ed Simon); *De Iure Belli*, para 7, §§425–6.

²² *Le Droit des Gens* (1758), vol I, Introduction, §1; ch I, §1. ²³ Introduction, §15.

in a society established by nature and subject to the law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.²⁴

The novel element in this definition is the wide-reaching implications Vattel draws from the notion of the equality of States, the effect of which is to make each State the sole judge of its rights and obligations under the law of nations. Thus, 'the Law of Nations is in its origin merely the *Law of Nature applied to Nations* . . . We use the term *necessary Law of Nations* for that law which results from applying the natural law to Nations . . .'²⁵ Although the positive law of nations may not, in principle, conflict with this necessary law, the latter is 'internal' to the State while the positive law is 'external', and other sovereigns are only entitled and able to judge the actions of other independent States by this external standard: 'A Nation is . . . free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation, and so far as the Nation is under merely obligations without any *perfect external* obligation. If it abuses its liberty it acts wrongfully; but other Nations can not complain, since they have no right to dictate to it.'²⁶ Here a deduction from 'sovereignty' overturns what has previously been held to be the basis of the law of nations. But as yet, no further deduction is drawn from this independence or sovereignty to deny the juridical existence of new States; sovereignty is inherent in a community and is thus independent of the consent of other States: 'To give a Nation the right to a definite position in this great society, it need *only* be truly sovereign and independent . . .'²⁷

The link between these earlier views and the nineteenth-century positivist view of statehood may be illustrated from Wheaton's classic *Elements of International Law*. Under the influence of Hegel,²⁸ he came to regard statehood for the purposes of international law as something different from actual independence:

Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously

²⁴ Introduction, Bk I, ch I, §4. But he subsequently states that authority and laws are not enough for sovereignty where there is no control over foreign affairs (treaties, making war, alliances): *ibid.*, §11.

²⁵ Introduction, §§6–7 (original emphasis). The 'necessary Law of Nations' was thus peremptory, i.e. permanent and imprescriptible (§9). ²⁶ *Ibid.*, §20.

²⁷ *Ibid.*, Bk I, ch I, §4 (emphasis added).

²⁸ *Grundlinien der Philosophie des Recht*, vol VIII; Hegel, *Werke* (1854) VIII, Pt 3, para 331; cited by Alexander (1958) 34 *BY* 176, 195: In Nisbet's translation the passage reads: 'The state has a primary and absolute entitlement to be a sovereign and independent power *in the eyes of others*, i.e. *to be recognized* by them. At the same time, however, this entitlement is purely formal, and the requirement that the state should be recognized simply because it is a state is abstract. Whether the state does in fact have

formed a part, and on which it was dependent. This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed . . . between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty . . . The external sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete . . . [I]f it desires to enter into that great society of nations . . . such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition . . .²⁹

As was to be expected, this view was combined with a denial of the universality of international law³⁰ and of the law of nature as its foundation.³¹

It will be noted that, although Wheaton reproduces Vattel's 'internal/external' terminology, he puts it to a different use. For Vattel the 'internal' law was the law of nature, the necessary though imperfect element of the law of nations. Wheaton, having dispensed with the law of nature, means by 'internal' those aspects of the government of a State confined to its own territory and distinguished from 'foreign affairs'.³² By Wheaton's time the positive law of nations was concerned essentially with the latter; nor could there be any

being in and for itself depends on its content—on its constitution and condition; and recognition, which implies that the two [i.e. form and content] are identical, also depends on the perception and will of the other state. Without relations with other states, the state can no more be an actual individual than an individual can be an actual person without a relationship with other persons. [On the one hand], the legitimacy of a state, and more precisely—in so far as it has external relations—of the power of its sovereign, is a purely *internal* matter (one state should not interfere in the internal affairs of another). On the other hand, it is equally essential that this legitimacy should be *supplemented* by recognition on the part of other states . . . When Napoleon said before the Peace of Campo Formio "the French Republic is no more in need of recognition than the sun is," his words conveyed no more than that strength of existence which itself carries with it a guarantee of recognition, even if this is not expressly formulated.' Hegel, *Elements* (1991), 366–67.

²⁹ *Elements* (3rd edn, 1846), Pt I, ch II, §6. For his earlier hesitations see the 1st edn (1836), Pt I, ch II, §§15–18.

³⁰ *Ibid*, Pt I, ch I, §11: 'The law of nations or international law, as understood among civilized, christian nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.' In the 3rd edition (1846), the definition was retained, as §14, but with the qualification 'christian' omitted. This is consonant with treaty practice involving the Ottoman Empire in the 1840s, which Wheaton discussed in the 3rd edition, Pt I, ch I, §13.

³¹ *Ibid*, Pt I, ch I, §5 (quoting Hobbes on the law of nature and international law). There was no change between the 1836 and 1846 editions.

³² Vattel made the same distinction, although it is not developed and is inconsistent with other elements of his work. For Vattel's influence see Ruddy, *International Law in the Enlightenment*, 119–44; Tourmé-Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, 319–40.

necessary obligations owed to States by virtue of their mere ‘political existence’. The law of nations was becoming an artificial system studied in basically consensual areas of inter-State relations such as treaties, diplomatic relations and commerce. Basic relations between States as such (in particular, the legality of resort to war, and the very existence and survival of the State) were excluded from its scope.³³

(2) Statehood in early international law: aspects of State practice

Despite its claims to universality, the early law of nations had its origins in the European State-system, which existed long before its conventional date of origin in the Peace of Westphalia (1648), ending the Thirty Years’ War.³⁴ The effect of the Peace of Westphalia was to consolidate the existing States and principalities (including those whose existence or autonomy it recognized or established) at the expense of the Empire, and ultimately at the expense of the notion of the *civitas gentium maxima*—the universal community of mankind transcending the authority of States.³⁵

Within that system, and despite certain divergences, writers of both naturalist and positivist schools had at first little difficulty with the creation of States. New States could be formed by the union of two existing States. More common was the linking of States in a personal union under one Crown (for example, Poland and Lithuania in 1385; Aragon and Castile in 1479; England and Scotland in 1603); such unions often became permanent. Equally, it was agreed that princes or rulers could create new States by division of existing ones. In Pufendorf’s words, ‘[A] king can convert one of his provinces into a kingdom, if he separates it entirely from the rest of the nation, and governs it with its own administration, and one that is independent from the other.’³⁶ New States could also be formed by revolution, as when Portugal (1640–8) and

³³ Thus international law abandoned the ‘just war’ doctrine and left the question whether to wage war to the domestic jurisdiction of States. Hall, *Treatise* (8th edn), 82: ‘International law has . . . no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation’; Röling, in Miller and Feindrider, *Nuclear Weapons and the Law*, 181; Dinstein, *War, Aggression and Self-Defence* (3rd edn), 71.

³⁴ On competing views as to the starting point of the European States system, see Koskenniemi (1990) 1 *EJIL* 4.

³⁵ On the Peace of Westphalia see Nussbaum, *Concise History of the Law of Nations*, 115–18; Rapisardi-Mirabelli (1929) 8 *Bib Viss* 5; Gross (1948) 42 *AJIL* 20; Braubach, *Acta pacis Westphalicae*; Harding and Lim, *Renegotiating Westphalia*, 1; Steiger (1999) 59 *ZaöRV* 609; Ziegler (1999) 37 *Archiv der Völkerrechts* 129. For the conventional view, see, e.g., Schrijver (1999) 70 *BY* 65, 69; Osiander (2001) 55 *Int Org* 251.

³⁶ Cf Pufendorf, *De jure Naturae et Gentium*, Bk VII, ch 3, §9, para 690.

the Netherlands (1559–1648)³⁷ broke away from Spain. What was unclear was whether the revolutionary entity could be treated as an independent State before its recognition by the parent State. Pufendorf thought not, on the grounds that ‘... if a man who, at the time, recognized the sovereignty of another as his superior, is to be able to become a king, he must secure the consent of that superior who will both free him and his dominions from the bond by which they were tied to him.’³⁸ Vattel was less categorical: a subject remained bound to the sovereign ‘without other conditions than his observance of the fundamental laws’, and thus, in most cases, secession was contrary to the basic compact that was the foundation of the State. However, if a sovereign refused to come to the aid of part of the nation, it might provide for its own safety by other means.

It was for [this] reason that the Swiss as a body broke away from the Empire, which had never protected them in any emergency. Its authority had already been rejected for many years when the independence of Switzerland was recognized by the Emperor and by all the German States in the Treaty of Westphalia.³⁹

The Swiss cantons, referred to by Vattel, retained tenuous links with the Empire until their complete independence was recognized at the Peace of Westphalia. Part IV of the Treaty of Osnabrück stated:

And whereas His Imperial Majesty ... did, by a Particular Decree ... declare the said city of *Bazil*, and the other *Swiss* Cantons to be in possession of a *quasi*-full Liberty and Exemption from the Empire, and so no way subject to the Tribunals and Sentences of the said Empire, it has been resolved that this same Decree shall be held as included in this Treaty of Peace ...⁴⁰

In practice other States tended to conduct relations on an international plane with the entity in revolt before its recognition by the parent State. The point was clearly established in this sense following the breakaway of the South American provinces from Spain in the 1820s.⁴¹

³⁷ See Blok and Vetter (1986) 34 *Zeitschrift für Geschichtswissenschaft* 708; Borschberg, *Hugo Grotius ‘Commentaries in theses XI’* (1994), 180–1.

³⁸ Pufendorf, *De jure Naturae et Gentium* (1688), Bk VII, ch 3, §9, para 690.

³⁹ *Le Droit des Gens*, Bk I, ch 17, §202; cf Gentili, *On the Law of War* (1612), Bk I, ch XXIII, §§185–7.

⁴⁰ I CTS 119. Cf the unconditional reference to the Netherlands in Art 1: ‘Premièrement declare ledit Seigneur Roy et reconnoit que lesdits Seigneurs États Generaux des Pays-Bas Unis, et les Provinces d’iceux respectivement avec leurs Pays associés, Villes et Terres y appartenants sont libres et Souverains États ...’.

⁴¹ See Frowein (1971) 65 *AJ* 568; Smith, *GB & LN*, vol I, 115–70; Bethell (ed), *The Independence of Latin America*. See also de Martens, *Nouvelles Causes celebre du droit des gens* (1843), vol 1, 113–209, 370–498 (American War of Independence). Cf Wheaton, *Principles*, Pt I, ch II, §26.

The impression given by this brief review is that, despite the limited amount of State practice, nothing in early international law precluded the solution of the legal problems raised by the creation and existence of States. That impediment, as we shall see, arose later with the application by nineteenth-century writers of a thoroughgoing positivism to the concept of statehood and the theory of recognition.

1.3 Recognition and statehood

(1) 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 (*suprema potestas*), necessarily came from within and 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 entail an injury for the sovereignty of such a king to be called in question by a foreigner.’⁴² The 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. 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...’⁴³

When recognition did begin to attract more detailed consideration, about the middle of the eighteenth century, it was in the context of recognition of monarchs, especially elective monarchs: that is, in the context of recognition of governments. Von Steck⁴⁴ and later Martens⁴⁵ discussed the problem and reached similar conclusions. Recognition, at least by third States in the case of secession from a metropolitan State, was either illegal intervention or it was

⁴² *De Iure Naturae et Gentium*, Bk VII, ch 3, §9, para 689.

⁴³ (1958) 34 *BY*176, 176.

⁴⁴ *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse* (1783).

⁴⁵ *A Compendium of the Law of Nations* (1789), 18 ff.

unnecessary.⁴⁶ 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.’⁴⁷ 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.

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.⁴⁸

(2) Positivism and recognition

But this was 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 seemed to require consent either to the creation of the State or to its being subjected to international law so far as other States were concerned. 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.⁴⁹ The important point, however, is 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 given the benefit of, and treated as obliged by, the whole body of international law.⁵⁰ The problem was largely doctrinal, but doctrine was, nonetheless, influential. For if one starts from the premiss that ‘Le droit des gens est un droit contractuel entre des États’,⁵¹ the conclusion as to recognition and statehood seems 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

⁴⁶ Alexandrowicz (1958) 34 *BY* 176, 180 ff and authorities there cited.

⁴⁷ Saalfeld, *Handbuch des positivism Voikerrechts*, 26; cited by Alexandrowicz, (1958) 34 *BY* 176, 189.

⁴⁸ *Ibid*, 191. Cf also Alexandrowicz (1961) 37 *BY* 506.

⁴⁹ 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.

⁵⁰ Smith, *GB & LN* vol I, 14–18; Davidson (1994) 5 *Canterbury LR* 391. See also Chapter 6.

⁵¹ Redslob (1934) 13 *RDI* 429, 430.

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 État.⁵²

(3) Statehood in nineteenth-century international law

It is useful to attempt a summary of the position with regard to statehood and recognition in the late nineteenth century. There was of course no complete unanimity among text-writers: nevertheless what we find is an interrelated 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 accepted scope of international law. Oppenheim's *International Law* provides the clearest as well as the most influential expression of these interrelated 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'.⁵³ 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 nations⁵⁴—for example the United States of America and Turkey.⁵⁵

As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations. Those States which are

⁵² Redtslob (1934) 13 *RDI*, 431. The essential 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* (3rd edn), vol I, 163–6 cited Jaffé, *Judicial Aspects of Foreign Relations*, 90n) and mutuality was required, as in any contract. Cf, however, Lauterpacht, *Recognition*, 2. See further Devine (1984) 10 *S Af YBIL* 18, Hillgruber (1998) 9 *EJIL* 491, 499–502.

⁵³ Cited by Smith, *GB & LN*, vol I, 12, 14.

⁵⁴ Oppenheim (1st edn), vol I, 17, §12; (8th edn), 18, §12: 'New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct [1st edn: 'in existence'; 8th edn: 'in force'] at the time of their admittance.' The 9th edition treats the matter as follows: 'Thus new states which come into existence and are admitted into the international community thereupon become subject to the body of rules for international conduct in force at the time of their admittance.' *Ibid*, vol I, 14, §5; see also *ibid*, vol I, 29, §10.

⁵⁵ On Turkey's 'membership' see General Treaty between Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey for Re-establishment of Peace, Paris, 30 March 1856, 46 *BFSP* 12, esp para VII, in which the allied monarchs 'déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens.' See also Smith, *GB & LN*, vol I, 16–17; Hall, *International Law* (2nd edn), 40; Wood (1943) 37 *AJ* 262; Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*, 394. In *European Commission of the Danube*, PCIJ ser B no 14 (1927), 40,

members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members as having been recognized by the body of members already in existence when they were born.⁵⁶

(2) States as such were not necessarily members of the society of nations. Recognition, express or implied, made them members and bound them to obey international law.⁵⁷ States not so accepted were not (at least in theory) bound by international law, nor were the 'civilized nations' bound in their behaviour towards them, as was implied by their behaviour with regard to Africa and China.⁵⁸

(3) Only States then, or rather only those entities recognized as States and accepted into international society, were bound by international law and were international persons. Individuals and groups were not subjects of international law and had no rights as such under international law. 'Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law'.⁵⁹

(4) The binding force of international law derived from this process of seeking to be recognized and acceptance.

Thus new States which come into existence and are admitted into the international community thereupon become subject to the body of rules for international conduct in force at the time of their admittance.⁶⁰

International Law does not say that a State is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.⁶¹

Art VII of the Treaty of Paris was said to have effected 'the elevation of the position of Turkey in Europe'. Among the enormous literature on the extension of international law beyond Europe see Andrews (1978) 94 *LQR* 408; Grewe (1982) 42 *ZaöRV* 449; Fisch, *Die europäische Expansion und das Völkerrecht*; Sinha, *Legal Polycentricity and International Law*; Onuma (2000) 2 *J Hist IL* 1. On international law in relation to specific regions and States, see, e.g., Eick, *Indianerverträge in Nouvelle-France: ein Beitrag zur Völkerrechtsgeschichte*; Ziegler (1997) 35 *Archiv des Völkerrechts* 255; Ando (ed), *Japan and International Law*.

⁵⁶ Oppenheim (1st edn), vol 1, 17, §12; (8th edn), vol 1, 125, §71. See also 9th edition, vol 1, 14, §5.

⁵⁷ Oppenheim (1st edn), vol 1, 17, §12, 108, §71; (9th edn), vol 1, 14, §5, 128, §39.

⁵⁸ Oppenheim (1st edn), vol 1, 34, §28; (8th edn), vol 1, 50, §28. Lauterpacht omitted the sentence 'It is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family' and characterized 'the question of membership of the "Family of Nations" ... a matter of purely historical interest.' Cf *ibid* (9th edn), vol 1, 87, §22.

⁵⁹ Oppenheim (1st edn), vol 1, 18 (§12). By 'States' Oppenheim presumably meant 'recognized States'.

⁶⁰ Oppenheim (1st edn), vol 1, 17, §12; (9th edn), 14, §5.

⁶¹ Oppenheim (1st edn), vol 1, 110, §71. The second sentence only is in the 8th edn, vol 1, 125, §71. US Secretary of State Webster put it as follows: 'Every nation, on being received at her own request, into the circle of civilized governments, must understand that she not only attains rights of

This satisfied the positivist canon that could discover the obligation to obey international law only with the consent of each State.

(5) Accordingly how an entity became a State was a matter of no importance to 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. Unrecognized entities had not consented to be bound by international law, and neither had the existing community of recognized States accepted them or agreed to treat them as such. Nascent States (States ‘*in statu nascendi*’) were not international persons. How they acquired territory, what rights and duties they had or owed to others as a result of events before they were recognized, these were irrelevant to international law: they were matters ‘of fact and not of 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 States become a member of the Family of Nations and 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.⁶²

Likewise Phillimore: ‘The question as to the origin of States belongs rather to the province of Political Philosophy than of International Jurisprudence.’⁶³

Hence 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 has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition.’⁶⁴

sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states . . .’. Letter to Mr Thompson, Minister to Mexico, 15 April 1842. *Moore’s Digest*, vol I, s 1, 5–6.

⁶² Oppenheim (1st edn), vol 1, 264, §209; (8th edn), vol 1, 544, §209. In the 9th edition, vol 1, 677, §241, the position is reformulated thus: ‘When a new state comes into existence, its title to its territory is not explicable in terms of the traditional “modes” of acquisition of territory . . . The new state’s territorial entitlement is more to do with recognition; for, as soon as recognition is given, the new state’s territory is recognised as the territory of a subject of international law; although, questions of succession and of the legal history of the territory may also be involved where particular boundaries, or the precise extent of the territory, are doubtful or disputed.’ See also *ibid* (9th edn), vol 1, 120, §34: ‘A state proper is in existence when a people is settled in a territory under its own sovereign government.’

⁶³ Phillimore, *Commentaries on International Law* (2nd edn), vol 1, 79.

⁶⁴ Oppenheim (1st edn), vol 1, 297–8, §246; (9th edn), vol 1, 717, §276. See also *ibid* (9th edn), vol 1, 717, §276, to similar effect but with the following qualification: ‘It is perhaps now questionable whether the term revolt is entirely a happy one in this legal context. It would seem to indicate a particular kind of political situation rather than a legal mode of the loss of territorial sovereignty. If a revolt as a matter of fact results in the emergence of a new state, then this matter is the situation discussed [under the category ‘acquisition’].’

1.4 Recognition of States in modern international law

It is against this background that the modern law of statehood and its relation with recognition must be examined. The effect of positivist doctrine was to place all the emphasis, in matters of statehood, on the question of recognition. Indeed the courts of many States still refuse to determine for themselves any questions of statehood, even where the matter is between private parties,⁶⁵ on the ground that status is necessarily determined by executive recognition.⁶⁶ They will sometimes be able to avoid the harmful effects on private rights of the political act of recognition by means of construction.⁶⁷ The executive may leave the matter for the courts to decide.⁶⁸ But as a matter of the common law, at least, where the international status of any entity is squarely in issue executive certification is binding.⁶⁹

This has led courts to seek to distinguish between the 'external' and 'internal' consequences of non-recognition. In *Hesperides Hotels*, Lord Denning asked

⁶⁵ And even where the results are unfortunate: the Second Circuit of the US Court of Appeals held that, absent recognition, notified to the court by the executive branch, Hong Kong could not be treated as a State for jurisdictional purposes, and a corporation organized under the laws of Hong Kong, thus 'stateless', was unable to maintain an action in US federal court. *Matimak Trading Co v Khalily*, 118 F 3d 76 (2nd Cir, 1997, McLaughlin, CJ). The Third Circuit took the view that Hong Kong corporations could be treated as UK subjects and the problem thus avoided: *Southern Cross Overseas Agencies, Inc v Wah Kwong Shipping Group Ltd*, 181 F 3d 410 (3rd Cir 1999, Becker, CJ). The Supreme Court resolved the matter in favour of federal jurisdiction: *JP Morgan Chase Bank v Traffic Stream (BVI) Infrastructure Ltd*, 536 US 88, 122 S Ct 2054 (Souter J 2002).

⁶⁶ This was not always so: *Yrisarri v Clement* (1825) 2 C & P 223, 225. For an illuminating discussion of the cases in which Lord Eldon laid down the orthodox common law rule see Bushe-Foxe (1931) 12 BY 63; (1932) 13 BY 39. See also Jaffé, *Judicial Aspects of Foreign Relations*, 79.

⁶⁷ *Luigi Montà of Genoa v Cechofracht Co Ltd* [1956] 2 QB 522 (term 'government' in a charter party); *Kawasaki Kisen Kaisha Ltd v Bankers Trust Co Ltd* [1939] 2 KB 544 ('war'), 9 ILR 528. For an extreme case of 'construction' see *The Arantzazu Mendi* [1939] AC 256, 9 ILR 60, criticized by Lauterpacht, *Recognition*, 288–94.

⁶⁸ *Duff Development Co v Kelantan Government* [1924] AC 797, 825 (Lord Sumner); and cf the certificate in *Salimoff v Standard Oil Co*, 262 NY 220 (1933) just before US recognition of the Soviet government.

⁶⁹ *Luther v Sagor* [1921] 3 KB 532; but cf *Carl Zeiss Stiftung v Rayner and Keeler Ltd* (No 2) [1967] 1 AC 853, 953–4 (Lord Wilberforce), 43 ILR 23. For more recent cases, see, e.g., *Caglar v HM Inspector of Taxes*, 1996 *Simon's Tax Cases* 150; 108 ILR 150. The American position was historically less rigid: *Wulfsohn v RSFSR*, 234 NY 372 (1923); *Sokoloff v National City Bank*, 2 ILR 44, 239 NY 158 (1924); *Bank of China v Wells Fargo Bank & Union Trust Co*, 209 F2d 467 (1953). US courts often defer to executive determinations (e.g., *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc*, 917 F 2d 278, 291–3 (Ind, 1990) 108 ILR 488; Smith, (1992) 6 *Temple ICLJ* 169, 178–90), but not always: *Efiat Ungar v Palestine Liberation Organization*, 402 F3d 274, 280 (1st Cir, 31 March 2005, Selya, CJ) (slip op), 14: '[T]he lower court's immunity decision neither signaled an official position on behalf of the United States with respect to the political recognition of Palestine nor amounted to the usurpation of a power committed to some other branch of government. After all, Congress enacted the [Anti-Terrorism Act], and the President signed it. The very purpose of the law is to allow the courts to determine questions of sovereign immunity under a legal, as opposed to a political, regime.'

whether the law of the ‘Turkish Federated State of Cyprus’ could be applied to a tort claim even though the Foreign and Commonwealth Office had certified that the United Kingdom did not recognize that entity as a State:

The executive is concerned with the *external* consequences of recognition, vis-à-vis other states. The courts are concerned with the *internal* consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it—in its impact on individuals—as justice and common sense require: provided always that there are no considerations of public policy against it.

The distinction has also been expressed as one between private international law and the law or practice of foreign relations:

[P]rivate international law is designed to find the most appropriate law . . . and it is not concerned with adjusting the mutual relationship of sovereigns. Therefore, foreign law applied under private international law principles should not be limited to the law only of a recognized State or Government; effectiveness of foreign law should not depend on recognition.⁷⁰

Indeed legislation has sometimes had to be passed authorizing courts to treat unrecognized entities as ‘law areas’ for various purposes, in order to separate non-recognition from its consequences.⁷¹

However 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 much harm. A tension is thereby created between the conviction that recognition is at some level a legal act in the international sphere,⁷² and the assumption of political

⁷⁰ District Court of Kyoto, Judgment of 7 July 1956, quoted in Peterson, *Recognition of Governments*, 149, 243 n 77.

⁷¹ See, e.g., the extended definition of ‘foreign state’ in the Foreign Enlistment Act 1870 (UK). See also Foreign Corporations Act 1991 (UK); Foreign Corporations (Application of Laws) Act 1989 (Cth). These Acts, though general in terms, were passed to deal with the situation of Taiwan, an issue dealt with by the US through special legislation, the Taiwan Relations Act, 22 USC §3301. See *New York Chinese TV Programs, Inc v UE Enterprises, Inc*, 954 F 2d 847 (2d Cir 1992), *cert denied*, 506 US 827 (1992); *Millen Industries Inc v Coordination Council for N American Affairs*, 855 F 2d 879 (1988), 98 ILR 61. Other jurisdictions have simply accepted Taiwan acts and laws without legislative mandate: *Romania v Cheng*, 1997 Carswell NS 424 (Nova Scotia SC); *Chen Li Hung v Tong Lei Mao* [2000] 1 HKC 461. On Taiwan see further Chapters 5 and 10.

⁷² E.g., among earlier writers, Kelsen (1941) 35 *AJ* 605; Schwarzenberger, *International Law*, vol I, 127–36, 134; Lauterpacht, *Recognition*, 6 ff.

leaders that they are, or should be, free to recognize or not to recognize on grounds of their own choosing.⁷³ If this is the case, the international status and rights of whole peoples and territories will seem to depend on arbitrary decisions and political contingencies.

(1) Recognition: the great debate

Before examining State practice on the matter, it is necessary to refer again to the underlying conflict over the nature of recognition. 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.⁷⁴ To some extent this was inevitable, as long as the constitutive position retained its influence, for a corollary of that position was that there could be no such rules. Examination of the constitutive theory is, therefore, first of all necessary.

(i) *The constitutive theory*⁷⁵

The tenets of the strict constitutive position, as adopted by Oppenheim and others, have been referred to already. Many of the adherents of that position are also positivist in outlook.⁷⁶ On the other hand, it is possible to reconcile the declaratory theory with some versions of positivism, and many writers have adhered both to positivism and the declaratory theory.⁷⁷ Moreover, Lauterpacht, who was not a positivist, was one of the more subtle proponents

⁷³ Cf the statements of Sir Percy Spender, Australian Minister for Foreign Affairs, cited in O'Connell (ed), *International Law in Australia*, 32; and US Ambassador Warren Austin, SCOR 3rd yr 294th mtg, 16. See also MJ Peterson (1982) 34 *World Politics* 324.

⁷⁴ Cf Bot, *Non-Recognition and Treaty Relations*, 1.

⁷⁵ Constitutive writers include the following: Le Normand, *La Reconnaissance Internationale et ses Diverses Applications*; Jellinek, *Allgemeine Staatslehre* (5th edn), 273; Anzilotti, *Corso di Diritto Internazionale* (3rd edn); Kelsen (1941) 35 *AJ* 605; Lauterpacht, *Recognition*; Schwarzenberger, *International Law* (3rd edn), vol I, 134; Patel, *Recognition in the Law of Nations*, 119–22; Jennings (1967) 121 *HR* 327, 350; Verzijl, *International Law*, vol II, 587–90 (with reservations); Devine [1973] *Acta Juridica* 1, 90–145. 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, Higgins ed), 103. Cf also the German argument in the *Customs Union Case*, PCIJ ser C no 53, 52–3. Schachter argues that Secretariat practice (in one case, the Democratic Republic of Vietnam in 1947) is implicitly constitutive: 25 *BY* (1948) 91, 109–15. This is doubtful. It is also argued that the Permanent Court adopted a constitutive position in *Certain German Interests in Polish Upper Silesia*, PCIJ Ser A No 7 (1926), 27–9, but this was in the context of the belligerency of the Polish National Committee, not the existence of Poland as a State.

⁷⁶ Lauterpacht, *Recognition*, 38–9; but cf Jaffé, 80–1.

⁷⁷ Cf Chen, *Recognition*, 18 n 41.

of a form of the constitutive position.⁷⁸ He expressed the most persuasive argument for that position 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.⁷⁹

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

It should be stressed that this argument is not generally applicable in international law. Determining the legality of State conduct or the validity of the termination of a treaty often involves 'difficult circumstances of fact and law', but it has never been suggested that the views of particular States are 'constitutive'. If individual States were free to determine the legal status or consequences of particular situations and to do so definitively, international law would be reduced to a form of imperfect communications, a system for registering the assent or dissent of individual States without any prospect of resolution. Yet it is, and should be, more than this—a system with the potential for resolving problems, not merely expressing them.

It may be argued that determining the subjects of international law is so important that, exceptionally, there must exist some method of conclusive determination for this purpose. Yet there is 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, and there is no reason why they should be bound either by the views of the first State to recognize or of the last to refuse to do so. Does the fact that Belize was not recognized by Guatemala,⁸⁰ Macedonia by

⁷⁸ Lauterpacht, *Recognition*, 2 distinguishes two 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.' He adopts the first but not the second of these. In fact neither is distinctly positivist: what is so is their combination. cf Kunz (1950) 44 *AJ* 713; Higgins, *Development*, 136.

⁷⁹ *Recognition*, 55 (emphasis in original). Cf Kelsen, (1941) 35 *AJ* 605, 606–7.

⁸⁰ See (1992) 63 *BY* 633–4; 243 *HC Debs*, vol 243, WA, col 5, 9 May 1994.

Greece⁸¹ or Liechtenstein by Czechoslovakia and its successors⁸² mean that these entities did not exist, were not States, had no rights at the time?

Moreover, questions of status do not seem qualitatively different, either in theory or practice. International law has relatively few subjects, and the status of most of them is not open to doubt. By contrast problems relating, for example, to the legality of the use of force occur frequently and are often difficult and controversial. It is not suggested that individual State pronouncements on that subject are 'constitutive' of legality, for the recognizing State or more generally.

Two further arguments add decisive support to the rejection of the constitutive position. First, if State recognition is definitive then it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void. Yet the nullity of certain acts of recognition has been accepted in practice, and rightly so;⁸³ otherwise recognition would constitute an alternative form of intervention, potentially always available and apparently unchallengeable. Lauterpacht himself allowed the possibility of an *invalid* act of recognition,⁸⁴ but if that is the case then the test for statehood must be extrinsic to the act of recognition. 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 constitutivist 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.'⁸⁵ No doubt international relations are full of contingency, but to those who do not share Kelsen's premisses this seems a violation of common sense.⁸⁶ Lauterpacht, who accepts the relativity of recognition as inherent in the constitutive position, nevertheless refers to it as a 'glaring anomaly',⁸⁷ a 'grotesque spectacle' casting 'grave

⁸¹ Even after the Former Yugoslav Republic of Macedonia (known as FYROM) was admitted to the UN (GA res 225, 8 April 1993) it remained for a time unrecognized by Greece. See Riedel (1996) 45 *Südöst-Europa* 63; Craven (1995) 16 *AYIL* 199; Pazartzis (1995) 41 *AFDI* 281.

⁸² For the Czech position, see Statement by the Czech Republic in reply to the Statement by the Principality of Liechtenstein, Plenary meeting of the 10th OSCE Economic Forum, 29 May 2002; for the Liechtenstein position, see Review of the Implementation of OSCE Commitments in the Economic and Environmental Dimension, Statement to Agenda Point OSCE document EFDEL/12/04, 4 June 2004.

⁸³ See *Restatement (Third) Foreign Relations Law of the US*, §202, Comment f, 'Unlawful recognition or acceptance', and further Chapter 3.

⁸⁴ *Recognition*, 234 n3 (Italian and German recognition of the Franco regime 'illegal *ab initio*'); cf *ibid*, 95 n2.

⁸⁵ Kelsen (1941) 35 *AJ* 605, 609. On Kelsen's position see Pauly, in Diner and Stolleis (eds), *Hans Kelsen and Carl Schmitt*, 45, 46–7.

⁸⁶ Cf Verhoeven, *Reconnaissance*, 714–15. Kelsen himself was previously a declaratist: (1929) 4 *RDI* 613, 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.'

⁸⁷ *Recognition*, 67.

reflection upon international law'.⁸⁸ Moreover, in his view '[i]t cannot be explained away . . . by questionable analogies to private law or to philosophical relativism.'⁸⁹ But if a central feature of the constitutive position is open to such criticism the position itself must be flawed.⁹⁰

Aside from other objections,⁹¹ Lauterpacht's own position is dependent on a straightforward assertion about State practice:

. . . much 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 . . .⁹²

But State practice demonstrates neither acceptance of a duty to recognize,⁹³ nor a consistent constitutive view of recognition. Moreover, Lauterpacht's argument, which in the passage cited was plainly *de lege ferenda*,⁹⁴ assumes the insufficiency of the declaratory view of recognition.

(ii) *The declaratory theory*

According to the declaratory theory, recognition of a new State is a political act, which is, in principle, independent of the existence of the new State as a subject of international law.⁹⁵ In Charpentier's terminology, statehood is opposable to non-recognizing States.⁹⁶ This position has the merit of avoiding the logical

⁸⁸ *Recognition*, 78.

⁸⁹ *Ibid.* Lauterpacht proposed the collectivization of recognition as a solution. Developments in that direction are addressed in Chapters 4 and 12, below.

⁹⁰ A hybrid position would be to require recognition by one or some States as a prerequisite: e.g., Green, *International Law*, 34: 'Unless recognized by at least one State, the entity will have no claim to be considered as a subject of international law.' But why should any one State be allowed to change the legal position of others by an isolated and perhaps aberrant act of recognition? And what should the first recognizing State do, if it is seeking to act in accordance with international law? On Green's view, the first State to recognize acts unlawfully—in which case the origins of every State must be illegitimate.

⁹¹ E.g., the difficulty of a duty to recognize an entity that has, prior to recognition, *ex hypothesi* no rights: see *Recognition*, 74–5, 191–2. In Lauterpacht's view the duty is owed to the society of States at large: that society is 'entitled to claim recognition', but this is an unenforceable or imperfect right. This is a mere construct, bearing no relationship to State practice or general legal opinion. Cf Chen, *Recognition*, 52–4.

⁹² *Recognition*, 77–8. But cf *ibid.*, 78: 'We are not in a position to say . . . that there is a clear and uniform practice of States in support of the legal view of recognition . . .'.

⁹³ The United Kingdom alone seems to have accepted a duty to recognize: (1951) 4 *ILQ* 387–8, and even its statement is not an assertion of the constitutive theory. Cf Verhoeven, *Reconnaissance*, 576–86; Rich (1993) 4 *EJIL* 36.

⁹⁴ Cf *Recognition*, 78.

⁹⁵ See Chen, *Recognition*, for a full discussion of this position. Green's annotations to the published edition are consistently constitutivist: in this respect Green follows Schwarzenberger rather than Chen.

⁹⁶ Charpentier, *Reconnaissance*, 15–68, 160–7.

and practical difficulties involved in constitutive theory, while still accepting a role for recognition as a matter of practice. It has the further, essential, merit of consistency with that practice, and it is supported by a substantial body of opinion. The following passage of Taft CJ's in the *Tinoco Arbitration* is frequently cited as the classic statement of the declaratory position:

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.⁹⁷

But this was a case of recognition of governments, and it is arguable that while recognition of governments may be declaratory in effect, recognition of new States goes further. Where an authority in fact exercises governmental functions within an area already accepted as a State, there seems to be nothing for recognition to constitute, at least at the level of international personality. But the establishment of a new State involves the demarcation of a certain area as a 'State-area' for the purposes of international relations, with consequent legal effects. 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 international capacity.⁹⁸

⁹⁷ (1924) 18 *AJ* 147, 154; cf also *Hopkins Claim* (1927) 21 *AJ* 160, 166. The matter was put even more strongly by Commissioner Wadsworth in *Cuculla v Mexico*, Mex-US Cl Com (1868), in respect of the premature and unauthorized recognition by the US Minister of the Zuloaga Government as the *de facto* Government of Mexico: 'Where then, is the evidence of the *de facto* government? The possession of the capital will not be sufficient, nor recognition by the American minister with or without the appraisal of his government. Recognition is based upon the pre-existing fact; does not create the fact. If this does not exist, the recognition is falsified . . . If, therefore, the Zuloaga movement in Mexico was the government *de facto*, it was because the facts existing at the time made it so. If it was a government, the government in Mexico, it was because it claimed and possessed the sovereignty over that independent nation we call 'the Republic of the United Mexican State.' Moore, *IA* III, 2873, 2876–7. See also *Wulfsohn v RSFSR*, 138 NE 24, 25 (1923); app diss 266 US 580 (1924): 'The result we reach depends upon more basic considerations than recognition or non-recognition by the United States. Whether or not a government exists clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact not a theory. For its recognition does not create the state although it may be desirable.'

⁹⁸ See Le Normand, 268, cited by Chen, *Recognition*, 14 n 1.

But neither legal opinion nor State practice draws from this the conclusion that the several acts of recognition by other States constitute the entity being recognized or are conclusive as to its status. 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.’⁹⁹ Less well known in this context is the Report of the Commission of Jurists on the Åland 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.¹⁰⁰

Evidently the Commission, 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’.¹⁰¹

On this matter the Arbitration Commission established to advise the European Peace Conference on Yugoslavia was categorical. In its first opinion, on 29 November 1991, the Commission stated that ‘the effects of recognition by other States are purely declaratory.’¹⁰² This was reiterated in further opinions.¹⁰³ It has, however, been suggested that the actual practice of States respecting the dissolution of Yugoslavia may have been constitutive in effect;

⁹⁹ *Deutsch Continental Gas Gesellschaft v Polish State* (1929) 5 ILR 11, 13.

¹⁰⁰ LNOJ, Sp Supp 4 (1920), 8.

¹⁰¹ The Report of the Commission of Rapporteurs is less explicit. Certain passages are at least capable of a constitutivist interpretation: e.g., ‘The recognition of the Finnish State by the Powers gave her admission into the community of nations, as fulfilling the conditions necessary for this official confirmation of an independent existence, one of the most important of which is the possession of frontiers which are sufficiently determined.’

LN Council Doc B7: 21/68/106 (1921), 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, 22).

¹⁰² Opinion 1, Badinter Commission, 29 November 1991, 92 ILR 165.

¹⁰³ Opinions 8 and 10: 92 ILR 201 (4 July 1992); ibid, 206–8 (4 July 1992).

indeed debate continues to rage between those who attribute the troubles of Yugoslavia to premature recognition and those who blame European governments for not intervening earlier and more decisively.¹⁰⁴ It is difficult to reach a conclusion on this without examining in detail the bases for some of the particular claims to statehood, a matter addressed in Chapters 12 and 17. But overall the international approach to the dissolution of Yugoslavia, unhappy as it has been, does not support the constitutive theory,¹⁰⁵ still less demand that we adopt it as a general matter. The International Court in the *Bosnian Genocide case*, though not addressing the matter of recognition directly,¹⁰⁶ may be seen, by implication, to have favoured the view that statehood and its attendant rights exist independently of the will of other States. The Federal Republic of Yugoslavia (FRY) had argued that the Court was not competent to adjudicate questions under the Genocide Convention, because the FRY and Bosnia-Herzegovina had not recognized one another at the time proceedings were instituted. The Court dismissed this argument on the basis that (as mutual recognition had subsequently been given in the Dayton Accord)¹⁰⁷ any defect was merely procedural and could be repaired simply by refileing the claim, which would relate back to alleged acts of genocide occurring prior to 1995.¹⁰⁸ The result is consonant with the declaratory view: the rights of Bosnia-Herzegovina (under the Genocide Convention or otherwise) were opposable to the FRY from the time the former became a State, whether or not the FRY had yet recognized it as such.

Among writers the declaratory doctrine, with differences in emphasis, predominates. 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.'¹⁰⁹

¹⁰⁴ On recognition of constituent entities emerging from the former SFRY see Hillgruber (1998) 9 *EJIL* 491; Warbrick and Lowe (1992) 41 *ICLQ* 473, Craven (1995) 66 *BY* 333, Crawford, *Selected Essays*, 213–21.

¹⁰⁵ Thus Macedonia was not recognized for some years (due to political problems with Greece), yet it was treated by all as a State. Serbia and Montenegro was not recognized as the continuation of the old SFRY, and most States had limited diplomatic relations with it as a result. But its statehood was never in doubt.

¹⁰⁶ 'For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty.' ICJ Rep 1996 p 595, 613.

¹⁰⁷ General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 *ILM* 75.

¹⁰⁸ ICJ Rep 1996 p 595, 612–13.

¹⁰⁹ *Principles* (2nd edn), 94; (6th edn), 89–90 (emphasis in original); see also cf (2nd edn), 90–3; (6th edn), 86–8. Among older authorities, those supporting the declaratory position include: Erich

Moroeover States do not in practice regard unrecognized States as exempt from international law;¹¹⁰ indeed failure to comply with international law is sometimes cited as a justification for non-recognition. And they do in fact carry on relations, often substantial, with such States, extending even to joint membership of inter-State organizations such as the United Nations.¹¹¹ Recognition is usually intended as an act, if not of political approval, at least of political accommodation.¹¹²

(2) Conclusions

It is sometimes suggested that the 'great debate' over the character of recognition has done nothing but confuse the issues, that it is mistaken to categorize recognition as either declaratory or constitutive in accordance with some general theory. According to Brownlie:

in the case of 'recognition', theory has not only failed to enhance the subject but has created a *tertium quid* which stands, like a bank of fog on a still day, between the observer and the contours of the ground which calls for investigation. With rare exceptions the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis.¹¹³

(1926) 13 *HR* 427, 457–68; Jaffé, *Judicial Aspects of Foreign Relations*, 97–8; Borchard (1942) 36 *AJ* 108; Brown (1942) 36 *AJ* 106; Kunz (1950) 44 *AJ* 713; Chen, *Recognition*; Marek, *Identity and Continuity*, 130–61; Charpentier, *Reconnaissance*, 196–200; Lachs (1959) 35 *BY* 252; Waldock (1962) 106 *HR* 147–51; Brierly, *Law of Nations* (6th edn), 139; Higgins, *Development*, 135–6; Starke, *Studies in International Law*, 91–100; O'Connell, *International Law* (2nd edn), vol I, 128–34; Fawcett, *The Law of Nations* (2nd edn), 49, 55; Akehurst, *Modern Introduction* (3rd edn), 60–3. See also the *Resolutions of the Institut du 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 Général des Résolutions 1873–1956*, ii; and cf Brown [1934] *Annuaire* 302–57. Among more recent writers see Davidson (1980) 32 *NILQ* 22; Menon, (1989) 67 *RDISDP* 161, 176; Weston, Falk and D'Amato, *International Law and World Order* (2nd edn), 847; Verhoeven (1993) 39 *AFDI* 7; Warbrick, in Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe*, 9; Emanuelli, *Droit international public*, 189 (para 385). See also *Restatement* 3rd, §202, Reporters' Note 7 (1987): 'This section tends towards the declaratory view . . .'; and, *ibid*, §202, comment b: 'An entity that satisfies the requirements of §201 is a state whether or not its statehood is formally recognized by other states.'

¹¹⁰ Cf the Protocol of the London Conference, 19 February 1831: 18 *BFSP* 779, 781 (concerning Belgium); Marek, *Identity and Continuity*, 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, *Use of Force*, 380. See also Briggs (1949) 43 *AJ* 113, 117–20; Charpentier, *Reconnaissance*, 45–8, 56–8; Whiteman, 2 *Digest*, 604–5.

¹¹¹ See Bot, *Non-Recognition and Treaty Relations*; Whiteman, 2 *Digest*, 524–604, and for the older practice see Moore, 1 *Digest*, 206–35; Hackworth, 1 *Digest*, 327–63.

¹¹² Cf Lachs (1959) 35 *BY* 252, 259; Higgins, *Development*, 164–5; Verhoeven, *Reconnaissance*, 721.

¹¹³ Brownlie (1982) 53 *BY* 197, 197.

Some continental writers, following de Visscher, have tended to regard recognition as combining both declaratory and constitutive elements.¹¹⁴ One can sympathize with these views, but at a fundamental level a choice has to be made. The question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State—to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law. The answer must be no, and the categorical constitutive position, which implies a different answer, is unacceptable.

But this does not mean that recognition does not have important legal and political effects.¹¹⁵ Recognition is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or ‘recognize’ entities the status of which is doubtful:¹¹⁶ depending on the degree of unanimity and other factors this may be evidence of a compelling kind.¹¹⁷ Even individual acts of recognition may contribute towards the consolidation of status: in Charpentier’s terms, recognition may render the new situation opposable to the recognizing State.¹¹⁸

In some situations, the term ‘recognition’ may also be used to describe acts that are properly speaking constitutive of a particular State; for example, a multilateral treaty establishing a new State will at the same time extend the

¹¹⁴ De Visscher, *Problèmes d’interprétation judiciaire en droit international public*, 191; de Visscher, *Théories et Réalités* (4th rev edn), 258; Salmon, *La Reconnaissance d’État*, 19 ff. Cf Charpentier, *Reconnaissance*. Verhoeven, *Reconnaissance*, 548 refers in the same vein to a ‘dialectical relationship’ between recognition and the criteria for statehood, although his basic position remains declaratist: *ibid*, 545, 714–15, 720, esp 547–8: ‘Force est en effet de convenir que pareille aptitude n’est originellement qu’une virtualité qui doit être impérativement présumée dès l’instant où sont réunis les critères traditionnels de l’État, sans réserve d’une vérification de la “viabilité” de l’Etat, sous réserve d’une vérification de la proposition illustre néanmoins indirectement cette caractéristique fondamentale de l’effectivité étatique, d’être principalement une effectivité par rapport à autrui, qui privilégie autant qu’elle problématise l’autorité “externe” par rapport à l’autorité interne. Cette effectivité par rapport à autrui introduit une relation dialectique entre l’effectivité purement matérielle et la reconnaissance qu’elle conditionne, qui complique singulièrement la vérification de celle-là. Il n’est en effet guère douteux que dans la réalité des rapports internationaux la reconnaissance comme fait a fréquemment une portée constitutive et devient l’élément d’une effectivité qui théoriquement la conditionne.’

¹¹⁵ Cf *Restatement 3rd*, §202, comment c.
¹¹⁶ E.g., GA res 195 (III) declaring the Republic of Korea and its government to be representative of the State of Korea.

¹¹⁷ Admission to the United Nations is a strong form of ‘collective recognition’: see Chapter 4.

¹¹⁸ Charpentier, *Reconnaissance*, 217–25.

signatories' recognition of that State.¹¹⁹ But the constitutive acts here are those involving the establishment of the State, the stipulation of its constitution, the definition of its borders, etc. Collective recognition is ancillary and is not a substitute for action by the competent authorities.¹²⁰

The conclusion must be that the status of an entity as a State is, in principle, independent of recognition, although the qualifications already made suggest that the differences between declaratory and constitutive schools are less in practice than has been depicted. But this conclusion assumes that there exist in international law and practice workable criteria for statehood. If there are no such criteria, or if they are so imprecise as to be practically useless, then the constitutive position will have returned, as it were, by the back door.¹²¹ The question whether such criteria exist will be discussed in the next chapter.

1.5 Certain basic concepts

Certain basic concepts—personality, sovereignty, the state/government distinction, continuity and succession—recur throughout this work and need some brief initial explanation.

(1) International personality¹²²

The term 'international personality' has been defined as 'the capacity to be bearer of rights and duties under international law'.¹²³ Such definitions only tend to obscure: any person or aggregate of persons has the capacity to be given rights and duties by States,¹²⁴ and in an era of human rights, investment protection and international criminal law, everyone is at some level 'the bearer of rights and duties' under international law.¹²⁵ Yet there is evidently a distinction

¹¹⁹ E.g., the recognition of Cyprus by the Treaty of Guarantee, Art II, 16 August 1960, 382 UNTS 3.

¹²⁰ For collective action in the creation of States see further Chapter 12.

¹²¹ Cf Anzilotti, *Corso di Diritto Internazionale* (3rd edn), vol I, 163–6.

¹²² See, e.g., Kelsen, *Principles of International Law* (2nd edn), 573–4; Barberis, *Festschrift für Hermann Mosler*, 25; Cassese, *International Law in a Divided World*, 74–104; Jennings and Watts, *Oppenheim* (9th edn), 119–20 (§33), 330–1 (§103); Hickey (1997) 2 *Hofstra LPS* 1; Charlesworth and Chinkin, *The Boundaries of International Law*, 124–5; Shinoda, *Re-examining Sovereignty*, 17–18; Raič, *Statehood and the Law of Self-Determination* (2002), 10–18; Brownlie, *Principles* (6th edn), 648–50 (respecting personality of international organizations); Shaw, *International Law* (5th edn), 175–201.

¹²³ Schwarzenberger, *Manual*, 53.

¹²⁴ Cf *Danzig Railway Officials*, PCIJ ser b No 15 (1928) 17–18.

¹²⁵ See Crawford, *Selected Essays*, 17, 26–9; Brownlie, *Principles* (2nd edn), 73, (6th edn), 69: 'The state is a type of legal person recognized by international law. Yet, since there are other types of legal person so recognized... the possession of legal personality is not in itself a sufficient mark of statehood.'

between being a beneficiary of rights or a bearer of duties, on the one hand, and being an active participant on the international level, on the other. Individuals and companies can bring claims in international forums established by treaty (and not only as the delegates of the States parties to these treaties^{125a}). But it remains true that these forums are created and ultimately controlled by States or by intergovernmental organizations, and it is these entities that remain the gatekeepers and legislators of the international system.¹²⁶

As an aspect of the developments in doctrine and practice in the late nineteenth and early twentieth centuries, international legal personality came to be regarded as synonymous with statehood.¹²⁷ For example, it was never definitively settled whether the League of Nations had international personality.¹²⁸ The question arose with respect to the United Nations soon after its foundation: could the United Nations bring a claim for injury (a) to itself and (b) to its agents caused by the conduct of a non-member State? In the *Reparations* Opinion the International Court gave an affirmative answer in both respects. It reformulated that question in the following terms:

... whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. *In other words*, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.¹²⁹

As to whether the United Nations might claim reparations for injury to its agents committed by nationals of a non-Member state, the Court gave an affirmative answer, stating that ‘... fifty States, representing the vast majority of the members of the international community, had the power, in conformity

^{125a} See *Occidental Exploration & Production Co v Republic of Ecuador*, ‘the investor is given direct standing to pursue the state.’ [2005] EWCA Civ 1116, *Times*, 23 Sept 2005 (Mance LJ), para 16.

¹²⁶ See Oppenheim (9th edn), 119–20, §33; Malanczuk, in Weiss et al (eds), *International Economic Law With a Human Face*, 64; Brownlie, in Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe*, 5; Virally (1985) 183 *HR* 9, 71–2.

¹²⁷ Crawford, *Selected Essays* (2002) 17, 19; Nijman, in *State, Sovereignty, and International Governance*, 109.

¹²⁸ Williams, *Some Aspects of the Covenant of the League of Nations*, 38, 43; Zimmern, *The League of Nations and the Rule of Law 1918–1935*, 277–85; Brierly (1946) 23 *BY* 83, 85.

¹²⁹ *Reparations Case*, ICJ Rep 1949, p 174, 178 (emphasis added). On the legal personality of international organizations generally, see Menon (1992) 70 *RDI* 61; Bederman (1996) 36 *Va JIL* 275; Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen*, (6th edn), 43; Lim, in Harding (ed), *Renegotiating Westphalia*, 53; Amerasinghe, *Principles of the International Law of International Organizations* (2nd edn), ch 3. Regarding the legal personality of particular organizations, Bernhardt (1982) 18 *Europarecht* 199; Khodakov (1993) 7 *Emory ILR* 13; Head (1996) 90 *AJ* 214, 221; Packer and Rukare (2002) 96 *AJ* 365.

with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims'.¹³⁰ A distinction is thus drawn between 'objective international personality' and personality recognized by particular States only. It would appear that the former exists wherever the rights and obligations of an entity are conferred by general international law, and the latter where an entity is established by particular States for special purposes.¹³¹ States clearly are included in the former category: the Order of St. John of Jerusalem, Rhodes and Malta is an example of the latter.¹³² The Court held that, by virtue of the importance of its functions and the extent of its membership, the United Nations was also in the former category, an 'objective' legal person.¹³³

There is thus a distinction between 'general' (or 'objective') and 'special' (or 'particular') legal personality. General legal personality arises against the world (*erga omnes*): particular legal personality binds only consenting States. But no further implications may be drawn from the existence of legal personality: the extent of the powers, rights and responsibilities of any entity is to be determined only by examination of its actual position.¹³⁴ And, as with other

¹³⁰ ICJ Rep 1949 p 174, 185.

¹³¹ There does not appear to be any general practice of recognition by States of the legal personality of international organizations. The USSR sought for years (and unavailingly) to deny the existence of the European Communities; that episode does not seem to have generated imitators. Distinguish, however, headquarters agreements between international organizations and host countries, e.g., Headquarters Agreement of 15 April 1991 between UK and European Bank for Reconstruction and Development, UKTS No 45 (1991), (1991) 62 *BY* 576 and the position respecting the European Union. *HC Debs*, vol 240, *WA*, col 291, 23 March 1994; *Parl Papers* 1992-3; (1992) 63 *BY* 660-1.

¹³² The position of individuals or corporations as bearers of rights under international law is a distinct one. They may have standing under treaties, and they may certainly have rights especially under international human rights instruments. That does not make them in any meaningful sense 'international legal persons'. As holders of rights and even obligations they do not cease to be subject to the State of their nationality, residence or incorporation, as the case may be. On the position of individuals under international law see Janis (1984) 17 *Cornell ILJ* 61; Orentlicher (1991) 100 *Yale LJ* 2537; Vazquez (1992) 92 *Col LR* 1082; Meron (2000) 94 *AJ* 239; Dolzer (2002) 20 *Berkeley JIL* 296. Compare St Korowics (1956) 50 *AJ* 533.

¹³³ For criticism see Schwarzenberger, *International Law*, vol I, 128-9, 469-71, 523, 596. Brownlie describes the passage cited as 'an assertion of political and constitutional fact rather than a reasoned conclusion', but regards it as 'appropriate and necessary' in the special circumstances: *Principles* (2nd edn), 670; (6th edn), 661. Cf also Oppenheim (8th edn), vol 1, 407 (§168), 880 (§492), 928-9 (§522); *ibid*, (9th edn), vol 1, 18 (§7), 1203 (§583), 1263 (§627).

¹³⁴ See further O'Connell (1963) 67 *RGDIP* 5; Lauterpacht (1947) 63 *LQR* 433, (1948) 64 *LQR* 97; Siotto Pintor (1932) 41 *HR* 245; Aufrecht (1943) 37 *Am Pol Sci R* 217; Scelle, in Lipsky (ed), *Law and Politics in the World Community*, 49.

questions, it is not in the bulk of cases but, rather, in the marginal ones that the more difficult questions are likely to arise.¹³⁵

(2) The State

In a sense, the whole of this work is an attempt to define and elucidate the concept of statehood as it operates in present-day international law. In particular, the criteria for statehood, ancient and modern, are examined in detail in Chapters 2 and 3. Despite its importance, statehood ‘in the sense of international law’ has not always been a clearly defined concept. Although the United Kingdom and Indian Governments thought a definition of the term ‘State’ a prerequisite for the proposed Draft Declaration on the Rights and Duties of States,¹³⁶ the International Law Commission (ILC) concluded:

that no useful purpose would be served by an effort to define the term ‘State’ . . . In the Commission’s draft, the term . . . is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth . . . the qualifications to be possessed by a community in order that it may become a State.¹³⁷

This rather bland rejoinder concealed considerable disagreement as to the definition of both ‘State’ and ‘Nation’ and their relationship.¹³⁸ As we shall see, to refer merely to statehood ‘for the purposes of international law’ assumes that a State for one purpose is necessarily also a State for another. This may be true in most cases but not necessarily all. The ‘A’ Mandated territories were treated as States for the purposes of nationality, but were much less certainly States for other purposes. The Free City of Danzig was a State for the purposes of Article 71(2) of the Rules of the Permanent Court; whether it was a State for all purposes has been doubted. Many legal issues subsumed under the rubric of ‘statehood’ may be able to be resolved in their own terms—often this will take the form of interpretation of a treaty or other document. But at a basic level and for many purposes it still makes a great difference whether an entity is or is not a State. The matter is pursued in the next chapter.

¹³⁵ See, e.g., Tabory in Shapira (ed), *New Political Entities*, 139 (Palestine); Morin (1984) 1 *Rev Québécoise DI* 163 (Quebec); Mushkat (1994) 24 *HKLJ* 328 (Macau); Crawford, *Rights in One Country* (Hong Kong).

¹³⁶ ILC, *Preparatory Study*, A/CN.4/2, 1948, 50.

¹³⁷ ILC, *Report* 1949: A/925, 9.

¹³⁸ See *ILC Ybk*, 1949, 61–8, 70–1, 84–6, 138, 173.

(3) Sovereignty

The term ‘sovereignty’ has a long and troubled history, and a variety of meanings.¹³⁹ In its most common modern usage, sovereignty is the term for the ‘totality of international rights and duties recognized by international law’ as residing in an independent territorial unit—the State.¹⁴⁰ It is not itself a right, nor is it a criterion for statehood (sovereignty is an attribute of States, not a precondition). It is a somewhat unhelpful, but firmly established, description of statehood; a brief term for the State’s attribute of more-or-less plenary competence.

Unsurprisingly, the term has drawn criticism. According to Charney: ‘The word “sovereignty” should be stricken from our vocabulary. It evokes the anachronistic idea of the total independence and autonomy of the state, and has no real meaning today. Use of the word calls to mind a fundamentalist view that is difficult to debate in light of its emotive baggage.’¹⁴¹ But the term seems to be ineradicable, and anyway its eradication might only make matters worse. Better, one might think, 192 sovereigns than one or a few. Associated with the concept of sovereign equality, the term is a normative one and may be unobjectionable. What is objectionable is the abuse of language involved in statements of the form ‘State A is sovereign therefore its conduct is unquestionable’ (a statement normally used to defend the conduct of one’s own State, not that of others). As a United States court observed:

We cannot accept... [a] definition of sovereignty as the ‘supreme, absolute, and uncontrollable power by which an independent state is governed.’ [Appellant] would have us believe that sovereignty is an ‘all or nothing’ concept... we disagree... [T]his

¹³⁹ See 10 *Enc PIL* 397, 399; Wildhaber, in Macdonald and Johnston (eds), *The Structure and Process of International Law*, 425; Hinsley, *Sovereignty* (2nd edn 1986), 224–35; Kranz (1992) 30 *Archiv des Völkerrechts* 411; Bartelson, *A Genealogy of Sovereignty*; E Lauterpacht (1997) 73 *Int Affairs* 137; Dupuy, *Dialectiques du droit international*; Merriam, *History of the Theory of Sovereignty since Rousseau*; Rawls, *Law of Peoples*, 27, 79; Jackson (2003) 97 *AJ* 782; Sarooshi (2004) 25 *Michigan JIL* 1107; Krasner, *Sovereignty: Organized Hypocrisy*, 3–25.

¹⁴⁰ Cf *Reparations Case*, ICJ Rep 1949 p 174, 180. See generally Whiteman, 1 *Digest* 233–82; Korowicz, *Organisations internationales et souveraineté États membres*; Sukiennicki, *La Souveraineté des États en droit internationale moderne*; Crawford, *Selected Essays*, 95. Kamal Hossain, ‘State Sovereignty and the UN Charter’ (MS DPhil d 3227, Oxford, 1964) distinguishes three meanings of sovereignty: (1) State sovereignty as a distinctive characteristic of States as constituent units of the international legal system; (2) Sovereignty as freedom of action in respect of all matters with regard to which a State is not under any legal obligation; and (3) Sovereignty as the minimum amount of autonomy which a State must possess before it can be accorded the status of a ‘sovereign state’. There is a fourth meaning: sovereignty as plenary authority to administer territory. The first meaning seems to be reflected in the following UK Government statement: ‘Sovereignty is an attribute which under international law resides inherently in any independent state recognised as such. By virtue and in exercise of their sovereignty, states conduct dealings with one another internationally.’ *HL Debs*, vol 566, *WA* 85, 16 October 1995.

¹⁴¹ Charney (1997) 91 *AJ* 394, 395 (citing Henkin).

argument ignores the distinction between sovereignty, or the legal personhood of the nation, and jurisdiction, or the rights and powers of the nation over its inhabitants. It is uncontroversial that nations, even though they are recognized as full members of the international community, must modify their internal affairs as a result of their participation in the international community.¹⁴²

In any event, as a matter of international law no further legal consequences attach to sovereignty than attach to statehood itself. The question of sovereignty in international law is not to be confused with the constitutional lawyer's question of supreme competence within a particular State: the 'sovereignty of Parliament' could coexist with the effective abandonment of the sovereignty of the United Kingdom.¹⁴³ Nor is it to be confused with the exercise of 'sovereign rights': a State may continue to be sovereign even though important governmental functions are carried out on its behalf by another State or by an international organization. And, finally, 'sovereignty' does not mean actual equality of rights or competences. The actual competence of a State, for example, to wage war, may be restricted by its constitution,¹⁴⁴ or by treaty¹⁴⁵ or even by a particular international rule.¹⁴⁶ As a legal term 'sovereignty' refers not to omnipotent authority—the authority to slaughter all blue-eyed babies, for example—but to the totality of powers that States may have under international law.¹⁴⁷ By contrast, as a political term its connotations are those of untrammelled authority and power and it is in such discourse that the term can be problematic.¹⁴⁸

(4) State and government¹⁴⁹

One of the prerequisites for statehood is the existence of an effective government; and the main—for most purposes the only—organ by which the State

¹⁴² *Heller v US*, 776 F 2d 92, 96–7 (3rd Cir 1985).

¹⁴³ Cf *Harris v The Minister of the Interior* [1952] 2 SA (AD) 428. The confusion was reflected in the plaintiff's argument in *Blackburn v AG* [1971] 1 WLR 1037, 52 ILR 414. On the 'sovereignty of parliament' in relation to the incorporation of European law into UK law, see Akehurst (1989) 60 BY 351.

¹⁴⁴ E.g., The Philippines by the Constitution of 1935 as amended, Art II(3).

¹⁴⁵ E.g., Austria by the State Treaty of 1955, 217 UNTS 223, Art 13.

¹⁴⁶ E.g., Switzerland, by the 'public law of Europe': McNair, *Law of Treaties*, 50.

¹⁴⁷ The utility of the term is not increased by a good deal of writing loosely suggesting the eclipse of States, the lapse of sovereign equality and the value of 'relative' sovereignty. See, e.g., Simonovic (2000) 28 *Georgia JILC* 381; Wriston (1993) 17 *Fletcher Forum World Aff* 117, 117; Schreuer (1993) 4 *EJIL* 447–71; Cullet (1999) 10 *EJIL* 549, 551; Williams (2000) 26 *Rev Int Stud* 557, 557–73. See also Kingsbury (1998) 9 *EJIL* 599.

¹⁴⁸ Cf Westlake, *International Law*, vol I, 237 (cited in translation in the French *Counter-Mémoire, The Lotus*, PCIJ ser C, no 13-II, 275); Hart, *The Concept of Law* (1961), 217–18. See also Reisman (1990) 84 *AJ* 866; Henkin (1999) 68 *Fordham LR* 1; Krasner, *Sovereignty: Organized Hypocrisy*.

¹⁴⁹ See Whiteman, 1 *Digest* 911–16; Jennings (1967) 121 *HR* 350–2; Arangio Ruiz (1975) *OZFOR* 265, 260; Verhoeven, *Reconnaissance*, 66–71.

acts in international relations is its central government.¹⁵⁰ There would thus seem to be a close relation between the concepts of government and statehood. According to O'Connell: 'Until the middle of the nineteenth century, both types of change [change of State and change of government] were assimilated, and the problems they raised were uniformly solved. With the abstraction of the concept of sovereignty, however, a conceptual chasm was opened between change of sovereignty and change of government.'¹⁵¹ This 'post-Hegelian'¹⁵² development O'Connell criticizes as 'dogmatic' and 'arbitrary'.¹⁵³ In the context of succession to obligations—that is, in the context of the legal effects of changes in State or government—it is more useful and more cogent in his view to pay regard not to any such distinction but to the real changes or continuities in political, social and administrative structure.¹⁵⁴ He thus advocates a return to the eighteenth-century position of practical assimilation of changes of State and government.¹⁵⁵

It is true that some changes of government have greater and more traumatic effects than most changes of statehood (as with Russia in the period after the Revolution of 1917). Nonetheless it is a reasonable assumption that changes in statehood are more likely to have greater social and structural importance than changes in government. In any event, international law does distinguish between change of State personality and change of the government of the State.¹⁵⁶ There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government. Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.¹⁵⁷ The legal position of governments-in-exile is dependent on the distinction between government and State.¹⁵⁸ So also is the characterization of a lengthy conflict such as the Spanish Civil War as a 'civil' rather than as 'international' war.¹⁵⁹ The concept

¹⁵⁰ Cf *Genocide case (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)*, ICJ Rep 1996 p 595, 621–2 (citing Vienna Convention on the Law of Treaties, Art 7(2)(a)).

¹⁵¹ *State Succession* (1967), vol I, 5–6.

¹⁵² *Ibid*, vol I, vi.

¹⁵³ *Ibid*, vol I, 7; II, vi.

¹⁵⁴ *Ibid*, vol II, vi.

¹⁵⁵ *Ibid*, vol I 1, 7.

¹⁵⁶ Wright (1952) 46 *AJ* 299, 307; *Jessup, Modern Law of Nations*, 43.

¹⁵⁷ The occupation of Iraq in 2003 illustrated the difference between 'government' and 'State'; when Members of the Security Council, after adopting SC res 1511, 16 October 2003, called for the rapid 'restoration of Iraq's sovereignty', they did not imply that Iraq had ceased to exist as a State but that normal governmental arrangements should be restored. See Grant (2003) 97 *AJ* 823, 836–7.

¹⁵⁸ Whiteman, 1 *Digest* 921–30; Oppenheimer (1942) 26 *AJ* 568–95; Verhoeven, *Reconnaissance*, 76–83. On governments-in-exile, see Talmon, *Recognition of Governments in International Law*. For the special case of the Baltic States of Estonia, Latvia and Lithuania, see Grant (2001) 1 *Baltic YBIL* 23, 41–9.

¹⁵⁹ For the distinction between government and State in the Spanish Civil War, see *Government of Spain v Chancery Lane Safe Deposit Ltd; State of Spain v Chancery Lane Safe Deposit Ltd*, *The Times*,

of representation of States in international organizations also depends upon the distinction.¹⁶⁰

Moreover, in arguing for a closer identification of 'State' and 'government', O'Connell sought to maximize the extent to which treaty and other obligations are transmitted from one State to its successor.¹⁶¹ In other words he was trying to draw from the relative stability secured by the principle of State continuity a similar stability for the law of State succession. But the law of State succession has developed otherwise:¹⁶² it has come to be accepted that successor States, in particular newly independent States, have substantial freedom as to the succession of treaty rights and obligations, although with certain exceptions.¹⁶³ To obliterate the distinction between 'change of State' and 'change of government' would now only decrease the stability of legal relations.

(5) State continuity and State succession

There is then a clear distinction in principle between the legal personality of the State and its government for the time being.¹⁶⁴ This serves to distinguish in turn the field of State personality (which includes the topics of identity and continuity of States) and that of State succession.¹⁶⁵ State succession depends upon the conclusion reached as to State personality.¹⁶⁶ This is not to say,

26 May 1939; noted (1944) 21 *BY* 195. See also *Spanish Civil War Pension Case* (1978, Federal Social Court, FRG) 80 *ILR* 666, 668–70.

¹⁶⁰ The transition of the FRY (Serbia & Montenegro) from predecessor to successor State is discussed in Chapter 17.

¹⁶¹ Cf *State Succession*, vol I, 30–5. The argument, for opposite reasons, was advanced by La Forest (1966) 60 *PAS* 103; cf the reactions of Briggs, *ibid*, 125, Aufricht, *ibid*, 126.

¹⁶² See Crawford, *Selected Essays*, 243 for a detailed study in the context of O'Connell's own work and that of the ILC.

¹⁶³ In recent practice the recognition of newly emergent States has often been conditional on their acceptance of obligations arising under certain treaties to which the 'parent' State had been party. The 1991 EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union provided that States accept 'all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability' '31 *ILM* 1486'. European States required, under the rubric of disarmament, that States established on the territory of the former Soviet Union accept the obligations contained in the Treaty on Conventional Armed Forces in Europe, which the Soviet Union had signed on 19 November 1990 (30 *ILM* 1 (1991)). See, e.g., 63 *BY* 637 (EC Presidency statement regarding Kyrgyzstan and Tadjikistan, specifying requirement to observe, *inter alia*, the Treaty on Conventional Armed Forces in Europe). This practice has tended to be specific and of variable quality; its impact on general issues of treaty succession is doubtful.

¹⁶⁴ Cf O'Connell, *State Succession*, vol I, 3; O'Connell, 1972 *Grotius SP* 23, 26–8; Charpentier, *Reconnaissance*, 15–16.

¹⁶⁵ Marek, *Identity and Continuity*, 9–14, describes the two as 'mutually exclusive'; cf Pereira, *Succession d'États en Matière de Traité*, 7–11. The ILC resisted attempts at eroding the distinction in its work on State succession: see, e.g., *ILC Ybk*, 1974/II(1), 14–16, 30–1.

¹⁶⁶ Hall, *International Law* (8th edn), 114, cited O'Connell, *State Succession*, vol I, 3.

however, that the topic of State succession is irrelevant to this study. Views taken of particular State succession situations may illuminate related problems of personality. In some areas, at least, the principles and policy considerations involved are similar. The problem of 'State succession' in the case of devolving territories such as the British Dominions, 1919 to 1945, was in part a matter of succession and in part a matter of personality or agency. Nonetheless the concepts of continuity and succession remain distinct, and blurring them serves no useful goal.¹⁶⁷

¹⁶⁷ For the outcome of the ILC's work on State succession see Vienna Convention on Succession of States in respect of Treaties (1978) (entered into force 6 November 1996), 1946 UNTS 3, (1978) 17 ILM 1488; Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983), (1983) 22 ILM 298, A/CONF/117/15, 7 April 1983.