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# LAW, POLITICS, AND THE CONCEPTION OF THE STATE IN STATE RECOGNITION THEORY

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## I. INTRODUCTION

The competing theories of state recognition and their failings actively demonstrate that recognition of a state does not have any normative content *per se*, but rather, that the rules of state recognition, although legal rules, are legal vehicles for political choices. We have the dilemma of concurrently wanting the right cases to result in independent states while prohibiting the wrong ones from becoming so, and so we sail between political choices, using the language of law. The state is neither truly free to recognize another entity nor entirely bound. Differing cases require different legal criteria and different legal results. This flexibility in state recognition theory though, while depriving the act of any inherent legal meaning, has value in its utility for establishing lawful relationships.

Whenever a state recognizes another, there are two questions that are addressed. The first question is how the nature of statehood is conceived, that is, whether it is purely a bundle of legal rights or whether it contemplates a pre-state, non-legal collectivity. The second question is the degree of discretion that states have in acting on the international plane and the source of the international legal system's legitimacy. Is the international legal system legitimate because states have constructed and consented to it or is it legitimate because it constrains state action?

This paper will argue that the reason we find it difficult to resolve the controversy over state recognition theory is because the international legal system translates political controversies into legal questions that can then be addressed through legal means. Legal actors, by announcing preference for one side of the question, often reveal certain legal and moral choices they are making about the nature of the state and the legitimacy of the international legal system. In the area of state recognition, no theory of recognition has extinguished competition because no political choice has gained universal acceptance. The predominant political choice is most frequently deliberate indeterminacy, a co-existence of mutually opposing arguments. This indeterminacy is most likely deliberate because it permits the underlying rationale for the legal actor's policies to change and evolve to suit the situation.

On June 28, 2006, the newly independent Republic of Montenegro was formally admitted to United Nations membership by vote of the General Assembly.<sup>1</sup> This was followed by a number of states' recognition of the new state, as well as the new state's admission as a member of the Council of Europe on May 11, 2007.<sup>2</sup> The creation of this new state appears

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<sup>1</sup> See G.A. Res. 60/264, U.N. Doc. A/RES/60/264 (June 28, 2006) (admitting the Republic of Montenegro as a member of the United Nations). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91 (Feb. 26).

<sup>2</sup> See Press Release, Council of Europe, The Republic of Montenegro Becomes 47th Council of Europe Member State (May 10, 2007). See also Eur. Parl. Ass., *Accession of the Republic of Montenegro to the Council of Europe*, Op. 261 (2007).

rather uncontroversial. The public voted in a referendum for severance of its federation with Serbia, which was already tenuous at best. The former entity of the Socialist Federal Republic of Yugoslavia (“S.F.R. Yugoslavia”) was already in a process of dissolution, and this step was perhaps the final step in this process. There was no larger public debate about theories of state recognition.

The new state of Montenegro, however, should not fool us into thinking that state recognition theory is settled, clear, or internally consistent. The striking case in point is the protracted discussion over the independence of Kosovo, culminating in the government of the autonomous region declaring its own independence less than two years later on February 17, 2008,<sup>3</sup> and the referral of the entire question of the legality of its independence to the International Court of Justice (“I.C.J.”).<sup>4</sup> Aside from the formal distinction between Montenegro and Kosovo – that one is a constituent state of the former S.F.R. Yugoslavia and the other is an autonomous region within one of the constituent states – the substantive distinction is less clear. Both were sub-units of the former S.F.R. Yugoslavia with self-proclaimed unique ethnic identities. Both have enjoyed a large degree of autonomy since the dissolution of the S.F.R. Yugoslavia. Despite such substantive similarities, and notwithstanding U.N. Security Council Resolution 1244,<sup>5</sup> there is a significant difference in the recognition each received: the case of Montenegro’s recognition is not controversial, while the case of Kosovo is. It may be that the widespread recognition of Kosovo has spurred a “war of recognitions”, the latest salvo of which is the movement within Russia to recognize the independence of South Ossetia and Abkhazia,<sup>6</sup> a diplomatic attack on Georgia’s territorial integrity.

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<sup>3</sup> See *Kosovo MPs Declare Independence*, BBC NEWS (Feb. 17, 2007), <http://news.bbc.co.uk/2/hi/europe/7249034.stm>; *Bush Recognizes Kosovo’s Independence*, ASSOCIATED PRESS (Feb. 18, 2008), [http://www.usatoday.com/news/world/2008-02-18-3315721753\\_x.htm](http://www.usatoday.com/news/world/2008-02-18-3315721753_x.htm).

<sup>4</sup> See G.A. Res. 63/619, U.N. Doc. A/63/619 (Oct. 8, 2008) (“Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law.”).

<sup>5</sup> S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). The author notes the significance of the attempt of the Security Council to preserve the status quo in Kosovo in international law, i.e. Kosovar autonomy within Yugoslavian sovereignty, but also observes that the arguable violation of the resolution by U.N. Member States who recognize an independent state of Kosovo only results in responsibility to the U.N., not the prevention of the legal effects of the act of recognition. See *infra* for a more detailed analysis of this conclusion.

<sup>6</sup> See *Russian MPs Back Georgia’s Rebels*, BBC NEWS (Aug. 25, 2008), <http://news.bbc.co.uk/2/hi/europe/7580386.stm> (“Russia’s parliament has backed a motion urging the president to recognise the independence of Georgia’s breakaway regions of Abkhazia and South Ossetia.”). It is interesting, however, to note that at least twenty-five of the states that recognize Kosovo as a state have refused to recognize

The debate over statehood is dominated by two well-known competing theories: the declaratory and the constitutive theories. The constitutive theory provides that a state is only a state upon the political act of recognition by other states.<sup>7</sup> The declaratory theory, on the other hand, opines that recognition is merely acknowledgement of the existing statehood status, and that the act of recognition does not confer status.<sup>8</sup> Rather, statehood is acquired by satisfaction of objective criteria. Although many authors state that one or the other theory is confirmed by practice,<sup>9</sup> the record does not bear this statement out; neither of these two theories

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South Ossetia. The states recognizing Kosovo, but refusing to recognize South Ossetia, include Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Norway, Poland, Sweden, Turkey, the U.K., and the U.S. Also note that only Russia intends to recognize South Ossetia, yet it refuses to recognize Kosovo. Curiously enough, many of these same states have justified their positions against recognizing South Ossetia because such recognition would undermine Georgian sovereignty, independence and/or territorial integrity, which appear not to be legal constraints on the recognition of Kosovo. See, e.g., Press Release, Foreign Affairs & Int'l Trade Canada, Statement by Minister Emerson on Situation in Georgia (Aug. 26, 2008), available at [http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication\\_id=386468&language=E&docnumber=184](http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=386468&language=E&docnumber=184); Press Release, Estonian Ministry of Foreign Affairs, Estonia Disapproves Russia's Decision to Recognise the Independence of Georgia's Separatist Regions (Aug. 26, 2008), available at [http://www.vm.ee/eng/kat\\_138/10067.html?arhiiv\\_kuup=kuup\\_2008](http://www.vm.ee/eng/kat_138/10067.html?arhiiv_kuup=kuup_2008); Press Release, Ministry For Foreign Affairs Finland, OSCE Chairman Condemns Russia's Recognition of South Ossetia, Abkhazia Independence (Aug. 26, 2008), available at <http://formin.finland.fi/public/default.aspx?contentid=135447&nodeid=15146&contentlan=2&culture=en-US> (noting Finland's affirmation of Georgia's territorial integrity); Press Release, Dep't of Foreign Affairs, Ireland, Statement by Minister for Foreign Affairs on Russian Recognition of Abkhazia and South Ossetia (Aug. 26, 2008), available at <http://foreignaffairs.gov.ie/home/index.aspx?id=72518>; Press Release, Ministry of Foreign Affairs of the Republic of Latvia, Foreign Minister Riekstins Condemns Russia's Decision to Recognise Independence of Abkhazia and South Ossetia (Aug. 26, 2008), available at <http://www.am.gov.lv/en/news/press-releases/2008/Ausust/26-4/>; Press Release, White House, Office of the Press Secretary, President Bush Condemns Actions Taken by Russian President in Regards to Georgia (Aug. 26, 2008), available at <http://www.whitehouse.gov/news/releases/2008/08/20080826-2.html>; *Reaction to Russia's Recognition of Rebels*, BBC NEWS, Aug. 26, 2008, <http://news.bbc.co.uk/2/hi/europe/7582367.stm> (documenting the affirmation of Georgia's territorial integrity by France, Germany, U.K., and the U.S.); Leigh Phillips, *EU leaders Condemn Russia in Shadow of Kosovo*, EUOBSERVER.COM, Aug. 26, 2008, <http://euobserver.com/9/26644> (documenting the same justification expressed by the Czech Republic, France, Germany, Sweden, and the U.K., and also noting the comparison with the situation in Kosovo).

<sup>7</sup> See generally *infra* notes 11-12.

<sup>8</sup> See generally *infra* notes 13-14.

<sup>9</sup> See generally *infra* note 11.

satisfactorily describes the state of the law on the matter. Furthermore, on examination, the two theories can be broken down into aspects that inherently contradict each other or dissolve into each other. The theories in essence present two fundamentally different and irreconcilable views of international law. Because they describe the status of a state, the most significant legal actor in international law, the tensions between the two perspectives result in crucial differences in the creation, acquisition, and realization of rights and obligations under international law, not merely in the interpretation and settlement of rights. While the scholar or judge may consider one theory more legally correct than the other, the more important observation is seeing the choices that are being made regarding the nature of the state and the legitimacy of the international legal system in expressing support of and adherence to either of the two classic theories.

#### A. *Declaratory Theory and its Criticisms*

The declaratory theory looks to the purported state's assertion of its sovereignty within the territory it exclusively controls to determine if it can access the international plane. Recognition should be automatic based on specified criteria because the status of statehood is based on fact, not on individual state discretion.<sup>10</sup> The majority of contemporary scholars and commentators favor this theory.<sup>11</sup>

However, there are criticisms of this theory. State practice may not support it. States also do not acquire international rights on the international plane until they are recognized. The fact that recognition vests recognized states with rights changes the expectations on the state and may encourage choices that are more conducive to peace. In addition, the declaratory theory may undermine the principle that international law is the law made by states. Even if the theory were not, in itself, objectionable on this ground and was followed unanimously by states, other difficulties with the theory include the selection of the criteria to apply, the instability and unpredictable nature of competing versions of criteria, the application of those criteria, the hypocrisy in applying different criteria to different states, and the legitimacy of some proposed criteria. These issues may lead one to wonder whether the declaratory theory constrains the discretion of states to an appreciable degree.

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<sup>10</sup> See generally MARTHA J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-995* (1997).

<sup>11</sup> See generally JAMES L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (Humphrey Waldock ed., 6th ed. 1963); TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN THE UNITED STATES* (L. C. Green ed., 1951); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (1990); D. J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* (1983).

## B. *Constitutive Theory and its Criticisms*

The constitutive theory states that recognition is not automatic. Rather, it is based on the discretion of other states. Moreover, only upon recognition by those other states does the new state exist, at least in a legal sense.<sup>12</sup> Some practice in contemporary situations may evidence the application of the constitutive theory rather than the declaratory.<sup>13</sup> Numerous classical scholars have weighed in support of the constitutive theory.<sup>14</sup> Many modern scholars are beginning to reexamine the constitutive theory, considering whether it provides a firmer foundation for the determination of statehood status.<sup>15</sup>

The constitutive theory, however, also has its criticisms. Many states and scholars assert that the declaratory theory, not the constitutive theory, predominates in practice.<sup>16</sup> There is no evidence to suggest that states regard unrecognized states as *terra nullius*. Thus, there must be some international legal personality in the territory concerned that does not lapse or that predates statehood. Regardless of international recognition, a purported state might exercise state authority over its residents without regard to the position of other states, even if the other states do not believe the purported state fulfills the criteria for statehood. From a theoretical point of view, the constitutive theory is not attractive in that it permits states to ignore the facts, i.e. the existence of a state, acting as such and acknowledged as such by the nationals and perhaps neighbors thereof. There is a need for the law to reflect facts, and any other conclusion results in the assignment of recognition to the purely political process rather than a justiciable rights-based process. This objection to the theory is compounded by the constitutive theory's subjective nature and potential inconsistency with other states' determinations, resulting in uncertainties about which entities may be universally regarded as states. Further, on an ethical level, it is questionable whether other, existing states should be the gatekeepers to the international plane. Some have argued that the declaratory theory emerged because of objections to the discretion of states, as well as a principled acknowledgment of the role of self-determination. Larger, more powerful states that are secure in their

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<sup>12</sup> See generally *infra* note 14.

<sup>13</sup> See, e.g., Martii Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 469 n.54 (1996) (finding a "resuscitated 'constitutivist' approach to the recognition of states").

<sup>14</sup> See, e.g., 1 LASSA OPPENHEIM, INTERNATIONAL LAW §§ 71, at 125 (Hersch Lauterpacht ed., 8th ed., 1955) ("A State is, and becomes an International Person through recognition only and exclusively."); Hersch Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 419 (1944) (describing "[t]he orthodox constitutive view which deduces the legal existence of new States from the will of those already established").

<sup>15</sup> See generally PETERSON, RECOGNITION OF GOVERNMENTS, *supra* note 10.

<sup>16</sup> See generally *supra* note 11.

recognition may use recognition as a tool for their continued domination of other states.

### C. *Attempts at Synthesis*

Some commentators have attempted to merge the two theories into a coherent whole, but these theories are not entirely convincing. In his classic work, Hersch Lauterpacht attempted a nuanced merger of various aspects of the two theories.<sup>17</sup> While accepting the hypothesis that “recognition is a momentous, decisive and indispensable function of ascertaining and declaring the existence of the requisite elements of statehood with a constitutive effect for the commencement of the international rights and duties of the entity in questions,”<sup>18</sup> Lauterpacht attached a duty of recognition to mitigate extreme cases of denial of reality. If there is, however, a duty to recognize and thus constitute a new state, then the particular legal actor holding the power to constitute the new state is not important. But if the states are indeed empowered to create new states, then there is no adequate explanation of the source of such a duty. Lauterpacht’s attempt to create a synthesis—that the constitutive theory should be applied for the notion that the new state begins its existence upon recognition and the declaratory theory for the notion that states’ discretion in recognizing the new state was constrained—suffers from a flaw as well. Although he was quick to observe that the opposite view was untenable (that the state existed regardless of recognition, but that other states had the discretion to refuse to recognize), he did not perceive the weakness of his own theory – that it might not matter where the source of the power to create a new state lies if its creation is compelled by international law.

John Dugard has expanded on Lauterpacht’s theory but has found the source of the duty to recognize in admission to U.N. membership.<sup>19</sup> Although Dugard appears to acknowledge the crucial role of state consent in recognition, and perhaps the constitutive effect of recognition, the discretion of those acts is tempered by international oversight. While states may have a duty to the U.N. or the international community generally to recognize a U.N. member, there is no clear remedy for a violation of an obligation to the U.N. The denying state might be liable to the U.N. for a violation of U.N. law, but the remedy for the violation might not necessarily reverse the denying state’s refusal to recognize the purported state.<sup>20</sup>

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<sup>17</sup> See generally HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947).

<sup>18</sup> *Id.* at 51.

<sup>19</sup> See generally JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* (1987).

<sup>20</sup> *Cf.* Cases where the violation of an international obligation did not result in the reversal of the municipal measure: *Avena & Other Mex. Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (finding that the U.S. failed to follow its international

Thomas Grant suggests that there is more than one institution of recognition.<sup>21</sup> This theory sounds reasonable. However, states do not seem to distinguish between rigid types of recognition. Grant's classification is helpful because it acknowledges different legal results flowing from the same act. Because states do not appear to have the intention to create more than one institution, there might be one institution with more than one possible consequence, or an intermingling of several consequences, with certain consequences more predominant in different situations.

Michael Schoiswohl has proposed a "dissolving succession" theory in relation to Somalia, but which might apply more widely.<sup>22</sup> This theory proposes that recognition is declaratory when the new state's status is not disputed, but that it is constitutive (or semi-constitutive) when the state's personality is disputed.<sup>23</sup> There is, however, no evidence that states intend for this to be the result, so we must wonder whether this can be practice and *opinio juris* and thus whether it is a legal principle. There is also nothing to suggest that a non-disputed state's new existence was not constituted by recognition rather than merely declared, only that the effect of the constitution in that case was not acknowledged. It is an easy matter to argue that an act is merely declaratory when no one objects to it.

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obligation of consular notification, but conceding that such a finding did not automatically result in the annulment of the conviction by the I.C.J., but rather a request for the U.S. to reconsider the conviction); Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 3 C.M.L.R. 41, ¶¶ 285-330 (2008) (holding that, although the Security Council resolution established a binding international obligation of the Member States to the U.N., the municipal law measures implemented to put the resolution into effect internally could not violate European human rights norms, and thus, the municipal law measure was stricken); Order of Provisional Detention, Extraordinary Chambers in the Courts of Cambodia, No: 001/18-07-2007-ECCC-OCIJ (July 31, 2007) (upholding jurisdiction of the tribunal despite an arrest or detention that may have violated international norms); Prosecutor v. Rwamakuba, Case No. ICTR 98-44-T, Decision on Defence Motion Concerning the Illegal Arrest & Illegal Detention of the Accused, ¶ 30 (Dec. 12, 2000) (same); Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5 (Isr. Dist. Ct., Jerusalem, Dec. 12, 1961), *aff'd* 36 I.L.R. 277 (Isr. Sup. Ct. May 29, 1962) (same); *R v. O/C Depot Battalion, RASC Colchester Ex parte Elliott*, [1949] 1 All E.R. 373, 376-7 (K.B., U.K.); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). *But see* *R. v. Horseferry Rd. Magistrates' Court, Ex parte Bennett*, [1994] 1 A.C. 42 (H.L.) (appeal taken from Eng.) (holding the opposite); *R. v. Hartley* [1978] 2 N.Z.L.R. 199 (C.A.) (same); *S. v Ebrahim* 1991 (2) SA 553 (A.D.) (S. Afr.) (same).

<sup>21</sup> See generally Thomas D. Grant, *An Institution Restored?*, 39 VA. J. INT'L L. 191 (1998) (reviewing MARTHA J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE 1815-995* (1997)).

<sup>22</sup> See generally MICHAEL SCHOISWOHL, *STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED DE FACTO REGIMES IN INTERNATIONAL LAW: THE CASE OF 'SOMALILAND'* (2004).

<sup>23</sup> See *id.*



In sum, these theories attempt to bring together the disparate aspects of the two theories and resolve them coherently, when such resolution might not be possible. We will next turn to these elements of recognition theory to begin to examine why resolution may not be possible.

## II. ELEMENTS OF RECOGNITION THEORY

There are two elements of recognition theory: the first element is whether the new state exists before the recognition by other states; and the second element is the degree of discretion that states have to grant or withhold recognition. Lauterpacht observed two elements when he stated:

The constitutive theory, as commonly propounded, culminates in two assertions: the first is that, prior to recognition, the community in question possesses neither the rights nor the obligations which international law associates with full statehood; the second is that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned.<sup>24</sup>

This separation is significant because the two aspects of the theories, although often matched in their classic constitutive/declaratory arrangement, are sometimes mixed. Different authors do not necessarily religiously follow the classic models. Lauterpacht himself, for example, embraced the constitutive theory in the sense that the new state did not exist until recognized, but he also insisted on the declaratory theory in the sense that existing states did not have discretion to refuse to recognize a new state.<sup>25</sup> Thus, discussing the constitutive and declaratory theories in their classic formulations is not helpful, particularly given various attempts to synthesize the two theories, as discussed above. The classification into one of the two camps becomes strained when we discuss the variety of perspectives across the board. Instead, we should assess how each theory addresses the two elements. There are in effect two arguments being pursued concurrently: first, how the very status of statehood is conceived in different ways, and, second, how the role of state discretion and consent in forming legitimate international law is also differently conceived. Certainly the perspective on each element informs the perspective on the other, but commentators have advocated a number of techniques for justifying combinations of the two elements. First, this paper will discuss the existence of the state. Secondly, it will discuss the discretion of the recognizing states.

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<sup>24</sup> LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, *supra* note 17.

<sup>25</sup> See *id.* at 73. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 202 (1987) (stating a similar construction).

### III. THE EXISTENCE OF THE STATE

The two theories offer different visions of the state. There is the legal state, which is the entity that has rights enforceable against other states and obligations to those other states. In this view, the state is only a bundle of legal rights whose existence commences and terminates upon the acquisition and loss of those rights. The other view is that the state is not merely a question of rights because it is more than a purely legal construction; it is also an organic entity. This view is the sociological state (some might say a “nation,” though that term may not apply in all situations), which is the collectivity that holds the right to self-determination and can legitimize statehood. It may precede the acquisition of international legal rights and presumably survives the loss of those rights.

When we discuss whether the act of recognition actually creates the new state, different commentators will respond with different conclusions depending on what character of the state is seen to predominate. In certain situations one may precede the other, such as the nationalist movement that later gains enforceable rights of statehood or the artificially created state, such as a state set up and constituted by another or other states, that later provides a sense of nationalistic identity to its nationals. However, there is no standard model for the origins of statehood. Even though the two theories coexist and support each other, they coexist inharmoniously. A single theory of recognition may not be able to contemplate both visions of the state and a single theory of recognition may not be acceptable to a single individual who may prefer to select the model for the creation of state that better addresses the given situation. The version that a particular jurist accepts and applies evidences the understanding that the person has about what constitutes the nature of the state.

#### A. *Recognition Does Not Create a State*

There is state practice and theoretical justifications to support the notion that recognition has no effect on whether the state exists. There is, however, also state practice that opposes that view and, upon deeper consideration, the theory underpinning the theory has considerable weakness. First we look to state practice and the existence of *opinio juris* to assess whether a new state exists as a legal person before and following the act of recognition.

##### 1. State Practice

The classic, often cited, statement of prescribed state practice is the Montevideo Convention that states:

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to

legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts . . . The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.<sup>26</sup>

Many commentators have held that state practice clearly favors the declaratory model, that is, that the entity exists as a state before recognition.<sup>27</sup> “The better view is that the granting of recognition to a new state is not a ‘constitutive’ but a ‘declaratory’ act; it does not bring into legal existence a state which did not exist before. . . . The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain.”<sup>28</sup>

The I.C.J. has also pronounced that it adheres to the declaratory view, in the sense that the failure to maintain effective control during the process of dissolution of a state does not extinguish the legal entity as per the U.N.<sup>29</sup> This opinion on declaratory theory was again supported by the Arbitration Commission of the European Communities Conference on Yugoslavia, chaired by Robert Badinter, discussing the independence and status of states of the successor to the S.F.R. Yugoslavia.<sup>30</sup> However, the above may not truly evidence customary international law. Treaties may prescribe a practice that is not followed,<sup>31</sup> and the opinions of jurists and

<sup>26</sup> Convention on Rights and Duties of States art. 3, art. 6, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

<sup>27</sup> See, e.g., PETERSON, *RECOGNITION OF GOVERNMENTS*, *supra* note 10, at 26.

<sup>28</sup> BRIERLY, *THE LAW OF NATIONS*, *supra* note 11, at 139.

<sup>29</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91 (Feb. 26) (discussing F. Zacklin, U.N. Under-Sec’y-Gen. & Legal Counsel, Letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, U.N. Doc. A/47/485 (Sept. 29, 1992) (stating that the effect of G.A. Res. 47/1 (Sept. 22, 1992), as well as impliedly S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992), was not to terminate or suspend the S.F.R. Yugoslavia’s membership in the U.N.)). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 3, 14 (Request for the Indication of Provisional Measures, Order of Apr. 8) (the Court did not reach a finding on the status of the S.F.R. Yugoslavia).

<sup>30</sup> See Conference on Yugoslavia Arbitration Commission, Opinion Nos. 1, 8, & 10, 31 I.L.M. 1488, 1494, 1521-23, 1525-26 (1992) [hereinafter Badinter Commission] (“[T]he effects of recognition by other States are purely declaratory.”).

<sup>31</sup> See Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 102-103 (1987) (“[A] customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents . . . A treaty is obviously not equivalent to custom; it binds only the parties, and binds them only according to the enforcement provisions contained in the treaty itself. However, rules in treaties reach beyond the parties because a treaty itself

the I.C.J. can only state their perception of practice and *opinio juris*, as well as their intentions to apply a certain legal theory.<sup>32</sup>

Many national courts have recognized international rights in states that accrued before international recognition of the entity as a new state, suggesting a rejection of the notion that the state did not exist before recognition.<sup>33</sup> The reverse is true when a state is occupied and loses independence and effective control of its territory and population. The state as an entity with rights and obligations does not cease to exist.<sup>34</sup> As mentioned above, the territory is not regarded as *terra nullius*: “while unrecognized territorial communities are not states, neither are they *terra nullius*; as a community, they enjoy some rights associated with international legal personality.”<sup>35</sup> In addition, non-recognition does not necessarily mean that entities escape liability for violations of international law.<sup>36</sup>

A further problem arises. A particular legal actor may not properly characterize the acts of the state, either by deliberately misleading or misconstruing those acts, or even by feigning lack of understanding concerning the theory it intends to apply. Yugoslavia is a case in point. Some have argued that the Badinter Commission initially adopted declaratory language but applied a constitutive approach to balance major tensions

constitutes state practice,” although implicitly only considering cases where the parties actually complied with the treaty).

<sup>32</sup> See *infra* notes 38, 39, 42 (questioning whether the Badinter Commission and I.C.J. applied the theory they espoused).

<sup>33</sup> See Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 117 (2002).

<sup>34</sup> See International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 135-138 (Jul. 11); Thomas Baty, *Can an Anarchy be a State?*, 28 AM. J. INT’L L. 444, 454 (1934); Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*, 13 EUR. J. INT’L L. 1037, 1038 (Nov. 2002) (including as cases of suspended sovereignty: foreign occupation, the Mandate and U.N. Trusteeship systems, and interim international administrations).

<sup>35</sup> Sloane, *supra* note 33. *But see* Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT’L L. 131 (2005) (discussing multiple cases in which the I.C.J. or other international jurists or tribunals found that a territory could be rendered *terra nullius* when it lacked a government in effective control of the territory); Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); Legal Status of Eastern Greenland (Den. v. Norw.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5); Comm’n of Jurists, League of Nations, 1920 O.J. Spec. Supp. 4 (regarding the Åland Islands and the statehood of Finland); Badinter Commission, *supra* note 30, Opinion No. 1.

<sup>36</sup> See Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35, 38 n.9 (2005) (proposing an alternative for entities without international legal personality that they may be regarded nonetheless as “persons”) (citing David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT’L L. 275 (1996)).

between the various European states.<sup>37</sup> We can look to the Commission's statements that "recognition is 'purely declaratory'"<sup>38</sup> but does "confer certain rights and obligations under international law"<sup>39</sup> as an example of this apparent confusion. Based on European practice concerning Yugoslavia, Martii Koskenniemi observed a "resuscitated 'constitutivist'" theory being applied despite apparent endorsement of the declaratory theory.<sup>40</sup>

Furthermore, even if the legal actor does not mislead or misconstrue, the effects of the act may be unintended, that is, the state actor may intend to declare the existence of a new state, but in doing so, the act has a constitutive effect. Again, we can look at the dissolution of the former S.F.R. Yugoslavia as an example. Bosnia-Herzegovina and Croatia arguably did not fully satisfy the criteria for declaratory recognition, so the recognition of those entities as new states may have had constitutive effect<sup>41</sup> despite the supposed intended application of the declaratory theory. This was noted by Milenko Kreca, the *ad hoc* Judge in the I.C.J. *Genocide case*, who implied in his critical dissent that the Court was applying the constitutive theory.<sup>42</sup> The case of the former Yugoslavia, however, is not unique. For some microstates, admission to the U.N., as well as recognition by other states, may have clarified their position in international law, crystallized their rights, and assisted in their constitution,<sup>43</sup> regardless of the intended effect of their recognition.

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<sup>37</sup> See, e.g., Simon Nuttall, *The EC and Yugoslavia – Deus ex Machina or Machina sine Deo?*, 32 J. COMMON MKT. STUD. 11, 17 (1994) (Annual Review); SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 183-9* (1995).

<sup>38</sup> Badinter Commission, *supra* note 30, at Opinion No. 1.

<sup>39</sup> *Id.* at Opinion No. 8.

<sup>40</sup> See Koskenniemi, *The Place of Law in Collective Security*, *supra* note 13, at 469 & n.54 (citing European Commission Guidelines on the Recognition of States, 31 I.L.M. 1485 (1992)).

<sup>41</sup> See Matthew C.R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 1995 BRIT. Y.B. INT'L L. 333, 375; *Recognition of States*, 41 INT'L & COMP. L.Q. 473, 480 (A. V. Lowe & Colin Warbrick eds., 1992); Thomas D. Grant, *An Institution Restored?*, 39 VA. J. INT'L L. 191, 193-95 (1998) (reviewing M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995* (1997)).

<sup>42</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Prelim. Objs., 1996 I.C.J. Reps. 595, 661 (July 11) (dissenting opinion Judge *ad hoc* Kreca) ("The pretension of an entity to represent a State, and even recognition by other States, is not, in the eyes of the law, sufficient on its own to make it a State within the meaning of international law."). See also Thomas D. Grant, Comment, *Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 STAN. J. INT'L L. 305, 325-29 (1997).

<sup>43</sup> See JORRI DUURMSA, *FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD* 142 (1996) (arguing that

Even if the above could demonstrate state practice, the evidence is not clear or consistent. There is, however, another issue that must be considered. This issue is the logical coherence of this theory.

## 2. Logic of the Theory

There are theoretical reasons why the declaratory perspective might be favored. If state existence depends on recognition by other states, then there is always the risk that some state will abuse its position. Subjectivity in terms of the existence of the state may result in the abuse of power. For example, in 1941 the U.S.S.R. claimed it was liberating the Baltic States from German occupation, not that it was annexing them.<sup>44</sup> However, the later annexation of the occupied states, effectively reversing their independence won in the 1920s, casts doubt on the sincerity of the liberation claim. The liberation may have provided an excuse for annexation. The grant of independence may be conditioned on changing or unattainable criteria, or it may serve as a ploy to assert aggressive control over regions of the world.<sup>45</sup>

Not only would existing states have a potentially abusive position to review the independence of peoples, but also, a great number of existing states would disagree over which entities qualify as states, thus undermining the notion that a state is universally recognized. "To assert that 'recognition is a precondition of the existence of legal rights' raises questions about . . . how many states must recognize a putative state before it becomes a 'real' state; [and] whether it then exists only for states that have expressed recognition, formally or informally."<sup>46</sup> This concern has preoccupied many authors, leading to the conclusion that it cannot be the rule. "The status of a state recognized by state A but not recognized by state B, and therefore apparently both an 'international person' and not an 'international person' at the same time, would be a legal curiosity . . . and some of the consequences of accepting that conclusion might be startling."<sup>47</sup>

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the widespread recognition and recent admission into the U.N. of several European micro-states might have had some constitutive effect, compensating for the absence in some of those states of certain criteria traditionally viewed as prerequisite to statehood).

<sup>44</sup> See Richard C. Visek, *Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315 (1997); William J.H. Hough, III, Note, *The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting forcible Seizure Territory*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 301, 383 n.285 (1985).

<sup>45</sup> See BRIERLY, *THE LAW OF NATIONS*, *supra* note 11, at 138 (stating that the constitutive theory was "an attorney's mantle artfully displayed on the shoulders of arbitrary power . . . [and] a decorous name for a convenience of chancelleries").

<sup>46</sup> Sloane, *supra* note 33, 117 & n.34 (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 89 (1990)).

<sup>47</sup> BRIERLY, *THE LAW OF NATIONS*, *supra* note 11, at 138.

This lack of uniformity and certainty “seems a violation of common sense”<sup>48</sup> that “must be flawed”<sup>49</sup> to James Crawford, and is a “glaring anomaly”<sup>50</sup> and a “grotesque spectacle”<sup>51</sup> for Lauterpacht. However, common sense is not a legal basis for supporting the declarativist position. If the declaratory position is simply based, in the final analysis, on common sense, how can it make a claim to lawful validity? Guido Acquaviva argues that “it is illogical—and ultimately impractical—to allow an entity to be considered a subject of international law by some subjects but not by others,”<sup>52</sup> although it is not entirely clear why it is not logical nor is it clear why practicality has legal importance on status.<sup>53</sup> It may be that such a state of affairs offends a sense of predictability. Crawford asks, “[T]here 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. . . Does [non-recognition] mean that these entities did not exist, were not States, had no rights at the time?”<sup>54</sup>

Predictability alone is not a convincing legal argument for limiting states’ power. This need to find absolute, universally recognized statehood fails to note that rights are held against other entities, not in the abstract. Of course, a single state does not legislate for the world. Rather, it is constrained by its own competence. It can recognize another state only insofar as the recognizing state is concerned, creating rights and obligations as per the recognizing state, but not for others. Perhaps customary international law might force states that previously refused to recognize a purported state to provide such recognition. Such recognition of the purported state would also provide rights and obligations as per themselves, but recognition by one state cannot be constitutive as per all states. Many entities have been recognized as states for some purposes and not for others. Crawford himself cites such examples as “A” Mandated Territories,<sup>55</sup> the Free City of Danzig,<sup>56</sup> the Holy See,<sup>57</sup> British

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<sup>48</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 21 (2d ed. 2007).

<sup>49</sup> *Id.* at 22.

<sup>50</sup> LAUTERPACHT, *Recognition in International Law*, *supra* note 17, § 24, at 67.

<sup>51</sup> *Id.* § 34, at 78.

<sup>52</sup> Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 *VAND. J. TRANSNAT’L L.* 345, 350-51 (2005).

<sup>53</sup> See David O. Lloyd, Note, *Succession, Secession, and State Membership in the United Nations*, 26 *N.Y.U. J. INT’L L. & POL.* 761, 771 (1994) (“Statehood is not a clear-cut concept or status (although it carries with it clear legal rights); it more closely resembles a sliding scale, with different international actors possessing, in greater or lesser degree, the various hallmarks of statehood.”).

<sup>54</sup> CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 20.

<sup>55</sup> See *id.* (treated as states for purposes of nationality but not other purposes).

<sup>56</sup> See *id.* (treated as a state for purposes of art. 71(2) of the rules of the P.C.I.J., but not as a state for other purposes).

India,<sup>58</sup> Ukraine,<sup>59</sup> and Byelorussia.<sup>60</sup> Also, in the case of international organizations, Crawford is quick to accept that “personality [is] recognized by particular states only” and thus “particular legal personality binds only consenting States.”<sup>61</sup> Why this is such a comfortable conclusion for international organizations<sup>62</sup> and not for states is unclear, especially when, as now occurs more frequently, international organizations might send peacekeeping troops into areas of conflict and manage budgets larger than those of many countries.

If we accept that a state exists at some point prior to recognition, then we inevitably must face the question of when a state first exists and accrues international personality, rights, and obligations. Some scholars have begun to delve more deeply into those situations to determine what characteristics of a nation, and later a nation-state, are sufficient to establish that the state exists prior to recognition. Some have concluded that satisfaction of a sociological criterion is appropriate. Anthony Smith, for example, has argued that the quasi-state must evidence an effort to “reappropriate” its culture.<sup>63</sup> Vello Pettai has argued that in the case of Lithuania, the nation existed and could successfully argue for political independence from the U.S.S.R. because it was more racially homogeneous than other Baltic states.<sup>64</sup> The Polish Supreme Court, in two important cases regarding the personality of Poland held that “states cease to exist only if the people lose their consciousness of social differentia-

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<sup>57</sup> See *id.* at 45 n.37.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> *Id.* at 30; see, e.g., David J. Ettinger, Comment, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. 97 (1992) (discussing the I.O.C.'s claim to international legal personality).

<sup>62</sup> See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11) (impliedly contemplating that an international organization could have legal personality only in relation to its members, but holding that the U.N. has personality opposable to all states); *Arab Monetary Fund v. Hashim* (No. 3), (1991) 1 All E.R. 871, 875 (H.L.) (“[W]hen the AMF Agreement was registered in the UAE . . . that registration conferred on the international organisation legal personality and thus created a corporate body which the English courts can and should recognise.”); Klabbers, *The Concept of Legal Personality*, *supra* note 36; see generally Romana Sadurska & Christine M. Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility?*, 30 VA. J. INT'L L. 845 (1990) (discussing the status of the International Tin Council).

<sup>63</sup> See ANTHONY D. SMITH, *NATIONS AND NATIONALISM IN A GLOBAL ERA* 65-67 (1995).

<sup>64</sup> See Vello Pettai, *Contemporary International Influences on Post-Soviet Nationalism: The Cases of Estonia and Latvia*, Presented at the American Ass'n for the Advancement of Slavic Studies, 25th Nat'l Convention (Nov. 19-21, 1993), [www.ut.ee/ABVKeskus/publ/1999/Post\\_Soviet\\_Nationalism.html](http://www.ut.ee/ABVKeskus/publ/1999/Post_Soviet_Nationalism.html).



tion.”<sup>65</sup> Louis Rene Beres has argued that “[t]he State presents itself as sacred . . . [t]hroughout much of the contemporary world, the expectations of government are always cast in terms of religious obligation.”<sup>66</sup> All of these possible measures of statehood are abstract concepts that are not legal in a strict sense. They are open to the same abuse of process that plagues the constitutive theory, with the principal distinction being that the abusive actor in these cases might be different. Moreover, these possible tests for statehood must confront the contention that the nation is merely an “imagined community,”<sup>67</sup> a modern invention of nationalism<sup>68</sup> that is seeking to be sovereign as an expression of legitimacy.<sup>69</sup>

## B. *Recognition Does Create a State*

If we assume that recognition does have constitutive effect, there are instances of state practice supporting the contention that states apply the constitutive theory. However, this forces us to explain contradictory state practice, since there is evidence of state practice supporting the declaratory theory. It also forces us to confront the challenges of assessing state practice itself. Additionally, notwithstanding the criticisms expressed above concerning the logical failings of the declaratory theory, the constitutive theory also has problematic logical underpinnings.

### 1. State Practice

The constitutive theory appears to more accurately reflect state practice in that purported states only receive international rights and obliga-

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<sup>65</sup> See *Republic v. Pantol*, 1 ANN. DIG. 35, 37 (Pol. S.Ct. 2d Div., 1922); *Republic v. Siehen*, 3 ANN. DIG. 16 (Pol. S.Ct. 2d Div., 1926).

<sup>66</sup> See Louis René Beres, *Self-Determination, International Law and Survival on Planet Earth*, 11 ARIZ. J. INT'L & COMP. L. 1, 19 (1994).

<sup>67</sup> See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 5-7 (rev. ed. 1991) (“[The community] is imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”).

<sup>68</sup> See generally, e.g., ERIC J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* (1990).

<sup>69</sup> See ANDERSON, *IMAGINED COMMUNITIES*, *supra* note 67, at 5-7 (“[The community] is imagined as sovereign because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm. Coming to maturity at a stage of human history when even the most devout adherents of any universal religion were inescapably confronted with the living pluralism of such religions, and the allomorphism between each faith’s ontological claims and territorial stretch, nations dream of being free, and, if under God, directly so. The gage and emblem of this freedom is the sovereign state.”).

tions when they are recognized by other states.<sup>70</sup> Although potential states may have existed in a theoretical way, they did not effectively exist until rights of state status accrued. It is commonly observed that “only states sit on the United Nations Security Council, only states petition the International Court of Justice and only states participate in the Nuclear Non-Proliferation Treaty regime.”<sup>71</sup> Recognition of statehood changes the expectations of the international community regarding the behavior of the new state:

[T]wo functions are inter-related: norms help to define the distinguishing characteristics of an actor, and the actor’s identity in turn shapes expectations about its behaviour . . . Norms . . . reduce the complexity of choice-situations with which states are confronted and in so doing bring a measure of order and stability to an otherwise anarchic world.<sup>72</sup>

Thus it is clear that recognition as a state has very significant consequences for the entity and its relations with others.

There are a number of practices that have developed that appear to be based on the declaratory theory. The practice of states blocking the emergence of secessionary states may be evidence of the constitutive theory. In his report to the Canadian Government on the possibility of Quebec’s unilateral secession, Crawford observed:

Even in the context of separate colonial territories, unilateral secession was the exception. Self-determination was in the first instance a matter for the colonial government to implement only if it was blocked by that government did the United Nations support unilateral secession. Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede. There is no case since 1945 where it has done so.<sup>73</sup>

The factual circumstances of effectiveness and independence may be disregarded in favor of the fiction that a state continues to have an inter-

<sup>70</sup> RICHARD CAPLAN, *EUROPE AND THE RECOGNITION OF NEW STATES IN YUGOSLAVIA* 212 (2005).

<sup>71</sup> CAPLAN, *supra* note 70 (citing Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, *Norms, Identity, and Culture in National Security*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 33, 35-36 (Peter J. Katzenstein, ed., 1996)).

<sup>72</sup> *Id.* at 8-9 (citing Peter J. Katzenstein, *Introduction: Alternative Perspectives on National Security*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 1 (Peter J. Katzenstein, ed., 1996)).

<sup>73</sup> See JAMES CRAWFORD, *STATE PRACTICE AND INTERNATIONAL LAW IN RELATION TO UNILATERAL SECESSION: REPORT TO GOVERNMENT OF CANADA CONCERNING UNILATERAL SECESSION BY QUEBEC* ¶¶ (c), 8 (1997), available at <http://www.tamilnation.org/selfdetermination/97crawford.htm> [hereinafter CRAWFORD, *REPORT ON UNILATERAL SECESSION BY QUEBEC*].

national legal personality.<sup>74</sup> One example is the case of Yugoslavia whose legal personality continued to be regarded as existing during the long process of its dissolution. This practice suggests that recognition both constitutes and maintains the legal personality of other states whose reality would suggest that they no longer existed or existed in a fictitious state.<sup>75</sup> Supporting a failed state, or a nearly failed state, by continuing to act as if it effectively existed when the government in fact only controls a fraction of the territory, perhaps even sending financial and military support into the territory to enable the fragmented entity to regain its former existence, could also be interpreted as an endorsement of the constitutive theory because it denies the reality of the situation and strives to set up a functioning state for the territory. If whatever remains of the former state will collapse the moment international support is withdrawn, then there is no true independent existence to be declared. The state's very status is entirely the creation of other states. It is, in essence, the declaratory theory in form, but the constitutive theory in substance. Some authors find a presumption against extinction even when a state has lost all objective effectiveness under foreign dominion, and yet, continues to retain international legal personality until restored, even if such restoration is a long time coming, as in the case of the Baltic States.<sup>76</sup> The collective non-recognition events surrounding the Japanese occupation and control of Manchuria also demonstrate a constitutive approach in that if most states exclude a purported state from the international plane, then the purported state might be unable to assert its personality, such that it is rendered ineffective and non-independent.<sup>77</sup> Another example is Kuwait. Kuwait's personality was not deemed extinguished by the U.N.

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<sup>74</sup> See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 78-79 (1986) (“[T]he ‘survival’ of the international subjects rests on a legal fiction—politically motivated—and is warranted by the hope of recovering control over a particular territory. Once this prospect vanishes, the legal fiction is discarded by the other states.” The author also argues that the constitutive theory is “fallacious.”)

<sup>75</sup> See Yannis, *supra* note 34. See also International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 150 (Jul. 11) (separate opinion Judge McNair) (discussing “sovereignty in abeyance”); BROWNLIE, *supra* note 11, at 84 (discussing a “de facto sovereign”); Abdulqawi A. Yusuf, *Reflections on the Fragility of State Institutions in Africa*, 1994 AFR. Y.B. INT’L L. 3 (discussing “suspended statehood”); Oscar Schachter, *Sovereignty – Then and Now*, in *ESSAYS IN HONOUR OF WANG TIEYA* 671, 685-88 (Ronald St. John MacDonald, ed., 1994) (discussing “suspended sovereignty”); Baty, *supra* note 34, at 454 (discussing state in “suspended animation”).

<sup>76</sup> See 1 D.P. O’CONNELL, *INTERNATIONAL LAW* 437 (2d ed. 1970); BRIERLY, *THE LAW OF NATIONS*, *supra* note 11, at 163-73; KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 384 (1954); Visuvanathan Rudrakumaran, *The Legitimacy of Lithuania’s Claim for Secession*, 10 B.U. INT’L L.J. 33, 40 (1992) (holding that the Soviet governments in the Baltic states were illegitimate puppet regimes); Hough, *supra* note 44.

<sup>77</sup> Rudrakumaran, *supra* note 76.

even though it had been invaded, conquered and annexed to Iraq both in fact and under Iraqi law.<sup>78</sup> The U.N., however, interpreted international law to hold that the state's personality continued, notwithstanding the loss of effective control. Visuvanathan Rudrakumaran cites other cases of continuing fictive independence, such as Austria, which was annexed by Germany,<sup>79</sup> Algeria, which was occupied and annexed by France,<sup>80</sup> and Okinawa, which was under *de facto* U.S. sovereignty.<sup>81</sup> Rudrakumaran thus concludes: "[E]ven though the Soviet Union exercised real and effective control over their territories and inhabitants, Estonia and the other Baltic States theoretically were not extinguished and, instead, retained their legal personality under international law."<sup>82</sup>

Lauri Mälksoo distinguishes between cases in which other states have held that a state had a continuing personality in law despite the state's loss of effective control and cases where states have not. Mälksoo concludes that while a combination of political and legal considerations dictate each choice, this does not detract from the external decision of whether to constitute a state.<sup>83</sup>

These authors all support the argument that the existence of a state can rest on a fiction applied by other states. Whether states have discretion to apply the fiction or are limited by *jus cogens* or other criteria is another matter. Either way, there is considerable state practice evidencing the view that other states can and do legislate the existence of other states.

In addition to state practice, international tribunals also may support the constitutive theory. Rudrakumaran identifies examples such as the Permanent Court of International Justice's ("P.C.I.J.") cases of *Light-houses*, where effectiveness was disregarded for the fiction of continued sovereignty of the Turkish Sultan,<sup>84</sup> and the *Rights of Nationals of the United States of America in Morocco*, regarding the continued sovereignty of Morocco although under the French Protectorate.<sup>85</sup> Jurisprudence of the International Criminal Tribunal for the former Yugoslavia

<sup>78</sup> See S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990) (implementing measures to restore Kuwaiti government).

<sup>79</sup> See Rudrakumaran, *supra* note 76, at 52 & n.119 (citing 16 ANN. DIG. 66 (Verwaltungsgerichtshof, Aus. Admin. Ct. 1949)).

<sup>80</sup> See *id.* at 53 n.124 (citing MOHAMMED BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION 18 (1961)).

<sup>81</sup> See *id.* at 52 n.120 (citing *Cobb v. United States*, 191 F.2d 604, 608 (9th Cir. 1951)).

<sup>82</sup> Visek, *supra* note 44.

<sup>83</sup> See generally LAURI MÄLKSOO, ILLEGAL ANNEXATION AND STATE CONTINUITY: THE CASE OF THE INCORPORATION OF THE BALTIC STATES BY THE USSR (2003).

<sup>84</sup> See Rudrakumaran, *supra* note 76, 51 & n.115 (citing *Light House (Fr. v. Greece)*, 1934 P.C.I.J. (ser. A/B) No. 62, at 4 (Mar. 17)).

<sup>85</sup> See Rudrakumaran, *supra* note 76, 51 & n.116 (citing *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 175, 188 (Aug. 27)).

(I.C.T.Y.) is also supportive. In the *Celebici* case, the I.C.T.Y. supported the constitutive theory when it held that the conflict within the former Yugoslavia was only of an international nature after international recognition of the independent statehood of Croatia and Bosnia and Herzegovina.<sup>86</sup> In the *Tadic* case, Judge Li, in a separate opinion, criticized the majority because it in effect applied the constitutive theory. Judge Li argued that the conflict should have been seen as international from the moment of Slovenia's and Croatia's declarations of independence, not because of recognition by others.<sup>87</sup>

However, although the foregoing appears to make a good case for the constitutive theory, it does not necessarily evidence customary international law because there are other explanations for the *opinio juris* being expressed. As mentioned above in the discussion on the declaratory theory, especially in the situation of state recognition, states misconstrue situations and may cause unintentional consequences. The constitution of continued personality, even after a loss of effective control and independence, may partly serve as an effort to find a vehicle to prevent those territories from becoming exempt from international law.<sup>88</sup> If other states are not able to maintain another state's existence, then a state may escape liability for obligations and delicts by dissolving.<sup>89</sup> The declaratory theory seems more politically palatable out of a respect for self-determination and disfavor of pure power politics. The application of recognition theory to maintain states' personalities so that they remain bound to international law appears at first glance to apply the constitutive theory, but that may be deceptive.

Even the practice of state recognition can be opaque in terms of what acts may constitute recognition. Practice, in terms of seeking legitimacy in either theory, evolves. As Grant has argued, there may be more than one act of recognition,<sup>90</sup> but another way of analyzing this is to focus on the particular theory being applied and how the application of this theory by different states may vary over time. A good example of the evolution of practice is the Badinter Commission where the theory being applied may have evolved from the declaratory to the constitutive just within the course of the Commission's life.<sup>91</sup> The other alternative is that the Com-

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<sup>86</sup> See Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Nov. 16, 1998).

<sup>87</sup> See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) (separate opinion of Judge Li).

<sup>88</sup> See MAREK, *supra* note 76, at 140 (observing that the application of international law during Korean and Middle East wars, the states of Israel and North Korea were not recognized); Delahunty & Yoo, *supra* note 35 (discussing the cases of Guinea-Bissau, Ukraine and Byelorussia, none of which satisfied the traditional criteria for statehood at the time of recognition).

<sup>89</sup> See *id.*

<sup>90</sup> See *supra* note 21.

<sup>91</sup> See Badinter Commission, Opinion Nos. 1, 8, 10.

mission misspoke when it said that it intended to apply the declaratory theory and then actually applied the constitutive theory. Deriving clear *opinio juris* from such inconsistent and fluctuating behavior is almost impossible.

## 2. Logic of the Theory

The logic of the theory similarly presents difficulties upon examination. Some have argued that the constitutive theory is more pragmatic than the declaratory theory. This, however, is too idealistic:

[A]n entity that lacks recognition by other states remains, in practice, a non-entity. This is because the inquiry into statehood reduces in practice to questions about whether an entity does or should enjoy the incidents of statehood; and these questions, in turn, depend on whether existing states choose to extend these privileges.<sup>92</sup>

This accrual of international rights is key. “Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”<sup>93</sup> That is, statehood is a functional right. In terms of the consequences of recognition, Lauterpacht defined recognition as an act intended to vest rights and obligations in an entity,<sup>94</sup> a view supported by numerous other authorities.<sup>95</sup>

Grant discusses Hans Kelsen’s definition of the state as a legal creature composed of “a legal system exercising control over a territory and a people.”<sup>96</sup> Such a definition seems to support the more pragmatic constitutive theory of determining statehood, in that a non-recognized state is judged by predictable legal criteria of effective power, not unpredictable sociological factors. “A state exists legally only in its relations to other states. There is no such thing as absolute existence.”<sup>97</sup> In *Reparation for Injuries*, the I.C.J. searched for the vesting of international rights and obligations in the U.N. as a precondition to the organization’s interna-

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<sup>92</sup> Sloane, *supra* note 33, at 116 & n.29 (discussing Biafra’s unsuccessful secession as a case in point) (citing David Ijalaye, *Was “Biafra” at Any Time a State in International Law?*, 65 AM. J. INT’L L. 551 (1971) (criticizing the claim to pragmatism)).

<sup>93</sup> *The Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

<sup>94</sup> See LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 17.

<sup>95</sup> See, e.g., BRANIMIR M. JANKOVIC, *PUBLIC INTERNATIONAL LAW* 97-111 (1984); 2 JAN H.W. VERZIIL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 574-92 (1969); WILLIAM L. TUNG, *INTERNATIONAL LAW IN AN ORGANIZING WORLD* 47-56 (1968); OPPENHEIM, *INTERNATIONAL LAW*, *supra* note 14, at 127-203.

<sup>96</sup> Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 410 (1999).

<sup>97</sup> Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605, 609 (1941).

tional personality.<sup>98</sup> The I.C.J.'s analysis concerning the creation of the U.N.'s international personality serves as a useful illustration of the constitutive theory.

Prior to sovereignty over territory, many proto-states were, in effect, nationalist organizations that engaged in a discussion of how to structure their polity. The constitutive position may more accurately describe practice in that a state becomes an international person through recognition only<sup>99</sup> because before recognition, the state might exist, but states take no notice of it and it is considerably constrained in its ability to act internationally.<sup>100</sup> "Not being a State is to be denied independent access to those forums that States – themselves or through international organizations – still control."<sup>101</sup> Whether the state is "created" or merely acknowledged may not really be a distinction that matters if recognition opens the gate to full access to the international plane. Even Crawford acknowledges that the difficulty facing all proponents of the declaratory theory is that statehood has little practical significance unless complemented by recognition because the entity still needs access to international rights.<sup>102</sup> Thus, the "actual practice of States respecting the dissolution of Yugoslavia may have been constitutive in effect."<sup>103</sup> If we can characterize the state as merely a bundle of rights, then the state can only exist when the rights are granted, i.e. the state is recognized. The distinction between the theories in this case may be purely semantic.

The degree to which rights are necessary for determining independence and statehood is debatable. The rights of an entity may not be determinative of the entity's status. States have, on many occasions, not recognized an entity as a state and yet treated it as a *de facto* state with many of the rights of a *de jure* state.<sup>104</sup> In those cases, the rights of a subject of international law did not constitute statehood. Kelsen argues against construing rights and obligations as the effective measure of personality since "[t]here must exist something that 'has' the duty or the right."<sup>105</sup>

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<sup>98</sup> See Klabbers, *The Concept of Legal Personality*, *supra* note 36; see generally James E. Hickey, Jr., *The Source of International Legal Personality in the Twenty First Century*, 2 HOFSTRA L. & POL'Y SYMP. 1 (1997).

<sup>99</sup> See OPPENHEIM, *INTERNATIONAL LAW*, *supra* note 14.

<sup>100</sup> See *id.* § 58, at 100.

<sup>101</sup> CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 44.

<sup>102</sup> See *id.*

<sup>103</sup> *Id.* at 24.

<sup>104</sup> See *id.* at 25 ("[O]verall the international approach to the dissolution of Yugoslavia, unhappy as it has been, does not support the constitutive theory."); see also *id.* at n.105 ("Thus Macedonia was not recognized for some years (due to political problems with Greece) yet it was treated by all as a State."); see *supra* notes 55-60 and accompanying text.

<sup>105</sup> HANSEN, *GENERAL THEORY OF LAW AND STATE* 93 (Anders Wedberg, trans., 1945).

Crawford would criticize the emphasis on rights as erroneously identifying state recognition with diplomatic relations.<sup>106</sup> Koskenniemi has observed that Kelsen, even though proposing the juridical concept of the state, also accepted that there was a separate “sociological and . . . ethical” concept of the state.<sup>107</sup> The state may be more than just legal rights and obligations.

An interesting parallel to evaluating a state’s personality is presented within the corporate law field. Jan Klabbers writes of two competing theories to determine the personality of corporations that may be applicable in the case of states: the “Von Savigny” theory and the “Gierke” theory. The “Von Savigny” theory holds that legal personality does not have an innate will of its own as distinct from the will of the individuals behind it.<sup>108</sup> The “Gierke” theory holds that legal personality has real existence separate from the individuals.<sup>109</sup> Klabbers further argues that the law alternates between the two theories in maintaining a separation but then abolishing the separation by “piercing the veil” in appropriate circumstances.<sup>110</sup> “An obvious circularity sets in: one needs to be a person to have a right, yet having a right implies that one is a person.”<sup>111</sup> Klabbers concludes:

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<sup>106</sup> See CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48. See also Michael E. Field, *Liberia v. Bickford: The Continuing Problem of Recognition of Governments and Civil Litigation in the United States*, 18 MD. J. INT’L L. & TRADE 113 (1994); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (discussing the distinctions between recognition and diplomatic relations).

<sup>107</sup> See Martti Koskenniemi, *The Wonderful Artificiality of States*, 88 AM. SOC’Y INT’L L. PROC. 22, 28-29 (1994) (“This was the conception of the state as a *Rechtsordnung*, a normative system, as pure form, identical with the legal order.”) (citing HANS KELSEN, *DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF: KRITISCHE UNTERSUCHUNG DES VERHÄLTNISSSES VON STAAT UND RECHT* (1928)).

<sup>108</sup> See Klabbers, *The Concept of Legal Personality*, *supra* note 36, at 39 & n.11 (citing G. W. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* 168 (2d ed. 1949)).

<sup>109</sup> See *id.* at 43 & n.20 (citing OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 67-73 (Frederic William Maitland, trans., 1968)).

<sup>110</sup> Klabbers, *The Concept of Legal Personality*, *supra* note 36, at 45 & n.25 (citing MOSHE HIRSCH, *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD STATES: SOME BASIC PRINCIPLES* (1995)); *TRIAL OF GERMAN MAJOR WAR CRIMINALS: JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY* 41 (1946) (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”).

<sup>111</sup> Klabbers, *The Concept of Legal Personality*, *supra* note 36, at 36 n.5, 49 (citing Int’l Law Comm’n, *First Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/532 (Mar. 26, 2003) (prepared by Giorgio Gaja) (reasoning that an entity must have personality in order to violate an international obligation, but also, that having the capability to act with international legal effects may be a basis for personality)).



When personality is a bundle of rights, obligations, and competences, there cannot exist a gap between recognized and unrecognized groups. Rather, the extent to which groups are not recognized as legal persons will simply be because they have no rights, obligations, or competences resting upon them. Hence, the first ambivalence is apparently deflected. All the more so, as it suggests that personality is flexible, rather than an all-or-nothing concept: one can have personality in various gradations.<sup>112</sup>

Thus, the view of the constitutive theory that holds that the state does not exist prior to recognition is correct only to the degree that a state is viewed as a bundle of rights on the international plane, and nothing more. There is little evidence of such agreement.<sup>113</sup>

In addition to disagreement on the constitutive force of recognition, various authorities disagree on what form recognition must take. Some scholars have argued that it is necessary to clearly note that the act is an act of recognition and has legal consequences.<sup>114</sup> Others have argued that recognition can be implied by dealing with a state or government,<sup>115</sup> or even by extensive non-governmental contacts, such as business, humanitarian contacts, and communications between nationals.<sup>116</sup> If recognition does not create the state, then there is no vesting of rights and little need for the act of recognition to be clear and unequivocal. If recognition does create the state, then the opposite is true, and recognition

<sup>112</sup> *Id.* at 47.

<sup>113</sup> See *supra* notes 108-110 and accompanying text.

<sup>114</sup> See TUNG, *INTERNATIONAL LAW*, *supra* note 95, at 50 (noting that diplomatic contacts of the U.S. with the P.R. China, in 1968, did not result in recognition of that government); LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 17, at 346; Grant, *An Institution Restored?*, *supra* note 41 (excluding certain acts as not constituting recognition, including admission to international organizations, participation in international conferences, and exchange of unofficial representatives, letters or memoranda).

<sup>115</sup> See Application of the Convention on the Prevention & Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugo.*), 1996 I.C.J. 595, 675 (July 11) (dissenting opinion of Judge *ad hoc* Kreca) (citing The Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 752 (1992), U.N. Doc. S/24000 (May 15, 1992) (arguing for implied recognition of the statehood of Republika Srpska by entering into negotiations with that entity)). See also Montevideo Convention, *supra* note 26, at art. 7, 49 Stat. at 3100 (“The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.”).

<sup>116</sup> See PETERSON, *RECOGNITION OF GOVERNMENTS*, *supra* note 10 at 109-11; Cheri Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357 (1995); Field, *supra* note 106 (noting that governments can prohibit their nationals from trading with non-recognized powers and that permitting trade with Angola resulting in implied recognition of the state).

should preferably not be implied by interactions not rising to the level of formal recognition. Nonetheless, there is inconsistency in the form that recognition must take and the perception of the nature of the state. Crawford, in setting forth his view of the declaratory theory, emphasizes that the important measure should be how an entity is treated, not the form of recognition.<sup>117</sup> Citing treatment as supportive of a state's existence regardless of recognition is strange, because the existence of recognition, implied by treatment, should be unimportant. A state should exist regardless of how it is treated. Any measure that focuses on the relation of legal rights between states must necessarily accept that the state is primarily a legal entity. Until those rights have vested, then the entity cannot exist.

An additional factor in assessing state recognition is the concern of some states that recognition implies formal approval. Many states have ceased recognizing governments, as opposed to states, for fear of appearing to approve a foreign government or its policies.<sup>118</sup> In some cases, states even have withheld recognition of a state out of concern for significant acts of international illegality by the purported state<sup>119</sup> This policy appears to endorse the perspective that recognition does not serve to vest rights in an objectively existing agent of the state, but that recognition implies approval of the agent. If recognition is merely declaratory, in that recognition merely acknowledges the existence of a given state or its respective government, then approval of the state or government is irrelevant. Fears regarding approval suggest that the recognition might have some legitimizing and perhaps constitutive effect. If a state wished to avoid approval of a purported state, then it might deliberately choose to

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<sup>117</sup> See CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 23 (citing TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN THE UNITED STATES* 14 n.1 (L. C. Green ed., 1951) (recognition is "treating like a State," implying that prior to recognition the entity was not treated as such)).

<sup>118</sup> See PETERSON, *RECOGNITION OF GOVERNMENTS*, *supra* note 10, at 88 (listing U.K., Australia, Belgium, Canada, France, and Switzerland as no longer recognizing governments). See also Field, *supra* note 106; *U.S. Recognition of Eritrea*, 4 DEP'T ST. DISPATCH 320 (1993) ("[O]ur consulate in Asmara informed the authorities that we recognized Eritrea as an independent state."); Stefan Talmon, *Recognition of Governments: An Analysis of the New British Policy and Practice*, 1993 BRIT. Y.B. INT'L L. 231; *U.S. Recognizes Czech and Slovak Republics*, 4 DEP'T ST. DISPATCH 35 (1993) ("The President today recognized the new Czech and Slovak Republics . . ."); *U.S. Recognition of Former Yugoslav Republics*, 3 DEP'T ST. DISPATCH 287 (1992) ("The United States recognizes Bosnia-Herzegovina, Croatia, and Slovenia as sovereign and independent states."); Geoffrey Marston, ed., *United Kingdom Materials on International Law 1981, 1982* BRIT. Y.B. INT'L L. 361, 376-78.

<sup>119</sup> See S.C. Res. 217, U.N. Doc. S/RES/217 ((Nov. 20, 1965) (The Security Counsel "[c]ondemns the usurpation of power by a racist settler minority" and calls on all states to withhold recognition and refrain from any dealings with the "illegal" state).

recognize the new state through a form of engagement that would provide the substance of recognition (rights) without the suggestion of approval, such as a trade mission. Therefore, the form of the recognition can have some relation to the theory of the state, and the theory of recognition, being applied.

This confusion in state practice and theory is also exacerbated by the variety of legal actors within each state who assess statehood of various entities and can potentially announce recognition by the state. Generally, a statement of recognition is made by the executive with binding effect on the judiciary because of the political impact of such a decision.<sup>120</sup> All too often, however, the judiciary is called on to adjudicate a dispute involving a purported state and must determine if the entity is in fact a state, without such guidance by the executive.<sup>121</sup> Sometimes the legislative branch of a state's government might weigh in on the assessment of the status of statehood.<sup>122</sup> The judiciary might see itself as bound by law and take the perspective that it can only assess legal questions, not political questions. In order to determine statehood, the question concerning what constitutes a state must be narrow to assess its legal nature. For these reasons, the court must refer to international rights and obligations. The execu-

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<sup>120</sup> See, e.g., *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997) (holding that Hong Kong could not be treated as a state unless the executive certified that it was a state); *Luther v. Sagor* [1921] 3 K.B. 532 (U.K.) (executive certificate is binding on courts).

<sup>121</sup> See Field, *supra* note 106, at 117-18 & nn.37, 39, 42-3 (discussing cases in which the U.S. barred the new Russian Soviet Government from litigating in U.S. courts notwithstanding that it had effective control over Russia) (citing *United States v. Pink*, 315 U.S. 203, 230 (1942); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938) (referring to the "political department," not the President)); *United States v. Belmont*, 301 U.S. 324, 330 (1937); *Jones v. United States*, 137 U.S. 202, 212 (1890) (holding that the decisions "by the legislative and the executive departments bind the courts"); *Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977) (holding that after the surrender of the Republic of Vietnam to the Socialist Republic, the former was extinguished); *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973) (holding that the German Democratic Republic would not be recognized for purposes of intervening in a suit); *The Penza*, 277 F. 91 (E.D.N.Y. 1921); *The Rogdai*, 278 F. 294 (N.D. Cal. 1920); *Russian Socialist Federated Soviet Republic v. Cibrario*, 139 N.E. 259 (N.Y. 1923). See also *Russian Gov't v. Lehigh Valley R. Co.*, 293 F. 135 (S.D.N.Y. 1923); *Gur Corp. v. Trust Bank of Afr., Ltd.*, [1986] 3 W.L.R. 583, 587 (Q.B.) (regarding Ciskei). Also note that in some cases the courts have either refused the absolutely binding nature of the executive certificate. See, e.g., *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853, 953-4 (U.K.); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 209 F.2d 467 (1953).

<sup>122</sup> See, e.g., *Foreign Relations Authorization Act, Fiscal Years 1994 and 1995*, Pub. L. No. 103-236, § 536, 108 Stat. 481 (1994); *Foreign Relations Authorization Act, Fiscal Years 1992 and 1993*, Pub. L. No. 102-138, §355, 105 Stat. 647 (1991) (The U.S. Congress twice "determined that Tibet is an occupied sovereign country under international law.").

tive and potentially the legislature, on the other hand, may see themselves as not bound to only assessing rights and obligations in determining statehood. These branches of government might assess statehood by applying policy preferences and non-legal considerations, even sociological considerations. Michael Field has observed:

Foreign policy decision makers have utilized recognition in myriad ways, depending on the political circumstances of the time and their perception of the national interests involved in a change of government. Thus, for example, the United States has used recognition as a political tool to support antimonarchical governments (under George Washington), to advance economic imperialism (under Theodore Roosevelt), to promote constitutional government (under Woodrow Wilson), and to halt the spread of communism (under Dwight Eisenhower). The practice of other states is similarly diverse.<sup>123</sup>

Thus, the very nature of the legal actor within the state and its inherent constitutional or similar limitations may influence the outcome of a state's status determination. Although a state may wish to speak with one voice, its legal actors that speak for it have a variety of inherent limitations.

In addition to the problems presented by having a variety of differently constrained actors within the state, there are also limitations on states by the international legal system. Since states cannot alone legislate for other states, constitutive recognition by one state can only truly have repercussions for the recognizing state, not for other states. A new state might be constituted in relation to the recognizing state, but only declared as far as other states are concerned.

Sometimes these legal actors, however, may not contemplate these objectives and limitations when speaking for the state. We must consider cases where a legal actor within a state does not act within his constitutional or legal limitations when recognizing a state. Klabbers has observed, referring to the state acts of these legal actors, "[o]n the international level, entities usually act first and ask questions later."<sup>124</sup> Thus, the variety of state organs that might assess statehood both undermines the notion of the consistent state practice of a single state and the predict-

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<sup>123</sup> Field, *supra* note 106 at n.58. See also John Foster Dulles, Secretary of State, Our Politics Toward Communism in China, Address at the International Convention of Lions International, in DEP'T ST. BULL. JULY 1957, AT 93-94 (arguing that the decision to recognize a new government is a political decision).

<sup>124</sup> Klabbers, *The Concept of Legal Personality*, *supra* note 36, at 58 & n.52 (citing Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 251 (Martti Koskenniemi, ed., 1998) (discussing the agreement between the E.U., the local communes of East and West Mostar, and the Croats of Bosnia and Herzegovina, none of which was previously considered to possess international legal personality)).

ability of reliance on a single actor to determine a state's status. It also undermines the constitutive theory in that the various actors might have institutional or cultural constraints on their ability to constitute a state.

### C. *A Question of Defining the State*

The first conclusion arising from the preceding is that customary international law on the creation of states is unclear, even if we could establish an objective standard for measuring it. The second conclusion is that an objective standard for measuring state practice and *opinio juris* probably cannot be established. The third conclusion is that the theories themselves are not logically coherent in that they are attempting to describe two distinct and irreconcilable conceptions of the state.

The definition of a state is alone an almost impossible task. Crawford cites two comments made at the International Law Commission: James Brierly noting "the word ['state'] was commonly . . . understood without definition"<sup>125</sup> and Georges Scelle conceding "he did not know what a state was and he felt sure that he would not find out before he died. He was convinced that the Commission could not tell him."<sup>126</sup>

These problems with recognition that have been discussed above are merely indicative of differing theories of the state and the power of recognition. Grant has surveyed the various meanings of recognition including recognition of monarchs, governments, territorial claims, and treaties, and concludes:

Recognition belongs to a spectrum of techniques which States have used to adapt themselves to new situations in the decentralized society which States compose . . . . Whether recognition is better understood as a coherent and distinct subject of international law or as a diffuse process of adjustment readily blurred into others is contingent upon variables of history, its objects, politics, legal theory, and place.<sup>127</sup>

Based on this variety, Grant proposes a distinction between normative (recognition causes a change in the entity) and non-normative recognition (where it is "a diplomatic exercise with symbolic content only"),<sup>128</sup> meaning that recognition in some cases does constitute a state, and in others, does not. Such a harsh division into two categorical processes, though, may be too extreme.

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<sup>125</sup> CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 38 (citing *Summary Records and Documents of the First Session*, [1949] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/Ser.A/1949).

<sup>126</sup> *Id.* at 38 (citing *Summary Records of the Second Session*, [1950] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/Ser.A/1950).

<sup>127</sup> Grant, *An Institution Restored?*, *supra* note 41, at 217.

<sup>128</sup> *See id.*

The reason for this variety of legal consequences is the application of differing theories of statehood to different entities. Klabbers argues that the purpose of personality is to distinguish between those human groups “worthy of recognition”<sup>129</sup> and those that are not. Recognition identifies the “legitimate participants in struggles over scarce resources”<sup>130</sup> and “may help to shield the group from outside interference.”<sup>131</sup> The symbolism of recognition “is important . . . Search Term End because non-recognition Search Term End of the group also implies non-recognition Search Term End of the individuals composing the group.”<sup>132</sup> Recognition may serve coexistent purposes; “To be or not to be recognized as a nation entails different rights for the community which claims to be one, since being a nation usually implies the attachment to a particular territory, a shared culture and history, and the vindication of the right to self-determination.”<sup>133</sup>

This distinction may reflect a merging by these authors of two other distinct notions: the nation (human group conscious of forming a community, sharing a common culture and a clearly demarcated territory, having a common past and a common project for the future, and claiming the right to rule itself)<sup>134</sup> and the state (“a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory”).<sup>135</sup> These two aspects may be parallel, but they might not be capable of integration. Koskenniemi states that:

[d]istinction to be made between the sociological and the juridical conception of the state . . . [states] are the consequences and instruments of the use of power . . . [but] states are not mere power. We

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<sup>129</sup> Klabbers, *The Concept of Legal Personality*, *supra* note 36, at 61 & n.62 (citing DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 249-55 (1997) (discussing the connection between legal personality and the ability to promote political or ideological goals)).

<sup>130</sup> *Id.* at 63 & n.66 (citing IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 105 (2000) (“A politics of recognition . . . usually is part of or a means to claim for political and social inclusion or an end to structural inequalities that disadvantage them.”)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 62 & nn.64-65 (citing Charles Taylor, *The Politics of Recognition* Search Term End, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25-73 (Amy Gutman, ed. 1994); NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND PRACTICAL REASON* 189 (1999) (stressing the relevance of group recognition Search Term End in terms of cultural self-expression)).

<sup>133</sup> Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 *MICH. J. INT’L L.* 1251, 1251 (2004).

<sup>134</sup> *See id.* at 1252 n.2 (citing MONTSERRAT GUIBERNAU, *NATIONALISMS: THE NATION-STATE AND NATIONALISM IN THE TWENTIETH CENTURY* 47-48 (1996)).

<sup>135</sup> *Id.* at 1252 n.1 (citing MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (H. H. Gerth & C. Wright Mills, trans. & eds., 1946)).

do not recognize a group of people as a government merely because it has power, but because we see its power as somehow acceptable.<sup>136</sup>

Perhaps it is in Koskenniemi's two concepts of *polis* (the form of the power of the state and venue for realizing social debate as equals) and *oikos* (the household and source of our external social value and goals),<sup>137</sup> where we can find a clear distinction of the two sides of the statehood coin. This distinction characterizes the state as both a bundle of rights and power and a source of legitimacy. The two aspects may be opposing and yet co-exist.

The constitutive and declaratory theories are difficult to distinguish from each other in the sense that recognition affects the entity. The application of either theory of recognition may initially realize that aspect of statehood that corresponds to the theory being applied. However, it may also secondarily result in the other aspect of statehood. We could say that constitutive recognition by other states creates the *polis* and not the *oikos*, since recognition by other states does not result in the necessary "reappropriation" of culture. However, constitutive recognition may help to inspire such coalescence since nationalism is not unknown in many apparently highly artificial states which had initially been set up by larger, more powerful states for political purposes. We could similarly argue that declaratory recognition merely acknowledges an existing *oikos* but not a *polis*, since there are no international rights and no clearly bounded forum in which to engage in social debate. On the other hand, declaratory recognition is meaningless when the *oikos* already exists and the social debate is already underway. When we choose between the recognition theories proposing the existence of the state prior to or only following recognition, we are choosing to concentrate our definition of the state on one of these two aspects of the state and, from that source, derive the other.

#### IV. THE DISCRETION OF STATES TO RECOGNIZE OTHER STATES

The second aspect of state recognition theory on which the constitutive and declaratory models take different stands is the role of state discretion in determining whether an entity constitutes a new purported state. This is partly a question of the form and effect of state recognition. Generally, the lesser weight given to recognition as supporting a state's creation, the lesser weight the international community gives to the discretion exercised by the state, with the reverse also being true. Grant suggests that in modern international law the distinction between "recognition conceived as a legal act and recognition conceived as a political act" is one of two

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<sup>136</sup> Koskenniemi, *The Wonderful Artificiality of States*, *supra* note 107, at 24 (citing HANS Kelsen, *DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF: KRITISCHE UNTERSUCHUNG DES VERHÄLTNISSSES VON STAAT UND RECHT* (1928)).

<sup>137</sup> *See id.* at 29 (citing ARISTOTLE: *THE POLITICS* 52 (T. A. Sinclair, trans., 1992)).

critical “axes” along which the “critical tension in recognition law is concentrated.”<sup>138</sup> This axis is often characterized as a choice between two justifications in forming the law, either the role of state consent or the legitimacy of the international community’s authority. To a large degree Grant is correct in stating that it is difficult to conceive of recognition as constituting a single institution.<sup>139</sup> However, there is a deeper problem: the choice of characterizing recognition as law or politics. Thus, the role of discretion is the second crucial aspect of state recognition theory.

#### A. *Politics of Unlimited Discretion*

Traditionally, the constitutive theory afforded existing states considerable discretion in determining whether a new state had emerged.<sup>140</sup> A state might apply criteria to evaluate the purported state’s new status, but those criteria were factors or justifications, not legally mandated threshold requirements, since a state was always “free to recognize (another state) or not on any grounds.”<sup>141</sup> In the final analysis, it “does not matter how a state came to be.”<sup>142</sup> This theory therefore admitted that recognition was a political, as opposed to a legal, process. This theory also accordingly promoted a vision of international law as based primarily in state consent.

##### 1. State Practice

Expressions of state practice seem to support this perspective.<sup>143</sup> The variety of practice suggests that states are free to accept limited discretion in this matter, but they are not required to do so.<sup>144</sup> One difficulty is that states are not always clear as to what degree of discretion they are claiming. An example would be the Badinter Commission’s analysis of the status of statehood in the former Yugoslavia, stating “the effects of recognition by other States are purely declaratory,”<sup>145</sup> but later the Commission, or at least Alain Pellet, the author of the Commission opinions, acknowledged that politics played a large part in its analysis.<sup>146</sup> Another

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<sup>138</sup> THOMAS D. GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* xx (1999).

<sup>139</sup> See *supra* note 21.

<sup>140</sup> See OPPENHEIM, *INTERNATIONAL LAW*, *supra* note 14, at 127.

<sup>141</sup> Martha J. Peterson, *Political Use of Recognition: The Influence of the International System*, 34(3) *WORLD POL.* 324 (1982).

<sup>142</sup> OPPENHEIM, *INTERNATIONAL LAW*, *supra* note 14.

<sup>143</sup> See Igor Grazin, *The International Recognition of National Rights: The Baltic States’ Case*, 66 *NOTRE DAME L. REV.* 1385, 1388 (1991).

<sup>144</sup> See Delahunty & Yoo, *supra* note 35, at 131.

<sup>145</sup> Badinter Comm’n, Op. Nos. 1 & 8 *supra* note 30.

<sup>146</sup> See Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 *EUR. J. INT’L L.* 178, 181 (1992) (wherein Pellet, who drafted most of the opinions of the Badinter Commission and



example would be the refusal of many powers to recognize Tibet as an independent state due to concern over provoking China, even when some states may have believed that it satisfied their criteria to be a state.<sup>147</sup> Robert D. Sloane compares the situation of Tibet with that of East Timor, where world powers generally refused to recognize the annexation of East Timor by Indonesia, unless, of course, that particular world power viewed Indonesia as a Cold War ally in which case it was reluctant to criticize.<sup>148</sup> John McGinnis cites numerous cases where nation-states were formed merely to provide for more effective means to realize economic opportunities.<sup>149</sup> In these cases, it would appear that politics prevailed over law and that the states necessarily considered that in the realm of recognition policy, they wielded considerable discretion. A final example is where interested states have blocked the recognition of a new seceding state. Even where a purported state satisfies the Montevideo criteria, if the parent state from which the entity wishes to secede objects to the recognition of the new state, then it has generally had its will respected by other states.<sup>150</sup>

Again, however, we have the same problems with summarizing state practice. There is considerable inconsistent practice on either side of the

championed them as a source of law for recognition, acknowledges that the Commission mixed politics into its legal analyses).

<sup>147</sup> See Sloane, *supra* note 33, at 135 n.91, 140 (“Both the United States and Britain remained sympathetic to Tibet. After China did invade, each expressed willingness to support Tibet’s appeal to the General Assembly. But both nations continued to feel obliged to defer to India, which they viewed as the nation with the most at stake in any resolution of Tibet’s legal status. And India suffered from the naïve belief that ‘support for China over other issues,’ coupled with refusal to formally recognize Tibet, would ‘prevent China from directly antagonising India by invading Tibet.’”) (citing TSERING SHAKYA, *THE DRAGON IN THE LAND OF SNOWS: A HISTORY OF MODERN TIBET SINCE 1947* 26 (1999)).

<sup>148</sup> See *id.* at 180 (citing S.C. Res. 389, U.N. Doc. S/RES/389 (Apr. 22, 1976); S.C. Res. 384, U.N. Doc. S/RES/384 (Dec. 22, 1975); G.A. Res. 37/30, U.N. Doc. A/RES/37/30 (Nov. 23, 1982); G.A. Res. 36/50, U.N. Doc. A/RES/36/50 (Nov. 24, 1981); G.A. Res. 35/27, U.N. Doc. A/RES/35/27 (Nov. 11, 1980); G.A. Res. 34/40, U.N. Doc. A/RES/34/40 (Nov. 21, 1979); G.A. Res. 33/39, U.N. Doc. A/RES/33/39 (Dec. 13, 1978); G.A. Res. 32/34, U.N. Doc. A/RES/32/34 (Nov. 28, 1977); G.A. Res. 31/53, U.N. Doc. A/RES/31/53 (Dec. 1, 1976); G.A. Res. 3485 (XXX), U.N. Doc. A/RES/3485 (Dec. 12, 1975). See also Christine M. Chinkin, *East Timor Moves to the World Court*, 4 EUR. J. INT’L L. 206, 207 (1993) (quoting AUSTL. DEP’T FOR. AFF’RS, 1978 ANN. REP. 30 (1979) (recognizing the *de jure* incorporation of East Timor into Indonesia.)).

<sup>149</sup> See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 909 (1996).

<sup>150</sup> See CRAWFORD, REPORT ON UNILATERAL SECESSION BY QUEBEC, *supra* note 73, ¶¶ (c), 8 (“Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede. There is no case since 1945 where it has done so.”).

issue. States often also claim different sources of legitimacy for their acts for different situations and thus evidence differing practice from case to case. Those bases of legitimacy can evolve or be overturned with ease. There is no objective factual behavior from which we can derive *opinio juris* for this second aspect of state recognition theory. Furthermore, the discretion states claim is related to the form and effect that the state may claim for recognition. States may argue that the existence of a state precedes recognition, so that recognition is a purely ministerial acknowledgement and states have unlimited discretion to refuse to recognize a purported state:

[The declaratory theory] accepts the view of the rival doctrine according to which there does not exist, in any circumstances, a legal duty to grant recognition. At the same time, with some lack of consistency, it maintains that prior to recognition the nascent community exists as a State as is entitled to many of the most important attributes of statehood.<sup>151</sup>

Of course, if indeed the state does already exist prior to being recognized by other states, then a claim to unlimited discretion is superfluous. It is only where the state claims that the form and effect of its recognition is constitutive that the theory of unlimited discretion appears to threaten the international community's claim to limited discretion. Because the degree of discretion is only an issue in some contexts, some examples of state practice, when coupled with a certain theory of the legal nature of the state, do not evidence the practice claimed by orthodox constitutivists. In sum, state practice is not entirely consistent, reliable, or even indicative of the position that some commentators might claim.

## 2. Logic of the Theory

In addition to the weaknesses of state practice for this question, the theory of unlimited discretion has a logical problem. It reduces the state, an entity that plays the principal role in forming and interpreting international law, to a subject of other states' politics. It seems strange that the most significant international actor's very status would become subject to international politics.

Unlimited discretion seems to undermine sovereign equality. If states are free to refuse to recognize each other's existence, then the unrecognized states will be precluded from exercising their sovereign rights and contributing to the development of international law on the international plane. If states are theoretically equal, then how can any one of them be made a second-class citizen by ostracism?<sup>152</sup>

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<sup>151</sup> LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 17, at 2.

<sup>152</sup> See Acquaviva, *Subjects*, *supra* note 52, at 350 (“[T]he principle of the sovereign equality of the subjects of international law would be infringed by the

A second problem is the potential for overlooking facts when applying unlimited discretion. Is a state free to completely refuse to acknowledge reality? At some point, the state's insistence on the non-existence of its neighbor becomes absurd, although presumably a theory of unlimited discretion would permit this. Martha Peterson has argued that this denial of reality is limited, not necessarily by law, but by practical considerations: the existence of interconnections of international commerce and globalization.<sup>153</sup> If a nascent community were defined as a state by the rights it has, then the interaction of nationals of the two states would limit one of the state's ability to refuse to recognize the other. Peterson's perspective, however, does require that we view a state as a bundle of rights. It also requires acknowledgment of the fact that interactions between nationals would limit a state's option to recognize, thus affecting a state's recognition status.

A third problem is that unlimited discretion, if coupled with the power to create a state, may lead to considerable inconsistency in defining the members of the statehood club. This problem has also been discussed above, but it bears repeating:

To assert that 'recognition is a precondition of the existence of legal rights' raises questions about . . . how many states must recognize a putative state before it becomes a 'real' state; . . . whether it then exists only for states that have expressed recognition, formally or informally (e.g., by engaging in diplomatic relations); and . . . whether recognition must be based on 'adequate knowledge of the facts' or is instead purely discretionary.<sup>154</sup>

This inconsistency in universally acknowledging the states of the world leads to problems concluding treaties and establishing customary international law, as well as applying act of state doctrine, immunities, and a host of other questions.

These concerns all reflect one underlying problem: "to reduce the international law of recognition to a pure matter of political will eviscerates its status as law."<sup>155</sup> Although politics in this field is often seen as undesirable, most scholars nonetheless acknowledge "some concession to the realpolitik of international relations."<sup>156</sup> However, it is unclear why

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possibility that one or more subjects could deny the existence of another subject by refusing to recognize it.").

<sup>153</sup> PETERSON, RECOGNITION OF GOVERNMENTS, *supra* note 10, at 112-13.

<sup>154</sup> Sloane, *supra* note 3388, at 116 & n.34 (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 89 (1990)).

<sup>155</sup> *Id.* at 117-88 & n.35 (citing THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 19 (1999) (criticizing recognition theory as "unduly political; it relegates recognition to the 'unfettered political will' of existing states—pure realpolitik").

<sup>156</sup> BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 125 (1999).

politics is necessarily a problem from a legal perspective, aside from the fact that recognition might escape “international adjudication and scholarship,”<sup>157</sup> when so many other issues of major importance are considered suitable for politics. Numerous states have been recognized by major powers in pursuit of asserting international political power. Some of those states later failed, including Manchukuo, Katanga, and the South Africa Bantustans.<sup>158</sup> Others survived or were revived after having been extinct, such as Croatia, Eritrea, and the Central and Eastern European states of Poland, the Czech Republic (Bohemia), and Bulgaria, arising from Woodrow Wilson’s dismemberment of the Habsburg and Ottoman Empires.<sup>159</sup>

One problem that unlimited discretion may pose is that it can be manipulated for political ends<sup>160</sup> and may provide a vehicle for more dominant states to control less powerful ones through the overarching goal of promoting security. Raju Thomas has argued:

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<sup>157</sup> Sloane, *supra* note 33, at 117 & n.32 (citing BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 127 (1999)).

<sup>158</sup> See Protocol of Good Neighborhood, Japan – Manchukuo, 1932, 135 B.F.S.P. 637 (Japan recognizing Manchukuo); *but see* Assembly Resolution, Mar. 11, 1932, L.N.O.J. Spec. Supp. No. 101/I at 87; Assembly Resolution, Feb. 24, 1933, L.N.O.J. Spec. Supp. No. 112/II at 14 (regarding refusal of the members of the League of Nations to recognize Manchukuo); U.N.S.C. Res. 169 (Nov. 24, 1961), paras. 1, 8 (regarding Katanga); UNGA Res. 2775E (XXVI) (Nov. 29, 1971), para. 1 (regarding the South African “Bantustans”); John Dugard, *South Africa’s “Independent” Homelands: An Exercise in Denationalization*, 10 *DENV. J. INT’L L. & POL’Y* 11, 21-35 (1980).

<sup>159</sup> See *Socony Vacuum Oil Co. Claim*, (U.S. Int’l Claims Comm’n, 1954) *reprinted* at 21 *INT’L L. REPS.* 55, 58-62 (holding that “Croatia was . . . during its entire 4-year life . . . subject to the will of Germany or Italy or both” prior being absorbed into Yugoslavia); U.N.S.C. Res. 753 (May 18, 1992), U.N.G.A. Res. 46/238 (May 22, 1992) (admitting a ‘revived’ Croatia to the U.N. upon its independence from Yugoslavia); UNSC Res. 828 (May 26, 1993), UNGA Res. 47/230 (May 28, 1993) (admitting a ‘revived’ Eritrea, the former Italian colony administered by the U.K. and integrated into Ethiopia, to the U.N. upon its independence from Ethiopia); Act of the Congress of Vienna, June 9, 1815, arts. 1-5, 2 B.F.S.P. 7 (approving of the third, fatal partition of Poland, extinguishing the state); 1 HAROLD W.V. TEMPERLEY, ED. *HISTORY OF THE PEACE CONFERENCE AT PARIS 181-99* (1920) (describing Woodrow Wilson’s Fourteen Points, including the reestablishment of Poland as a state).

<sup>160</sup> See M. Kelly Malone, *The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict*, 6 *TEMP. INT’L & COMP. L.J.* 81, 91-92 (1992) (“The declarative view has gained authoritative prominence primarily because the constitutive position rested on a questionable premise and permitted States to manipulate recognition for political purposes. . . . [P]ast practice suggests that States often employ recognition as a means of arbitrary policy rather than its intended purpose of confirming the presence of objective statehood criteria.”) (citing HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 161-65 (1947) (noting the “spurious use of the weapon of recognition” by States)).

[S]tate recognition policy proved to be an inventive method of destroying longstanding sovereign independent states . . . Disintegration and war in the former Yugoslavia were caused mainly by the hasty and reckless Western policy of recognizing new states from an existing longstanding state. Indeed, the Western powers dismembered Yugoslavia through a new method of aggression: *diplomatic recognition*.<sup>161</sup>

This argument assumes that the states, though, are being created by recognition, not that the states existed beforehand. Unlimited discretion would not have the gravity Thomas sees if the recognition was mere acknowledgement of existence.

Some authors, on the other hand, believe that this degree of discretion is appropriate and desirable. Robert J. Delahunty and John Yoo argue that we must not forget the purpose of the state: “[to organize] a population for internal security and national defense,”<sup>162</sup> and that the modern nation-state is simply a more effective structuring of the monopoly of violence than previously existed in multi-ethnic empires.<sup>163</sup> Delahunty and Yoo also argue that the state is an imagined community, not merely the monopoly of violence.<sup>164</sup> Thus, their perspective appears to be that imagined communities organize themselves for security purposes. This thesis claims a basis in the needs of the international community, that security and stability are a “public good” in the international community,<sup>165</sup> implying a limited discretion on the part of states. However, just the opposite could be argued: that the need in the international order for state sovereignty and equality must necessarily result in less discretion on the part of states to refuse recognition. Although state discretion, and

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<sup>161</sup> Raju G.C. Thomas, Nationalism, Secession, and Conflict: Legacies from the Former Yugoslavia, paper presented at the 1st Annual Association for Study of Nationalities Convention, April 26-28, 1996.

<sup>162</sup> Delahunty & Yoo, *supra* note 35, at 137, 139 (noting that the nation-state has evolved to take the dominant position now in protecting the public welfare and culture) (citing PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY* (2002)).

<sup>163</sup> See *id.* at 137-38 (citing *e.g.* PETER TURCHIN, *WAR AND PEACE AND WAR: THE LIFE CYCLES OF IMPERIAL NATIONS* 285-308 (2006); DEEPAK LAL, *IN PRAISE OF EMPIRES: GLOBALIZATION AND ORDER* 74 (2004); 1 S.E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES: ANCIENT MONARCHIES AND EMPIRES* 2-3 (1997); F.W. WALBANK, *THE AWFUL REVOLUTION: THE DECLINE OF THE ROMAN EMPIRE IN THE WEST* 40-7 (1969)).

<sup>164</sup> See *id.* at 138 (citing BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991)).

<sup>165</sup> See *id.* at 137 (citing LEA BRILMAYER, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD* 17 (1994)).

the institution of statehood generally, has been a source of stability,<sup>166</sup> it also has been a source of conflict.<sup>167</sup>

This distinction again raises the two visions of the state and what the institution approximates, as well as what role the state fills in the international community. Various critics have observed that the state may be decreasing in importance because of global social, ecological, and economic developments that decrease its ability to solve problems, making the sovereign rights it holds less relevant.<sup>168</sup> But a critique of the state's effectiveness, the management or "sociological critique,"<sup>169</sup> does not necessarily diminish the state's role in providing meaning to political debate and peoples' notions of their imagined community. Thus, this critique only addresses the debate if we can assume that state recognition creates the state.

### B. *Law of Limited Discretion*

The alternative to the theory that states have unlimited discretion is that state discretion to recognize a new state is, or must be, limited. Crawford argues:

[T]he test for statehood must be extrinsic to the act of recognition . . . [because] 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 existence of State rights under international law . . . [which] is unacceptable.<sup>170</sup>

Of course, if states were not limited in their discretion to recognize a new state, but their acts of recognition did not create the state, then this argument is not really necessary. In fact, seeing unlimited discretion as a threat most likely assumes that the state is being constituted. If recognition was merely declaratory, then the power of a state to have unlimited

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<sup>166</sup> See *id.* at 133 (citing MICHAEL HOWARD, *THE INVENTION OF PEACE: REFLECTIONS ON WAR AND INTERNATIONAL ORDER* 103-04 (2000)).

<sup>167</sup> See Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1173 (2005) (arguing that "the history of the state is a history of repression and war" and that even the United Nations Charter, the emergence of human rights law, and other sovereignty-limiting doctrines "have not ended state predation"); Obiora Chinedu Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 HARV. INT'L L.J. 503, 503 & n.3 (2000) ("War made the state and the state made war" (quoting Charles Tilly, *Reflections on the History of European State-Making*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 42 (Charles Tilly, ed., 1975))).

<sup>168</sup> See Koskeniemi, *The Wonderful Artificiality of States*, *supra* note 107, at 23.

<sup>169</sup> *Id.* at 28.

<sup>170</sup> CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 21-22 (citing HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 234 n.3 (1947)).

discretion in choosing to recognize another state does not threaten the existence of the purported state. Crawford had argued that the act of recognition is not constitutive, so it is unclear why the merely diplomatic gesture of the act of recognition must have an extrinsic test, unless it is because refusal to recognize does affect rights. Arguing against unlimited discretion in this way without a clear sense of the affect of recognition is not helpful.

Even if recognition constituted the state, unlimited discretion might not be the threat to the international community. States ignore other entities all the time.<sup>171</sup> Some supposed nationalities with a claim to independence in Chechnya or Palestine are widely ignored,<sup>172</sup> and yet, those entities may arguably qualify as states under strict application of criteria. Furthermore, there is no reason why it should be unacceptable for states to ignore other purported states. While we might find the troubles visited on the citizens of the purported state unfair, “[r]ights cannot be presumed to exist merely because it might seem desirable that they should.”<sup>173</sup>

If we do accept limits on the discretion of states, then the question that naturally arises is what criteria should be employed to limit that discretion. There are a number of possible criteria for assessing whether an entity has attained statehood status, such as permanent population, territory, independence and willingness to observe international law, among others proposed. The possibilities for criteria are contentious and provide little hope in stating a consistent custom in international law. There is little evidence to suggest that these criteria are followed with any degree of consistency other than opportunism. Commentators have observed that criteria are often alternatively referred to as “require-

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<sup>171</sup> See, e.g., Lauterpacht, *Recognition of States in International Law*, *supra* note 14, at 53, 346-47, 388-95 (discussing the difference between recognizing as a state and ignoring an entity by refusing diplomatic and other relations).

<sup>172</sup> See Romain Yakemtchouk, *Les conflits de territoire et de frontière dans les états de l'ex-URSS*, 39 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 393, 424-26 (1993) (discussing the declaration of independence of Chechnya); Thomas Grant, *Afghanistan Recognizes Chechnya*, 15 AM. U. INT'L L. REV. 869 (2000) (discussing the lack of recognition of Chechnya, except for the Taliban); Declaration of Independence, Palestinian National Council of the P.L.O., 19th sess. (Nov. 15, 1988) *discussed in* Anis Al-Qasem, *Declaration of the State of Palestine: Background and Considerations*, 4 PALESTINE YB INT'L L. 314 (1987/8); G.A. Res. 57/107, A/RES/57/107 (Dec. 3, 2002) (affirming that Palestine remains a “question” that has not been resolved with “legitimacy”); S.C. Res. 1515, S/RES/1515 (Nov. 19, 2003) (endorsing the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, suggesting that the U.N. does not believe that Palestine qualifies as a state).

<sup>173</sup> South West Africa, (Ethiopia v. S. Africa, Liberia v. S. Africa) (2d phase), 1966 I.C.J. 6, 48 (Jul 18).

ments” or “essential conditions” for recognition.<sup>174</sup> Moreover, in establishing the kinds of criteria for statehood that will limit state discretion in the recognition process, we must question to what degree state consent to the assignment of international rights and obligations is to be limited in favor of law. Our determination of what the limitations of the law should be will inform the kinds of criteria we select. Inherently, limits on discretion establish a process that is legal, as opposed to political, as argued by many scholars.<sup>175</sup>

### 1. Limited by Factual Criteria

Discretion to refuse to recognize an entity as a state could be limited by certain criteria, such as effective control of territory or some similar facts. These options have the attractiveness that they would limit states’ ability to deny their effective reality. The I.C.J. has ruled that it must itself recognize realities on the ground and not be distracted by legal formality.<sup>176</sup> Koskenniemi has also argued that one vision of law is that it “consists of responses to social events - ‘reflects’ social power - and precisely there makes its unique contribution to the ordering of human affairs.”<sup>177</sup> Therefore, law may need to reflect reality and reality is crucial to establishing rules for future behavior.

If we accept that state discretion is or must be limited, then we must establish standards by which to measure criteria that will either conclusively or persuasively argue in favor of the status of statehood. One possible limitation on the discretion to recognize statehood is the Montevideo Convention criteria of a permanent population, defined territory, government, and the capacity to enter into relations with the other states.<sup>178</sup> There is no clear hierarchy within these Montevideo criteria, although an emphasis on certain criteria at the expense of others has been proposed.<sup>179</sup> Additional criteria<sup>180</sup> have also been proposed such as

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<sup>174</sup> See Acquaviva, *Subjects*, *supra* note 52, at 348 (citing, e.g., LOUIS HENKIN, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 246 (2d ed. 1987); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 HAGUE ACAD. INT’L L. REC. DES COURS 96 (1999)).

<sup>175</sup> See, e.g., Kelsen, *Recognition in International Law*, *supra* note 97; LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 17, at 6.

<sup>176</sup> See Klabbbers, *The Concept of Legal Personality*, *supra* note 36.

<sup>177</sup> Koskenniemi, *The Wonderful Artificiality of States*, *supra* note 107, at 23-24 (citing *The Island of Palmas (U.S. v. Neth.)* (Apr. 4, 1928), 2 R.I.A.A. 829 (Perm Ct. Arb. 1928)).

<sup>178</sup> See Montevideo Convention, *supra* note 26, at art I, 49 Stat. at 3097, 165 L.N.T.S. at 19. See also RESTATEMENT *supra* note 25, § 201 (“[A] state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”).

<sup>179</sup> See CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 42 (“There is thus a strong case for regarding government as the most



self-determination,<sup>181</sup> democracy and civil rights,<sup>182</sup> establishment in conformity with law and *jus cogens* obligations,<sup>183</sup> feasibility of the new

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importance single criterion of statehood, since all the others depend upon it.”); Acquaviva, *Subjects*, *supra* note 52, at 389 (arguing that the “only essential element of a subject of international law is its sovereignty”); Baty, *supra* note 34, at 444 (“[T]he entire absence of government is incompatible with the nature of a state. If a recognized government falls, and no single new government at once succeeds it throughout the whole extent of its territory, the state must ipso facto cease to exist.”).

<sup>180</sup> See Grant, *Defining Statehood*, *supra* note 96, at 405-22, 435-47 (arguing that the Montevideo Convention criteria are insufficient).

<sup>181</sup> See CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 604, 609, 638 (discussing G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/RES/4684 (Dec. 14, 1960), Declaration on the Granting of Independence to Colonial Countries and Peoples, as well as Rhodesia’s declaration of independence). Artificially created states that did not necessarily comprise a “people” at the time of independence, but whose “peopleness” may have later coalesced after independence, would be exempted from needing to demonstrate that they do in fact comprise a people.

<sup>182</sup> See Universal Declaration of Human Rights, G.A. Res. 217A, at 75 Art. 21, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”); International Covenant on Economic, Social, and Cultural Rights, art. 1, Dec. 16 1966, 993 U.N.T.S. 3 (providing that self-determination includes the right to freely determine a people’s political status); CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 131 (“It may be concluded that an entity may not claim statehood if its creation is in violation of an applicable right to self-determination.”); James Crawford, *Democracy and International Law*, 1993 BRIT. Y.B. INT’L L. 113, 115-17; Lawrence M. Frankel, *International Law of Secession: New Rules for New Era*, 14 HOUS. J. INT’L L. 521, 540-42, 551 (1992); Malone, *supra* note 160, at 86 n.27 (quoting J. E. S. Fawcett, *Security Council Resolutions on Rhodesia, 1965-1966* BRIT. Y.B. INT’L L. 103, 112 (“[T]o the traditional criteria for the recognition of a regime as a new State must now be added the requirement that it shall not be based upon a systematic denial . . . [of] the right of every citizen to participate in the government . . . .”)); John Dugard, *South Africa’s “Independent” Homelands: An Exercise in Denationalization*, 10 DENV. J. INT’L L. & POL’Y 11, 35-36 (1980); Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT’L L. 1, 3, 17 (1968); see generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992). None of these authors argue that the criteria of democracy and/or civil rights would be retroactive, depriving those states that cease to qualify of their recognition. In addition, the assessment of democracy and civil rights is difficult to fathom since most “democratic” states in fact strike their own unique political balance, restraining democracy to the degree necessary not to threaten civil rights.

<sup>183</sup> See CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 21 (acknowledging that the illegal creation of states has been accepted in practice) (citing ALSO RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 202, cmt. f (1987) (discussing “unlawful recognition or acceptance”)); Frankel, *supra* note 182. But see Koskenniemi, *The Wonderful Artificiality of States*, *supra* note

state,<sup>184</sup> and willingness to observe international law,<sup>185</sup> among others.<sup>186</sup> As evidenced by these options, it is by no means clear that there is any agreed upon list of statehood criteria, even if we could agree that recognition discretion should be limited. One alternative to these criteria is simply to acknowledge the reality of the monopoly of violence in a particular territory.

## 2. Limited by Effectiveness

A different “fact” that has been proposed to limit the discretion of states is the criteria of effective control.<sup>187</sup> “Where state exists, the law must take account of it.”<sup>188</sup> This perspective claims considerable state practice especially in regards to secessionist movements where “[t]he benchmark is simply the political and military success . . . .”<sup>189</sup> The work of the I.L.C. on succession of states in respect of treaties gives support to

107, at 28 (“Unjust entities have been regarded as states, and since the Peace of Westphalia, that they have been so regarded has been a cornerstone of the international system.”).

<sup>184</sup> See Frankel, *supra* note 182 at 554-55. However, existing states that are heavily dependent on foreign aid or with unsustainable balance of payments would not be held to this standard.

<sup>185</sup> See Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT’L L. 491, 499-503 (1998). Again, existing states are exempt; there is no obligation for them to continue to observe international law to preserve their statehood.

<sup>186</sup> See, e.g., Ralph Johnson, Deputy Assistant Sec’y of State for European and Canadian Affairs, Yugoslavia: Trying to End the Violence, Testimony Before the Senate Foreign Relations Committee (Oct. 17, 1991), in 2 FOREIGN POL’Y BULL., Nov.-Dec. 1991, at 39, 42 (stating that the purported states must (1) be peaceful and provide democratic determination of the country’s future; (2) respect existing borders; (3) support democracy and the rule of law; (4) safeguard human and minority rights; and (5) respect international law Search Term End and obligations); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 187 (1991) (stating that secessionists want “an independent state dominated by their own culture, language or religion” and arguing that a historically distinct territory is required); Grant, *Defining Statehood*, *supra* note 96, at 411 (citing Cavaré’s “historical evolution” as a criteria for statehood).

<sup>187</sup> See Malone, *supra* note 160, at 84-86; Grant, *Defining Statehood*, *supra* note 96, at 411 (“Other aspects of the evolving conception of statehood seemed also to shift focus away from effectiveness, though it is difficult to discern a single coherent direction in the shift, and writers hesitated to break completely from that standard criterion.”).

<sup>188</sup> CHEN, *supra* note 11; LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 17, at 91 (“[I]nternational law . . . cannot disregard facts . . .”).

<sup>189</sup> Frankel, *supra* note 182, at 534 & n.37 (“The status of parties to an internal conflict was determined by their political and military success and not by the perceived righteousness of their efforts.” (quoting HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION*

the criteria of effective control in that the “succession of States” is defined as the *fact* of “the replacement of one State by another in the responsibility for the international relations of a territory.”<sup>190</sup>

Effectiveness, however, does not have a widespread acceptance. Grant has argued that the admission of micro-states to the U.N. that are in fact highly dependent on larger, more powerful neighbors demonstrates that effectiveness and independence cannot be the central criteria of statehood.<sup>191</sup> An additional example is the I.C.J. judgment in *Nottebohm*, where the Court refused jurisdiction due to a lack of a genuine link of nationality between a citizen claiming Liechtenstein’s nationality and Liechtenstein, not on the ground that Liechtenstein was not a state.<sup>192</sup> In fact, the Court confirmed that it viewed Liechtenstein as a “sovereign State”.<sup>193</sup> However, some have argued that Liechtenstein’s delegation of its foreign affairs power to Switzerland and subsequent lack of effective power to manage that aspect of its affairs should have precluded the power to seize the court, regardless of its retention of *de jure* authority.<sup>194</sup>

Aside from the problems establishing state practice in customary international law and proving the factual existence of effectiveness, there are also theoretical problems with these criteria. If effectiveness is a factual criterion that establishes whether a state exists,<sup>195</sup> then whether a violation of international law occurred or not (even a violation of a *jus cogens* norm) should be immaterial. However, we see several cases where the statehood status of certain entities was denied due to violations of the law.<sup>196</sup> Although one could argue that peremptory norms trump other

MOVEMENTS 29 (1988)); see SCHOISWOHL, *supra* note 22 (arguing that the more effective a secessionary entity is, the less constitutive the recognition act is).

<sup>190</sup> Succession of States in Respect of Treaties, [1974] 1 Y.B. Int’l L. Comm’n 19742, U.N. Doc. A/CN.4/278 and ADD.1-6.

<sup>191</sup> See Thomas D. Grant, *States Newly Admitted to the United Nations: Some Implications*, 39 COLUM. J. TRANSNAT’L L. 177, 178-79 (2000).

<sup>192</sup> See generally *Nottebohm Case (Liech. v. Guat.) (Second Phase)*, 1955 I.C.J. 4, 20 (Apr. 6). See also G.A. Res. 363(IV) (Dec. 1, 1949) (stating that Liechtenstein qualifies as a state party to the Statute of the I.C.J.).

<sup>193</sup> See *Nottebohm* 1955 I.C.J. at 20.

<sup>194</sup> See Malone, *supra* note 160.

<sup>195</sup> See CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 5.

<sup>196</sup> See, e.g., Delahunty & Yoo, *supra* note 35, at 152-54 (“If the Montevideo Convention tests of legal ‘statehood’ had been applied in a purely neutral, factual manner, most or all of these outcomes would likely have been reversed. Kuwait (arguably), Estonia, Latvia, Lithuania, Guinea-Bissau, the Ukraine, and Byelorussia *did not, in fact*, meet the tests of statehood at the relevant times. On the other hand, Manchukuo (arguably), Southern Rhodesia, and Turkish Cyprus *did, in fact*, meet those tests.”); Rudrakumaran, *supra* note 76, at 52 & n.119 (citing Verwaltungsgerichtshof [VwGH] [administrative court] date, docket number, volume number reporter name [abbreviation of reporter] number of decision A (Austria),

concerns, this notion would argue that even a fact leading to the conclusion that an entity was a state is secondary to *jus cogens*. Of course, if fact were to be weighed against law, we would still need to be able to construct a legal process to conclusively establish facts sufficient to survive a finding of *jus cogens* violations, a considerable task. If we agreed to permit effective control to trump *jus cogens* violations, we might, in fact, actually increase the incentives for rebel groups to use violence when attempting to seize control of a territory rather than establishing legal right and title through the ballot box.<sup>197</sup>

### 3. Problems with Criteria

There are two problems with statehood criteria: establishing the criteria and applying the criteria. The conflict between *jus cogens* and effectiveness discussed above demonstrates a classic case of a conflict between two camps on the declaratory side, both attempting to argue that their position is proper for limiting state discretion. However, a secondary problem is the degree of discretion for state assessment built into applying the criteria. The greater the number of factors a state may assess and the less specific the criteria, the greater degree of discretion necessarily granted to states. At some point, the vagueness of the criteria renders the criteria more akin to factors for the states to consider, rather than as binding obligations on the states. As the vague criteria permit more discretion for assessment of facts, the absolute nature of the fact as a criterion fades into a very broad degree of discretion. Because of this, the two theories lose their distinctiveness.

#### i. *Establishing the Criteria*

The problems with establishing criteria are numerous. The first problem is a lack of sufficient consensus on the criteria for statehood.<sup>198</sup> Also, the establishment of legally binding criteria, as opposed to politically judged factors, is not widely supported in practice.<sup>199</sup> Many authors

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*reprinted in* 16 ANN. DIG. 66 (regarding Austria's unlawful absorption into Nazi Germany).

<sup>197</sup> See Frankel, *supra* note 182, at 550 ("Requiring *actual* control over the territory should be de-emphasized, as such a requirement provides incentives to use force.").

<sup>198</sup> See Roda Mushkat, *Hong Kong as an International Legal Person*, 6 EMORY INT'L L. REV. 105, 106 & n.3 (1992) (citing JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 31 (2d ed. 2007) ("[T]here is no generally accepted and satisfactory modern legal definition of statehood.")). See also DUURSMA, *supra* note 43, at 112-13 (examining difficulties preventing the I.L.C. from codifying statehood)).

<sup>199</sup> See Delahunty & Yoo, *supra* note 35, at 152-54 ("[I]t is obvious that [the U.S.] Government does not apply the Montevideo Convention tests of statehood in a value-neutral manner. On the contrary, our governmental practice reveals that the decision whether or not to recognize or derecognize a state is highly policy-laden.") (citing 1

maintain that states consider various factors, but the final determination ranges from a purely political one to one at least intimately bound to political considerations, not a neutral assessment of fixed criteria.<sup>200</sup> Recently, “[t]he European Union warned Kosovo . . . against an ‘irresponsible’ declaration of independence after Russia again rejected a Western-backed United Nations resolution that would effectively grant the move” without feeling any need to explain that satisfaction of objectively determined criteria was irrelevant.<sup>201</sup> This very ambiguity of the criteria leads to the inutility of the declaratory model.<sup>202</sup>

A second problem, partly due to the lack of agreement on appropriate criteria, leads to the charges of illegitimacy of the criteria applied, especially because criteria are weighed in favor of certain states and against others, or otherwise selectively applied.<sup>203</sup> Obiora Chinedu Okafor has argued that European powers effectively abolished certain states that existed in Africa by “the denial of the fact of statehood through the operation of the imposed normative order of international law—a law that had previously been only inter-European in reach.”<sup>204</sup> These powers

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OPPENHEIM’S INTERNATIONAL LAW 120, 122 (Sir Robert Jennings et al. eds., 9th ed. 1992)). See also Field, *supra* note 106, at 122 (“The signers of the Montevideo Convention understood that recognition was a political act, but they added a duty to treat even an unrecognized government as the government in fact or an unrecognized state as a state in fact. There is, however, no obligation to allow unrecognized states and governments access to domestic courts.”).

<sup>200</sup> See Rudrakumaran, *supra* note 76, at 47 & n.91 (discussing the international reaction to Italy’s occupation of Ethiopia) (citing Henry L. Stimson, U.S. Sec’y of State, Memorandum by Secretary of State, 3 U.S. FOR. REL. 8 (1932); L.N.O.J. Spec. Supp. 101 at 87 (1932)). See also MAREK, *supra* note 76, at 384; L. THOMAS GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 5 (1978) (“[T]he majority of states blend both law and politics into their decision.”).

<sup>201</sup> See Matt Robinson, *EU Warns Kosovo Against Declaring Independence*, REUTERS, (June 21, 2007), <http://www.reuters.com/article/topNews/idUSL213439320070621?sp=True>. Although note that, strangely, the great majority of E.U. Member States have now recognized Kosovo as an independent state. See also Recognition for New Kosovo Grows, BBC News (Feb. 18, 2008), <http://news.bbc.co.uk/2/hi/europe/7251359.stm>.

<sup>202</sup> See Grant, *Defining Statehood*, *supra* note 96, at 451 (“[T]he mere multiplication of criteria [for statehood] broadens the scope for variable outcomes in decision process. Making one factual determination is, all else being equal, easier than making multiple factual determinations.”).

<sup>203</sup> See Okafor, *supra* note 167, at 503 & n.1 (citing Carolyn M. Warner, *The Political Economy of “Quasi-Statehood” and the Demise of 19th Century African Politics*, 25 REV. INT’L STUD. 233, 233 (1999)). See also Grant, *An Institution Restored?*, *supra* note 41, at 192 (“[T]he proposition . . . that recognition is a tool used by stronger states against weaker ones.”).

<sup>204</sup> See Okafor, *supra* note 167, at 504 (citing Hedley Bull & Adam Watson, *Introduction*, in THE EXPANSION OF INTERNATIONAL SOCIETY 1 (Hedley Bull &

imposed policy-laden criteria, modeled on themselves, that distinguished between legitimate and illegitimate states; certain entities that did not look like post-Westphalian states were excluded from the international order.<sup>205</sup>

Furthermore, the existence of criteria suggests that existing states should also satisfy the new criteria, but they often do not.<sup>206</sup> Neil MacCormick has argued that, “[Search Term Begin i]n the traditional legal sense of ‘sovereignty,’ member states of the European Union no longer constitute legally sovereign entities.”<sup>207</sup> The inequity of changing criteria for the status of statehood does not comport with usual notions that the various states are equally sovereign.

Klabbers observed, however, in the context of corporate organizations, that the criteria for personality must necessarily change over time since:

[T]he law cannot envisage every type of situation, impairment, or form of association (in the generic sense) between human beings. . . . Thus, there will inevitably be gaps; forms of human association will arise which do not fit into one of the pre-conceived categories of the law. The explanation for this state of affairs seems to be reasonably obvious: people tend not to follow blueprints when organizing their lives together, and the demand for certainty will often be countered by a demand for flexibility.<sup>208</sup>

If indeed we desire that all states meet the same criteria, but concede that the criteria must evolve over time, then the very existence of binding criteria necessarily violates the equality of states. Furthermore, if we admit that criteria can be changed, then we must admit that the legal test could be altered to effectively create qualifying facts where there were none present. This undermines one of the supposed benefits of the declaratory model of criteria, which is that it clearly and predictably determines which entities are states.

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Adam Watson, eds., 1984)). See also Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113, 1124 (1995) (“In early international law certain European states, the ‘original members’ of the family of nations because they made the law through custom and treaties, did not need recognition to become states.”).

<sup>205</sup> See Okafor, *supra* note 167, at 505 n.9 (citing MONTSERRAT GUIBERNAU, NATIONALISMS: THE NATION-STATE AND NATIONALISM IN THE TWENTIETH CENTURY 59-62 (1996)).

<sup>206</sup> See CAPLAN, *supra* note 71, at 180-84.

<sup>207</sup> Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425, 444 (1999) (quoting Neil MacCormick, *Democracy, Subsidiarity and Citizenship in the “European Commonwealth,”* 16 L. & PHIL. 31 (1997)).

<sup>208</sup> Klabbers, *The Concept of Legal Personality*, *supra* note 36, at 40-41.

ii. *Application of the Criteria*

Even if we could settle on the specific criteria to be applied, we then are faced with the next problem of neutrally applying the criteria, both in terms of agreement on the factual conclusion and the inherent, institutional biases held by different actors in the evaluative process.

States need to agree on the factual foundations for the qualifying criteria or we will slowly return to the politics of unlimited discretion. Even though many authors now allege “that normative prescription and State implementation are now both concerns of international law,”<sup>209</sup> Grant identified the significant disagreement over even the apparently simple definition of “permanent population” in the case of the Vatican.<sup>210</sup> We are tempted to think that these criteria are mere facts to determine objectively, but this is not a complete picture. Even the Comment to the U.S. Restatement of Foreign Relations Law vaguely notes that each of the criteria for recognition “may present significant problems in unusual situations.”<sup>211</sup> These subjective or political elements of the test for statehood undermine the nature of the test as legal.<sup>212</sup> For example, self-determination might be a criterion, but it is unclear if a national referendum would satisfy it,<sup>213</sup> or even if so, what positive majority would be required and what the dissenters’ status would be in the new state. Secondly, self-determination is only a right held by “peoples,”<sup>214</sup> meaning that a prior determination must be made that there is a distinct people. It is not clear how other states would distinguish between a recognized “people” and a recognized state, except that it was temporarily without effective control of its territory. Furthermore, for the right to self-determination to result in a right to statehood, this may require that the people live under “colo-

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<sup>209</sup> Gregory H. Fox, *Strengthening the State*, 7 *IND. J. GLOBAL LEGAL STUD.* 35, 39 (1999).

<sup>210</sup> See Thomas D. Grant, *Between Diversity and Disorder*, 12 *AM. U. J. INT’L L. & POL’Y* 629, 671-674 (1997) (reviewing JORRI DUURSMAN, *FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD* (1996)).

<sup>211</sup> *RESTATEMENT*, *supra* note 25, § 201 cmt. a.

<sup>212</sup> See Grant, *Defining Statehood*, *supra* note 96, at 451-53.

<sup>213</sup> See Press Release, CONDOLEEZZA RICE, U.S. Sec’y of State, U.S. Recognizes Montenegro as Independent State (June 13, 2006), *available at* <http://www.state.gov/secretary/rm/2006/67839.htm> (explaining that the U.S. recognition of Montenegro was based on the positive referendum: “The United States has formally recognized the Republic of Montenegro as a sovereign and independent state, following the request of its government and consistent with the provisions of the Constitutional Charter which established the State Union of Serbia and Montenegro. This Charter explicitly provided means by which the people of Montenegro could express their will with respect to independence.”). See also Frankel, *supra* note 182.

<sup>214</sup> See U.N. Charter art. 1, para. 2.

nial rule” or “foreign occupation and alien domination.”<sup>215</sup> However, finding a distinct people who are not exercising self-determination would appear to necessitate a finding that the people are both occupied and dominated by another people. A referendum with a significant enough dissent might suggest that the people seeking to exercise their right to self-determination are, in turn, occupying and dominating another distinct people.

We also must be mindful of who the actor is that is performing the recognition—not only which state, but which organ of the state. The executive, legislative, and judiciary may reach different conclusions<sup>216</sup> with different levels of clarity<sup>217</sup> different binding force, and differing conceptions of their unique relations to international law, as well as with differing interpretations of the binding force of international law on their decisions.<sup>218</sup> Not only can different states reach different factual conclusions regarding the fulfillment of state recognition criteria, but individual states can also fail to present a unified face to the world and be inconsistent in their own factual findings. Perhaps the constitutive theory is more attractive in that, even though there may be disagreements among states, at least it is clear which states are considered states by other states.

The two theories of unlimited discretion and limited discretion have a risk of collapsing into each other, depending on the conception of the international law sources each state holds. If a state conceives of the legitimacy of international law as based on state consent and has discretion to apply criteria, then the end result is not that different from a state believing it has unlimited discretion. Some authors have stated that the

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<sup>215</sup> See G.A. Res. 1514(XV), *supra* note 181, at 67; G.A. Res. 1541 (XV), U.N. Doc. A/4684 (Dec. 15, 1960).

<sup>216</sup> See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 536, 108 Stat. 481, 418-482 (1994); Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, §355, 105 Stat. 647, 713-14 (Congress twice reached the conclusion that “Tibet is an occupied sovereign country,” yet executive recognition as such was never forthcoming.).

<sup>217</sup> See C.L. Lim, *Public International Law Before the Singapore and Malaysian Courts*, 2004 SING. Y.B. INT’L L. 243, 270-71 (discussing *Woo v. Singapore Int’l Airlines*, [2003] 3 Sing. L.R. 688 (H.C.)) (“One question was whether the court should, at that point, have embarked on an independent inquiry as to whether Singapore in fact recognizes Taiwan (i.e. recognizes Taiwan de facto), even if there had been no formal recognition of Taiwan. There seems to be no reason in legal principle to preclude such an independent inquiry, indeed the contrary would be true, since the Act says that whatever the Executive says is conclusive but does not say what happens if we do not know what the Executive is saying.”).

<sup>218</sup> See Rudrakumaran, *supra* note 76, at 48 & n.95 (“The political character of the act of recognition is further illustrated by the fact that judiciaries treat it as a political question and defer to the decision of the political branches.”) (citing *United States v. Pink*, 315 U.S. 203, 232 (1942) (action brought by the United States to recover assets of the New York branch of the First Russian Insurance Company)).



question of discretion “normally arises only in the borderline cases, where a new entity has emerged bearing some but not all characteristics of statehood,”<sup>219</sup> but this ignores many acts of discretion in interpreting and implementing criteria, even when states believe they have a duty to recognize a new state. As observed above, the notion of “permanent population” is already controversial in certain cases,<sup>220</sup> and there is no reason to think that a possible criterion of democracy or civil rights would be any clearer. The vagueness of the criteria allows states more discretion in assessing both the meaning of the particular criteria and the qualifying facts. At an extreme end, these criteria lose their binding force and retreat to being mere factors that states must consider in the application of their discretion.

#### 4. Limited by Obligations to International Organizations

Another way to limit states’ discretion is by a state’s international obligations. Lauterpacht stated that his proposal for recognition theory was a supra-national organ that would conclusively determine statehood status.<sup>221</sup> Based on developments in international law, Dugard later proposed that the U.N. had taken on the role Lauterpacht proposed.<sup>222</sup> This theory of the U.N. serving as an arbiter of statehood status has gained considerable support, partly because the theory avoids the problems of inconsistent and idiosyncratic recognition by states.<sup>223</sup> The theory has been endorsed favorably in many contexts,<sup>224</sup> and as the case of Manchukuo evidences,<sup>225</sup> the process of collective non-recognition has been

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<sup>219</sup> CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 40.

<sup>220</sup> See Grant, *Between Diversity and Disorder*, *supra* note 210 at 671-74 (observing that it is controversial whether the Vatican satisfies this requirement, yet it is widely regarded as a state).

<sup>221</sup> See LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 17, at 55.

<sup>222</sup> See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 2-3 (1987).

<sup>223</sup> See Malone, *supra* note 160, at 92 & n.54 (“By contrast, the declarative approach prevents States from refusing to uphold their duties towards other States by arbitrarily characterizing the obligee as a non-State entity.” (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 71 (1990))).

<sup>224</sup> See RESTATEMENT, *supra* note 25, § 201 cmt. h (“[A]dmission to membership in an international organization such as the United Nations is an acknowledgement by the organization . . . and by those members who vote for admission, that the entity has satisfied the requirements of statehood.”). See also Grant, *Defining Statehood*, *supra* note 96, at 445-46 (discussing O’Connell’s reference to U.N. practice in defining statehood).

<sup>225</sup> See David Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 CHINESE J. INT’L L. 105, 105-106 & n.1 (2003) (citing Henry L. Stimson, U.S. Sec’y of State, Excerpts from the Identical [*sic*] Notes from the U.S. Secretary of State to the Chinese and Japanese

effective, although cases of the recognition of states by force of U.N. obligations are less clear.

The difficulty with the theory is that it rests on practice, not a clear statement of law, and that practice is subject to the same difficulties mentioned previously: inconsistency, misrepresentation, and intended effects, among other problems. Admission to membership is certainly attractive as a form of confirmation of status,<sup>226</sup> but it is difficult to see how admission to membership was ever intended to result in the creation of a state since a proposal by Norway to this effect at the San Francisco conference was rejected.<sup>227</sup>

It was acknowledged by the U.N. that “[i]t is controversial, however, whether recognition of a government or of a state was considered a prerequisite of membership, or whether the question concerning *de jure* or *de facto* recognition was raised for purposes of information only.”<sup>228</sup> In fact, early in the life of the U.N., it was argued that the “ex-enemy states are, in principle, outside the law of the Charter. This outlawry is permanent; for, according to the wording of Article 107, it is not terminated by the admission of an ex-enemy state to the Organization.”<sup>229</sup> Thus certain states could never be admitted to the U.N., and yet, it was not contemplated that they were not states.<sup>230</sup> There is no obligation for a purported state to seek U.N. membership, as Switzerland declined to do for many years.<sup>231</sup> There also is no implication that a state such as Switzerland that refuses to join the U.N. is somehow not a state.<sup>232</sup> The opposite is also true that certain non-state entities were admitted to membership of some international organizations, including the U.N.<sup>233</sup> Furthermore, if admis-

Governments (Jan. 8, 1932), reprinted in ROYAL SOC. INT’L LAW, DOCUMENTS ON INTERNATIONAL AFFAIRS (1932)).

<sup>226</sup> See DUGARD, RECOGNITION AND THE UNITED NATIONS, *supra* note 222, at 3.

<sup>227</sup> See Amendments and Observations on the Dumbarton Oaks Proposals, Submitted by the Norwegian Delegation, U.N. Doc. 2, G/7(n)(1), 3 U.N.C.I.O. Docs. 365, 366 (1945); DUGARD, RECOGNITION AND THE UNITED NATIONS, *supra* note 222, at 44; Hans Aufricht, *Principles and Practices of Recognition by International Organizations*, 43 AM. J. INT’L L. 679, 691 (1949).

<sup>228</sup> Aufricht, *supra* note 227, at 679.

<sup>229</sup> HANS Kelsen, THE LAW OF THE UNITED NATIONS 813 (1951).

<sup>230</sup> See Leo Gross, *Progress Towards Universality of Membership in the United Nations*, 50 AM. J. INT’L L. 791, 826 n.168 (1956) (quoting HANS Kelsen, THE LAW OF THE UNITED NATIONS 813 (1951)).

<sup>231</sup> See CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, *supra* note 48, at 193.

<sup>232</sup> See CRAWFORD, REPORT ON UNILATERAL SECESSION BY QUEBEC, *supra* note 73, at 35-36.

<sup>233</sup> See DUGARD, RECOGNITION AND THE UNITED NATIONS, *supra* note 222, at 52-55 (observing that India, the Philippines, Lebanon, Syria, Byelorussia and the Ukraine, original members of the U.N. were not independent states at the signing of the U.N. Charter); W. Michael Reisman, *Puerto Rico and the International Process:*

sion as a member of the U.N. was tantamount to collective, constitutive recognition as a state, then the reverse is implied. Namely, expulsion from membership of the U.N. under Article 6 of the Charter could demand collective non-recognition of the state, the withdrawal of its international rights and, arguably, its effective extinction.<sup>234</sup>

We also have the problem of the U.N. establishing and applying its own criteria for assessment of statehood. The criteria for U.N. membership are not only an assessment of statehood, but include other considerations as well.<sup>235</sup> The League of Nations was similar in this regard.<sup>236</sup>

The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so. All these conditions are subject to the judgment of the Organization.<sup>237</sup>

These criteria condition the potential universality of membership of the U.N. “[U]niversality in the United Nations is subject only to the provisions of the Charter.”<sup>238</sup> In addition, other criteria have been mentioned

*New Roles in Association*, 11 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 533, 594-595 (1977) (Puerto Rico) (arguing that Bhutan was not truly independent from India when it was admitted to the U.N.); Aufricht, *supra* note 227, at 700 (observing that, e.g., Algeria and French colonies were admitted as members of the Universal Postal Union, and Belgian, French, Dutch, Portuguese, and U.S. protectorates and colonies were admitted as members of the International Telecommunications Union); Lloyd, *supra* note 53, at 771 (“Admittedly, the international community has consistently recognized entities that do not meet one or more of these factors as states and Members of the United Nations.”).

<sup>234</sup> See Aufricht, *supra* note 227, at 701.

<sup>235</sup> See Reisman, *Puerto Rico and the International Process*, *supra* note 233, at 603 (noting that the U.N. considered Liechtenstein’s application for admission by looking at factors such as (1) whether the applicant “would benefit by adherence to the Court, (2) [whether] other states with which it had relations would benefit by its adherence and (3) [whether] the general principle of the universality of participation would be realized”).

<sup>236</sup> See Lloyd, *supra* note 53, at 769-70 n.35 (citing LEAGUE OF NATIONS COVENANT art. 1, para. 2); MALBONE W. GRAHAM, THE LEAGUE OF NATIONS AND THE RECOGNITION OF STATES 12-13 (1933).

<sup>237</sup> Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, [1948] I.C.J. 57, 62 (May 28).

<sup>238</sup> G.A. Res. 718 (VIII) (Oct. 23, 1953); Admin. Comm. on Coord. to the Econ. & Soc. Council, 7th Rep., U.N. Doc No. E/1682 2-3 (May 11, 1950); see also Gross, *supra* note 230 at 794 (“The drive in favor of universality, however, was gaining momentum. The Secretary General expressed himself strongly in favor of universality of membership and his plea was endorsed by the heads of the specialized agencies.”) (quoting Secretary-General, Memorandum. of Points for Consideration in the Development of the Twenty-Year Programme for Achieving Peace Through the United Nations, U.N. Doc. A/1304, ¶ 5 (July 26, 1950); see also *id.*, at 800-01 & nn. 52-

as considerations for the admission of new states to the U.N., such as the operational effectiveness of the U.N. itself under the strain of too many members.<sup>239</sup>

There is also no guarantee that an international body, such as the U.N. or E.U., would objectively assess facts against criteria. Although part of the attractiveness of the U.N. model is its limitation on the inconsistent practice of states, we could equally worry that concentrating the power to determine which entities are the valid members of the international community in a single entity would bar non-charismatic, yet effective, states from statehood. Perhaps it is more comforting to know that non-politically appealing yet effective states could assert their statehood in stages by gathering recognition state by state. Grant criticized the application of the traditional criteria for statehood by the I.C.J. in the *Genocide* case<sup>240</sup> and by the E.C. in the case of the dissolution of Yugoslavia by flatly stating that “the [E.C.] Commission, like the I.C.J., failed to examine the factual situation in any meaningful way,”<sup>241</sup> observing that several members openly acknowledged that the problem of admission was not legal qualification but political opposition.<sup>242</sup> There is evidence of inconsistent, non-objective practice by the U.N. in that the U.N. admitted many states

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54 (citing, e.g., U.N. Doc. A/AC.80/P.V.26 (Dec 2, 1955), U.N. Doc. A/AC.80/P.V.30 (Dec 6, 1955); U.N. Doc. A/AC.80/P.V.32 (Dec 7, 1955) (“An often recurring theme was the desirability for the United Nations to achieve universality of membership. That it was desirable to aim at this objective was not doubted at the San Francisco Conference. The decision then taken and incorporated in Article 4 of the Charter was, however, in favor of membership open to such states as satisfied certain requirements. . . . Several delegates adopted a somewhat more cautious attitude. Thus the delegate of Israel reminded the Committee that in bridging the gap between the principle of universality and Article 4, the main concern should be to ‘preserve the integrity of the Charter – this irreplaceable foundation of our organization.’”)).

<sup>239</sup> See Matthew Olmsted, *Are Things Falling Apart? Rethinking the Purpose and Function of International Law*, 27 LOY. L.A. INT’L & COMP. L. REV. 401, 476 n.413 (2005) (“Could the United Nations discharge its responsibilities if, instead of being composed of 166 States, it had double that number of members? . . . Nationalist fever will increase *ad infinitum* the number of communities claiming sovereignty, for there will always be dissatisfied minorities within those minorities that achieve independence. Peace, first threatened by ethnic conflicts and tribal wars, could then often be troubled by border disputes.” (quoting Secretary-General, U.N. Doc. SG/SM/4691/Rev.I, SC/5360/Rev.I (Jan. 31, 1992))).

<sup>240</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, Judgment 2007 I.C.J. 91 (Feb. 26).

<sup>241</sup> See Grant, *Territorial Status, Recognition, and Statehood*, *supra* note 42, at 316.

<sup>242</sup> See Gross, *supra* note 230 at 802 & n.58 (citing, e.g., U.N. Docs. A/AC.80/P.V.26 (Dec. 2, 1955) (Burma), A/AC.80/P.V.28 (Dec 5, 1955) (Australia, Greece, and Argentina), A/AC.80/P.V.30 (Dec. 6, 1955) (Ecuador and Honduras), A/AC.80/P.V.32 (Dec 7, 1955) (Bolivia)).

in violation of these principles of statehood,<sup>243</sup> so the principles cannot be sacrosanct. If we are selective about state practice, we can find evidence that supports the view that no such consequences of U.N. membership are intended or result. Any other reading would necessitate a selective reading of only certain instances and certain authors as evidentiary of practice.

Even if the U.N. finds that the facts exist and states' duty to recognize is triggered, then the separate question would be whether the accrual of the duty to recognize alone creates the state. Arguably, the duty creates a legal obligation to recognize, but does not necessarily achieve recognition,<sup>244</sup> especially in countries adhering to the dualist theory of international law. The state, whose duty is invoked, might simply refuse to perform its duty, refuse to recognize the state, and incur some liability for the violation of the duty,<sup>245</sup> but would not force the state to perform its duty. We can look to the position of the League of Nations for guidance:

[A]dmission to League membership did not necessarily imply that each individual Member of the League was . . . bound to recognize every other Member . . . Argentina, Belgium and Switzerland, for instance, were Members of the League from 1934 to 1939, but did not recognize the U.S.S.R. [similarly Colombia was a member but refused to recognize Panama].<sup>246</sup>

We might then be faced with the unattractive spectacle of the Security Council taking measures under Chapter VII against a holdout state to force recognition of a purported state, and yet, we must question whether recognition can be achieved under this kind of duress.<sup>247</sup> Thus, a pur-

<sup>243</sup> See Lloyd, *supra* note 53, at 770-71.

<sup>244</sup> See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 756-57 (1988) ("[T]he 'view that a state may impose obligations on itself by promise, agreement, or treaty is not . . . consistent with the theory that states are subject only to rules which they have thus imposed on themselves.'" (quoting H.L.A. Hart, *THE CONCEPT OF LAW* 219 (1961))).

<sup>245</sup> See Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 273, 280-96 (2000) (arguing that in the case of East Timor the I.C.J. concluded that the U.N. non-recognition regime was not even enforceable).

<sup>246</sup> Aufrecht, *supra* note 227, at 680.

<sup>247</sup> See Vienna Convention on the Law of Treaties arts. 7, 51, 52, *opened for signature* May 13, 1969, 1155 U.N.T.S. 331, 334, 344. However, it is not clear whether Security Council Resolutions are held to the law of treaties. If the recognition under duress was accomplished by treaty or comparable instrument, though, it would later need to be interpreted in light of the law on treaties which might then hold it void. See also *Eighth Report on State Responsibility*, [1979] 2 Y.B. INT'L L. COMM'N 35-36, U.N. Doc. A/CN.4/318 (prepared by Roberto Ago, Special Rapporteur) ("[C]onsent may be expressed or tacit, explicit or implicit, provided, however, that it is clearly established," and is not "vitiated by 'defects' such as error, fraud, corruption or violence").

ported state might have a right to be recognized due to admittance to U.N. membership but does not have the power to force states to recognize it. This conclusion raises issues about the perception of the proponent of the legal nature of the state. The position that only members of the U.N. are the legitimate states in the international system, while supposedly limiting state discretion in line with the declaratory model, also demands that non-admitted entities cannot be regarded as states. This effectively bars them from statehood and embraces the constitutive position, in that states are only created by recognition.

### C. *A Contest Between Law and Politics*

The two elements of recognition theory are the nature of the existence of the new state prior to the recognition and the degree of discretion states have in refusing recognition. It is important to acknowledge that these two aspects must be separately considered because most authors combine the two in either the orthodox pairing or in other innovative ways. These combinations are the source of most of the attempts at synthesis of the two theories. However, the two aspects each have, in turn, two possible sub-choices that are irreconcilable. It is the inability to resolve the alternatives for each theory that demands a choice. This choice is based on the actor's understanding of the nature of the state, whether it is primarily a legal or non-legal entity, and the actor's understanding of the ultimate source of legitimacy in the international system, either from the legitimate external constraints of the laws of the international community or from the political will, consent, and overwhelming power of violence of states.

The irony is that the classic theories mix their justifications. The classic declaratory theory says that a state is not a purely legal entity since it exists prior to recognition, yet other states' right to recognize the state is constrained by the criteria of law and not subject to politics. The classic constitutive theory says that the state exists only upon recognition since it is a purely legal creation of rights and obligations, yet the other states have no constraints on them in law in recognizing the purported state.

The foregoing positions law and politics as enemies.<sup>248</sup> We return to the comment by Crawford that "'government'. . . has two aspects: the actual exercise of authority, and the right or title to exercise that authority."<sup>249</sup> Both of these choices, regarding the nature of the state or the source of legitimacy of the international system, are statements about the relationship between law and politics. States may recognize other states

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<sup>248</sup> See Yaël Ronen, Book Review, 99 AM. J. INT'L L. 953, 954 (2005) ("[T]here is an important distinction between nonrecognition based on a legal obligation (that is, when the de facto regime is flawed by reason of some illegality associated with its creation) and nonrecognition based on political considerations.").

<sup>249</sup> CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, *supra* note 48, at 57.

in one of two ways. As Koskenniemi described it: “it is either the *Führer* or the prudent statesman who finally gives formal legality its substance (legitimacy).”<sup>250</sup>

The standards for determining which entities are states and which are not must be perceived as legitimate.<sup>251</sup> Legitimacy has sometimes been established by incidents of the proper process and substance of the outcome, such as determinacy, coherence, and symbolic validation,<sup>252</sup> but legitimacy can also be established by acknowledging the role of state power in creating international law:

Sometimes there is a need for exceptional measures that cannot be encompassed within the general formulation of the formally valid rule. There may well be a time for revolution and the throwing off of valid law (and the profession that sustains it) altogether. However, none of this detracts from the need to know about valid law . . . Answers to the question about (valid) law are conditioned upon the criteria for validity that a legal system uses to define its substance.<sup>253</sup>

Here we are faced with two contradictory perspectives of international law.<sup>254</sup> If indeed law is “the projection of an imagined future upon reality,” and international law is “trapped between two imagined futures: one that is divisive, and the other that is universalizing [that] . . . will never amount to more than a means of suppressing and silencing those who do not conform to our vision of the world,”<sup>255</sup> then we can see potential motives behind adopting either perspective on state recognition theory. Examples of practice suggest that states use a mix of the two theories. Sometimes they are misstating or misleading regarding the theory they apply, and sometimes they are simply not intending to apply any particular theory. They switch from a theory of constrained power to unlimited power, from the creation of a new state to the acknowledgement of a pre-existing state, to justify desired political outcomes. Simply put, the continuity of Lithuania was western opposition to the U.S.S.R., whereas the non-recognition of the Bantustans was opposition to South African apartheid. The factors that contribute to this contest will depend on the

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<sup>250</sup> Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 17, 27 (Michael Byers ed., 2000) (describing the foundation of international relations political theory).

<sup>251</sup> See Franck, *Legitimacy in the International System*, *supra* note 244, at 706.

<sup>252</sup> See *id.*

<sup>253</sup> Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *supra* note 250, at 31-32.

<sup>254</sup> See Koskenniemi, *The Wonderful Artificiality of States*, *supra* note 107, at 23-24.

<sup>255</sup> Olmsted, *supra* note 239, at 476 (citing Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1604 (1986)).

unique situation itself.<sup>256</sup> “[T]he sovereignty of particular states, in the sense of their freedom of action, is often greatly limited by political realities. To speak of sovereignty as a uniform quality with respect to the United States and Andorra, for example, is not a piece of impressive sociological analysis.”<sup>257</sup> In many ways, the political goal of recognition now is to ensure some predetermined form of stability.<sup>258</sup> Of course, stability works to the benefit of certain actors. That period of dominance may have peaked with the fall of the Soviet Union. At first, we saw merely the dissolution of federal entities (e.g. U.S.S.R. and Yugoslavia), but we may come to see the increasing break away of autonomous regions (e.g. Kosovo and Quebec), and perhaps even the division of unitary states. As the entities for which stability was a benefit lose their power, that power may flow to entities for which stability is not a benefit. Another perspective, in many ways closely connected to stability, is that the ways in which societies are increasingly bound to each other and the depth of the interconnections through social, economic, and other connections may also determine which recognition policy is pursued with the goal of protecting and enhancing relationships.<sup>259</sup>

How we determine which avenue to follow in each case is perhaps a decision of the actor. “[T]he characterization of ‘political’ disputes depend[s] on the perspectives of the disputants themselves.”<sup>260</sup> Disputants whose ends are met through purely legal analysis may be satisfied with such analysis, but others may insist on a political-sociological analysis for different ends. We might be more open to this contest of perspectives in the future by addressing it as such and accepting that states are not the fixed and unchanging entities we would wish them to be. They may in fact be states for some purposes, and yet not for others. The two

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<sup>256</sup> See DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 55 (2001) (arguing that the choice between constitutive and declaratory theories is “ultimately . . . one of politics”).

<sup>257</sup> See Koskenniemi, *The Wonderful Artificiality of States*, *supra* note 107, at 28.

<sup>258</sup> See generally CAPLAN, *supra* note 71, at 2-3 (arguing that the E.C. borrowed the concept of political conditionality from international aid organizations and applied it to conditional state recognition as an instrument of conflict management and deterrence in the former Yugoslavia) (citing JENNIFER JACKSON PREECE, *NATIONAL MINORITIES AND THE EUROPEAN NATION-STATES SYSTEM* 44-8 (1998); Robert Cooper & Mats Berdal, *Outside Intervention in Ethnic Conflicts*, 35 *SURVIVAL* 118, 133-34 (1993)); see generally Karen E. Smith, *The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?*, 3 *EUR. FOREIGN AFF. REV.* 253 (1998).

<sup>259</sup> See PETERSON, *RECOGNITION OF GOVERNMENTS*, *supra* note 10, at 10 (“Because nonrecognition of a new regime can cause significant inconvenience for groups, firms, and individuals dealing with counterparts in another state . . .”).

<sup>260</sup> See Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *supra* note 250, at 22 (citing HANS J. MORGENTHAU, *La Notion du « Politique » et la Théorie des Différends Internationaux* 86-90 (1934)).



theories and aspects of the theories, in the end, dissolve into each other in the sense that they evidence these choices to find a position between two irreconcilable positions. Thus, in addition to seeing the choice between the two that is evidenced by the choice in recognition theories, we can also see the actor's understanding of the dualism of law and politics.

However, the hard choice between law and politics may be misleading, at least in terms of its strict division. We also must consider the relationship between politics and law, or rephrased, between power and authority, to understand the role of recognition and whether they are in fact such different and opposing concepts.<sup>261</sup> The exercise of power can create law,<sup>262</sup> but compliance with law can also crystallize power. We can see cases in which the force of politics eventually legitimated the existence of a new state and the people developed a sense of nationalism with an internal political debate. Many legal systems admit some form of prescription out of a need for law to accord with reality. "There may come a point where international law may be justified in regarding as done that which ought to have been done."<sup>263</sup> We also see cases in which a nation, without a territory, existed only in the minds of a people who sought the structure of that purported nation to debate their conceptions of the better life, but whose legitimacy as a "people" gave them a moral force and power to eventually realize independence and territorial sovereignty.

Neither law nor politics in the recognition theory sufficiently explain new states. Both choices are not supported by state practice, if state practice can even be assessed in this process, and both choices are, on their own, internally illogical. In the final analysis, state recognition theory cannot be resolved by appeal to clear legal principles, but may be seen as alternate justifications of state power or legitimacy. Strangely, the state, in recognizing other states, must be constrained and yet liberated at the same time. The actor will select the alternative more suited for the circumstances and its objectives, and yet, the convincing exercise of one justification may result in the achievement of the other. Perhaps we might even begin to discuss whether this flexibility in the recognition of states is in fact a positive aspect of state practice. The two must coexist without canceling each other out, yet they are inherently contradictory. It is then through this contest of perspectives, not by adhering to one perspective or the other, that states are recognized. What we find is a natural relationship between law and politics that does not position these two as enemies, but as parts of a process, though hopelessly incoherent, that can somehow contemplate two mutually destructive theories in a single system.

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<sup>261</sup> See Koskenniemi, *The Wonderful Artificiality of States*, *supra* note 107.

<sup>262</sup> See, e.g., CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 48, at 27 ("Even individual acts of recognition may contribute towards the consolidation of status . . .").

<sup>263</sup> *Id.* at 447.