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The CREATION and LEGAL STATUS of STATES

Discussions on Independent
Political Entities and Diminutive States
in Public International Law

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PREFACE

Public international law has special characteristics making it different from national law. Public international law is a horizontal legal system. The United Nations General Assembly is not a world legislature, the International Court of Justice can operate only on the basis of the consent of states to its jurisdiction, and law-enforcement capacity of the United Nations Security Council is limited. The old discussion on whether public international law is law is however a moot point. The general concept of law is subject to quite divergent views throughout the world, as has been shown by the modern discipline of comparative legal studies. It is based on different ideas, methods and traditions, as a consequence of historical and cultural diversity. This diversity is also relevant for proper understanding of the various national perceptions on the role and interpretation of public international law itself. A horizontal system of law is based on principles of reciprocity and consensus rather than command, obedience and enforcement.

What distinguishes the rules and principles of public international law from mere morality is that they are accepted in practice as legally, not morally, binding. While public international law is weaker than national law from the viewpoint of independent enforcement, it still provides the external relevant terms of legal reference for the conduct of states in their international relations, based on the fact that they are members of an existing international community. The fact that regional public international law, for instance the law of the European Union, can be seen as a vertical system of law, makes the discussion on whether public international law is law even more complex. For the reasons mentioned public international law is law, and the author's choice of subject.

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1 INTRODUCTION

1.1 Introduction

1.1.1 Objectives

Public international law consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical. The impact of politics is more immediately recognisable and relevant in public international law than in national law, considering the decisive significance of various factors of power. The functioning of public international law in structuring the international system has nevertheless been enhanced because of increasing global interdependence of states in regulating their intercourse rationally. In general, states are careful to observe obligations, and spectacular cases of violation of public international law are exceptional and should not be confused with the ordinary course of business between states. Public international law is predominantly made and implemented by *states*. Only states can be members of the United Nations, only states are entitled to call upon the United Nations Security Council if there is a threat to international peace and security, only states may appear in contentious proceedings before the International Court of Justice, and only states can present a claim on behalf of a national who have been injured by another state, if there is no treaty to the contrary.

In other words, the international legal system is primarily geared towards the international community of states, represented by governments. It is therefore necessary to have a clear idea of what a *state* is and how it emerges, that is, its creation and legal status.¹ During the decolonisation process members of the United Nations confronted the problems regarding *diminutive states*. The equality in terms of membership for these very small states with larger states raised a number of questions, for example whether such states could be admitted as members, and if the United Nations could give diminutive states the same right to vote as larger states in the General Assembly.² Diminutive states have been discussed in economic and political studies, although if we look on the amount of works written on public international law and very small states, we would be forced to conclude that not enough interest exist, considering the fact that these entities, as special entities of public international law, constitute $\frac{1}{4}$ of all states. It is therefore important to study diminutive states, that is, in this case to discuss how they function in the European community and what law – in particular rules and principles governing the creation and legal status of states, and public international law in general – can learn from their existence.

¹ Malanczuk, P., *Akehurst's Modern Introduction to International Law* (1997), passim.

² Therattil, J.J., *Small States and Territories – Status and Problems* (1971), passim.

The first objective is to understand how states emerge, that is, how states are created according to public international law. It is essential to find out what modes of transfer of sovereignty over territory that are justifiable in public international law, what individuals that may establish statehood and, in addition, under what circumstances. Considering the fact that very small states exist, it is also interesting to find out if there is any numerical limitation as to the number of inhabitants of new states. *The second objective* is to understand what a state is according to the criteria for statehood. Legal philosophy may add to the definition of a state, although we are here concerned with public international law and the established rules and principles with respect to the legal status of states, not various philosophical ideas. International relations of states are especially important since all states are subject to varying degrees of pressure, and because too much external influence from other states and organizations may constitute a problem for statehood. Even though one cannot say, without any uncertainty, that external influence is more problematic to diminutive states than to larger states, we are in particular concerned with the international relations of very small states. International relations of very small states are important, in part because diminutive states are of general interest, but also since very small states, often similar to various forms of entities that are *not* states, may add to the definition of a state.

The third objective is to understand how diminutive states function in the European community and what law – in particular rules and principles governing the creation and legal status of states, and public international law in general – can learn from their existence. The smallest historical European states are here chosen as *examples* because they emerged from a longstanding traditional unit outside the colonial context, situated in Europe and confronted with a growing European integration, in addition, often unheard of. Thus, these states may help us to understand what a state is according to the criteria for statehood, how diminutive states function in the European community, and what law can learn from their existence. Considering the objectives mentioned above there are, in other words, *three main questions*: How are states created according to public international law? What is a state according to public international law? How do diminutive states function in the European community and what can law learn from their existence? Nevertheless, before focusing on these questions it is necessary to comment on the history and purpose of public international law, to discuss the disposition, method and materials, and to comment on the various forms of entities concerned in the subsequent chapters, that is, states and integrated areas, federations and dependencies, the European Union, and colonial territories. In addition, it is important to understand the various forms of public international law, including relevant sources of law and their relations *inter se*.

1.1.2 Public International Law

Public international law has special characteristics making it different from national law. As mentioned, it consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical. Public international law is, as discussed, predominantly made and implemented by states, as subjects of law. Public international law is not a European phenomenon only. However, the origin of classical and contemporary, in contrast to ancient, public international law is considered to be the period after the *Peace of Westphalia* (1648), that is, when France and Sweden were recognised as major powers and revised the geopolitical map of Europe. As a result of the new political order the first modern centralised states began to emerge, inspired by earlier political philosophers and various theories of sovereignty and nationalism.³ It reminds us about the fact that state structures have always been subject to change, and that the geopolitical situation has been modified for about six thousand years. Thus, it is not the purpose of public international law to maintain the status quo of the geopolitical situation, but to provide a peaceful alternative for the adoption of modifications.⁴

1.1.3 Disposition

Subsequent to chapter one the second chapter sets forth the sources of public international law. Chapter three focuses on independent political entities, and in particular the general position of diminutive states. Chapter four and five set forth the legal aspects of public international law regarding the most important rules and principles governing the creation and legal status of states, in particular the transfer of sovereignty over territory and the criteria for statehood. There is a clear emphasis on the general legal aspects, thus chapter four and five do not explicitly consider the existence of very small states. Chapter six sets forth the phenomenon of diminutive states and emphasises, as discussed, in particular the smallest historical European states, chosen as examples because they emerged from a longstanding traditional unit outside the colonial context, situated in Europe and confronted with a growing European integration, in addition, often unheard of. The same chapter focuses on relations with larger (neighbouring) states, and international organizations, that is, politics, in contrast to the legal aspects in chapter four and five. In chapter seven the exceptional case of the State of the Vatican City is presented. Having collected relevant elements, chapter eight sets forth an analysis in which the questions raised will be answered in accordance with the findings of preceding chapters. Chapter eight is followed by Addendum and References.

³ Malanczuk, op. cit. n. 1, pp. 9-11, 17.

⁴ See for example, Charter of the United Nations, chapter 1: *Purposes and principles*.

1.1.4 Method and Materials

The *method* used is broader than a method of legal research in the sense of ways to identify and locate primary and secondary sources. It is also different from abstract theories that explain the nature of law but are without application to particular problems. The method used is a theory of public international law to the problems faced in the community of states. The study is an examination of public international law and politics that in particular focus upon describing the law as it is and, in general, doing so without normative elements. A connection is established between, on the one hand, public international law / legal science, and on the other hand, the existence and functioning of states in the international community / empirical science. Thus, the method used is interdisciplinary. The *legal material* used is the primary and secondary sources of public international law examined in chapter three, that is, conventions, custom, general principles, judicial decisions and doctrine. These sources have been found in the titles enumerated under References. The *empirical material* used is doctrine and various facts, which have been found in the titles enumerated under References, for instance, the U.S. Central Intelligence Agency, the U.S. Department of State, the European Union and the United Nations.

1.2 Territories

In order to study the creation and legal status of states from the perspective of diminutive states, there is a need to comment on the various forms of entities discussed in the subsequent chapters. All entities concerned have an attachment to a *territory*, although they are not necessarily states. *States* are independent political entities accepted by the international community of states, either because they meet the legal criteria for statehood in accordance with public international law, or due to constitutive recognition. It is a *contradictio in terminis* to speak of dependent states, since states are by definition independent. In addition, it is misleading to use the term independent states, because all states, even the strongest, are subject to varying degrees of pressure and influence from other states. *Integrated territories* are fully integrated areas of a state, and *dependencies* are territorial entities under authority of a state in external affairs, although to varied degrees independent in internal issues. Examples of dependencies are member states of federations, self-governing territories, autonomies and various areas of special sovereignty. The European Union is regarded as an organization *sui generis*, that is – unique, but it is not a federation. *Colonial territories* can be considered as integrated, dependent or colonial, although the United Nations refer to them as Non-Self-Governing and Trust Territories, in accordance with public international law.⁵

⁵ See *infra*, subsequent chapters, *passim*.

2 SOURCES of LAW

2.1 Sources of Public International Law

2.1.1 Statute of the International Court of Justice

Public international law, in contrast to *private* international law, is hereinafter referred to as international law. What are the sources of international law? The Statute of the International Court of Justice of 26 June 1945, article 38, paragraph 1, is generally agreed to reflect the sources of international law, that is, international conventions (treaties, charters, covenants, statutes, declarations, provisions, protocols, etcetera) and international custom or customary law, general principles, judicial decisions and doctrine. In a legal sense, a *source of law* means the criteria under which a rule is accepted as valid in the given legal system at issue. These criteria distinguish binding law from moral norms. In this sense, the term source has a technical meaning related to the law-making process and must not be confused with research sources used for empirical facts.⁶ General international law refers to rules and principles that are applicable to a large number of states, on the basis of either customary international law or multilateral treaties. If they become binding upon all states, they are often referred to as universal international law. Regional international law applies only to a certain groups of states, for instance the law of the European Union. In addition, the term particular international law is used to denote rules that are binding upon two or a few states only. Thus, what are the most important aspects of the sources mentioned above and enumerated in Article 38, paragraph 1 of the Statute of the International Court of Justice?

2.1.2 Conventions and Custom

Where there is agreement about rules of customary law, they are in general codified by *conventions*. Conventions only apply to parties that agree to

⁶ Brownlie, I., *Principles of Public International Law*, 4th edn. (1990), p. 1-3; Hart, H.L.A., *The Concept of Law* (1961), p. 246-247; see also Sepúlveda, C., "Methods and Procedures for the Creation of Legal Norms in the International System of States", *German Yearbook of International Law* (1990), passim.

them, and only subjects of international law, that is – states, organizations and other traditionally recognised entities, can conclude treaties under international law. Other subjects are covered by national, or private international, law. International conventions are regarded as *lex specialis*.⁷ International *custom* / customary law is constituted by two elements, the objective one of a general practice of states, and the subjective one of a general practice of states accepted as law – the *opinio iuris sive necessitatis* of states. The main evidence of customary law is to be found in treaties and the actual practice of states. Practice can be gathered from documents of the United Nations, for example resolutions, including judgements and various forms of published materials. Major inconsistencies in the practice, that is, a large amount of practice that goes against the rule in question, prevent the creation of a customary rule. Minor inconsistencies do not prevent the creation of a customary rule, although in such cases the rule in question probably needs to be supported by a large amount of practice. Where there is no practice that goes against an alleged rule of customary law, it seems that a small amount of practice is sufficient to create a customary law, even though the practice involves only a small number of states and has lasted only for a short time.⁸ General practice should reflect wide acceptance among the states particularly involved in the relevant activity, but it does not require the unanimous practice of all states or other international subjects. A state can be bound by general practice of other states if it does not protest against the emergence of the rule and continues persistently to do so. State practice also includes omissions, that is, what states do *not* do, and state practice consists not only of what states do or not do, but also of what they say. As mentioned, state practice must be accompanied by the *opinio iuris sive necessitates*, usually defined as a conviction felt by states that a certain form of conduct is required by international law. In contrast, *comitas gentium*, that is, international courtesy or *courtoisie*, is practice observed between states without any sense of legal obligation. Generally accepted law automatically binds new states, but many questions are far from settled concerning the universality of international law. International custom / customary law is regarded as *lex generalis*.⁹

2.1.3 Additional Sources

Other sources of international law are general principles of law, judicial decisions and legal doctrine. *General principles of law* are not so much a source of law as a method of using existing sources, although general

⁷ Malanczuk, op. cit. n. 1, pp. 2, 36-39; see also Klabbers, J., *The Concept of Treaty in International Law* (1996), passim; Reuter, P., *Introduction to the Law of Treaties*, 3rd edn. (1995), passim.

⁸ Bernhardt, R., “Customary International Law”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume I (1992), pp. 898-905; Malanczuk, op. cit. n. 1, pp. 39-48; see also Elias, O., “The Nature of the Subjective Element in Customary International Law”, *International and Comparative Law Quarterly* (1995), pp. 501-520; Kirchner, J., “Thoughts about a Methodology of Customary International Law”, *Austrian Journal of Public and International Law* (1992), pp. 215-239; Wolfke, K., “Some Persistent Controversies regarding Customary International Law”, 24 *Netherlands Yearbook (...)* (1993), pp. 1-16.

⁹ *Ibidem*.

principles of law can also represent principles based on natural justice common to nearly all states and legal systems. Besides, in international law courts are not obliged to follow previous *judicial decisions* as courts of lower instance in *common law* systems, although they almost always take previous decisions into account. Like judicial decisions, *legal doctrine* can be evidence of customary law and also have influence in developing new rules, although one should remember that decisions and doctrine are *subsidiary means*.¹⁰

2.1.4 General Assembly Resolutions

A *resolution* of the United Nations General Assembly is not legally binding but can be evidence of customary law because it reflects the views of the states voting for it. A resolution declaring that something ought to be the law is obviously not evidence that it is the law. However, if a resolution declares that something is the law, it can be used as evidence. The value of such a resolution varies in proportion to the number of states voting for it. If many states vote against it, its value as evidence of customary law is reduced. Resolutions, especially a series of resolutions, can provide evidence important for establishing the existence of a rule or the emergence of an *opinio iuris sive necessitatis* required for the establishment of a new rule.¹¹

2.2 Hierarchy of Sources

The relationship between treaties / *lex specialis* and custom / *lex generalis* is particularly complicated. Treaties and custom are of equal authority, but a later law repeals an earlier law – *lex posterior derogat priori*. However, a later law, general in nature, does not repeal an earlier law that is more

¹⁰ Malanczuk, op. cit. n. 1, pp. 48-52; Mosler, H., “General Principles of Law”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume II (1995), pp. 511-527; see also Degan, V.D., “General Principles of Law”, 3 *Finnish Yearbook of International Law* (1992), pp. 1-102.

¹¹ Malanczuk, op. cit. n. 1, pp. 52-54; Schermers, H.G., “International Organizations”, “Resolutions”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume II (1995), pp. 1333-1336; see also Sloan, B., *United Nations General Assembly Resolutions in Our Changing World* (1991).

special in nature – *lex posterior generalis non derogat priori speciali*, and a special law prevails over a general law – *lex specialis derogat legi generali*. Thus, a treaty overrides customary law as between the parties to the treaty, and two or more states can derogate from customary law by concluding a treaty with different obligations, the only limit to their freedom of law-making being rules of *ius cogens* – peremptory norms of general international law. Peremptory norms of general international law are basic principles of law which states are not allowed to contract out of. A rule cannot become a peremptory norm of general international law unless it is accepted and recognised by the international community of states as a whole. Without being able to discuss peremptory norms of general international law here, it should be reminded that *ius cogens* is connected with the concept of *erga omnes* obligations, norms which are the concern of all states, and the acceptance of the notion of *international crimes*. Finally, however, the different sources of international law mentioned in the preceding chapters are not arranged in a strict hierarchical order. Supplementing each other, in practice they are often applied side by side. Nevertheless, if there is a clear conflict, treaties prevail over custom and custom prevails over general principles and the subsidiary sources of judicial decisions and legal doctrine. However, as mentioned, states are not allowed to contract out of rules of *ius cogens*.¹²

¹² Bernhardt, R., “Customary International Law”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume I (1992), p. 899; Malanczuk, op. cit. n. 1, pp. 57-60; see also Akehurst, M., “The Hierarchy of the Sources of International Law”, 47 *British Yearbook of International Law* (1975), pp. 273 et seq.; Czaplinski, W. and Danilenko, G., “Conflicts of Norms in International Law”, 21 *Netherlands Yearbook of (...) Law* (1990), pp. 3-42.

3 STATES / MICROSTATES

States are ranked as superpowers, major powers, middle powers, small states and very small states, or diminutive states. Diminutive states are also referred to as *microstates*. The ranking of a state is based on various criteria such as the size of the population, territory, economy, military capacity and international influence.¹³ Microstates are special entities of international law, and the term is consistent with the terminology¹⁴ of the United Nations Secretary General. What distinguishes them from other subjects of law is their miniaturisation. There is no official definition of the term, although one can divide them into three categories. The largest not extending one million inhabitants, microstates with a population of not more than hundred thousand, and exceptionally diminutive states with thousand inhabitants or less. Without giving further quantitative limits, it suffices to recall that microstates are states with a small population, and in general a small territory. The World has 6.3 billion inhabitants in 192 states, including various forms of dependencies, in total about 270 entities and areas of special sovereignty. The geopolitical map encompasses more than forty microstates. Although diminutive, there is no reason to believe that the constitutional and legal organisation of microstates varies substantially from those encountered in larger states, for example, there are democratic state structures in most of the European microstates.¹⁵ States are in general referred to as independent political entities. The definition of microstates does not entail any changes in the existence, applicability and legal consequences of a rule of international law. States are distinct legal persons in international law. However, microstates are not. When we are defining a microstate, we are not attempting to create a new and different legal person, for microstates do not have specific rights or duties which international law confers solely upon them – they are states. In other words, no treaty, no rule of international customary law, nor any other rule of law bestows rights or duties upon a microstate as such, or as a distinct subject of law.¹⁶ Nevertheless, the use of the word state does not necessarily mean that the territory concerned is a state according to the *legal* criteria for statehood. An entity accepted as a state by the international community can be regarded as legitimate even if statehood has not been established. Thus, microstates do not form by themselves a separate subject of law – they are states according to the *legal* criteria for statehood or as a result of *political* acceptance. However, if they are not states in any sense, they are not microstates either. As mentioned in chapter one, the United Nations confronted the problems regarding diminutive states during the decolonisation process in the 1960s.

¹³ Berridge, G., *International Politics (...)*, 3rd edn. (1997), pp. 10-21.

¹⁴ Ehrhardt, D., *Der Begriff des Mikrostaats (...)* (1970), p. 14.

¹⁵ Central Intelligence Agency (USA): *The World Factbook 2002*:
<<http://www.odci.gov/cia/publications/factbook/index.html>> (1 June 2003);

U.S. Census Bureau (USA): *International Data Base*:
<<http://www.census.gov/ipc/www/idbnew.html>> (1 June 2003);

U.S. Department of State (USA): *Countries and Regions*:
<<http://www.state.gov/countries/>> (1 June 2003).

¹⁶ See *supra*, chapter 1: *Introduction*, and *infra*, *passim*.

The equality in terms of membership for microstates with larger states raised a number of questions, for example whether such states could be admitted as members, and if the United Nations could give diminutive states the same right to vote as larger states in the General Assembly. The Charter of the United Nations of 26 June 1945, article 4, point 1, reads: "Membership in the United Nations is open to all other peace-loving *states* which accept the obligations contained in the present Charter, and in the judgement of the Organization, are able and willing to carry out these obligations". Article 4, point 2 states: "The admission of any such *state* to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council". This means that both the Security Council and the General Assembly must vote in favour of admission. In addition, article 18, point 1, reads: "Each member of the General Assembly shall have *one* vote", n.b. emphasis added. These provisions have never been changed. Thus, the principle of universality of membership of all states succeeded without solving the underlying issue of voting rights and by circumventing the question whether such states are actually able to carry out the obligations required by the United Nations.¹⁷

Considering the provisions mentioned, a member of the United Nations should be considered a state. On the other hand, an accession to the United Nations is not an official international recognition, and one cannot rule out admittance even if statehood has not been established according to the legal criteria. However, an accession doubtless encourages a state's international activities and stimulates individual states to recognise the entity as a state in the international community.¹⁸ A distinction can be drawn between the historic microstates, and the many microstates originating in the framework of decolonisation. The first microstate to participate in the international system as acknowledged formal equal was Luxembourg, independent during the nineteenth century and one of the founding members of the United Nations. The international climate of scepticism for independence of diminutive entities changed with the cases of Cyprus and Malta, not to mention the decolonisation process outside the European context. During the subsequent decades dozens of diminutive states acquired independence, membership and equal participation in the United Nations. The historic European microstates, Andorra, Liechtenstein, Monaco and San Marino, were nevertheless confined to the margins of international diplomacy for a long time.

The sovereignty of these states was not challenged directly but their aspirations to engage the international system as equals after the Second

¹⁷ Herndl, K., "Admission of a State to Membership in the United Nations", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume I (1992), pp. 35-38; United Nations, *Charter of the United Nations*:

<www.un.org/Overview/Charter/contents.html> (1 June 2003); see also Dugard, J., *Recognition and the United Nations* (1987), passim; Gunter M.M., "What Happened to the United Nations Ministate Problem?", 71 *American Journal of International Law* (1997), pp. 110-124.

¹⁸ Ibidem; see also *infra*, 5.1.1., *Recognition*.

World War were refused just as their efforts to join the League of Nations had been denied in 1920. Nevertheless, the proliferation of diminutive states across the World during the decolonisation finally had the effect of facilitating for the European microstates to engage internationally diplomacy. In contrast with the League of Nations, and the United Nations until the 1960s, organizations no longer object to the admission of microstates as full members. The ultimate proof of the full acceptance of the principle of universality has been furnished by the United Nations through the admission¹⁹ of the historic European microstates. Liechtenstein and San Marino joined the United Nations in 1990 and 1992, and Monaco and Andorra obtained membership in 1993. Consequently, microstates are accepted as full members of the international community and are qualified for membership of international organizations, just as larger states. They are given the same right to vote in the United Nations General Assembly and, for example, to participate in international cooperation such as the Conference on Security and Co-operation in Europe, which bases its decisions²⁰ on consensus.²¹ In the twentieth century, the historic European microstates were completely dependent on their relations with larger neighbouring states. They are now able to present themselves to foreign governments and multilateral organizations directly and on their own terms. Initial scepticism about the prospects for microstates has been largely diminishing by their actual experience in an increasingly supportive world. In part, this is the consequence of exploiting jurisdiction as a resource unto itself.

The establishment of regional communities of various natures with ever-expanding areas of concern and the extension of international functionalism in inter-governmental organizations and agencies have all served to reinforce the independence of microstates. The forces of *integration* – membership of international organizations and distinctly defined relationships with regional communities as the European Union, and World *fragmentation* – the creation of new states in the international community, discussed in the subsequent chapters, are not in conflict as much as they are mutually reinforcing due to practical, economic and political relations.²²

¹⁹ United Nations, *Growth in United Nations Membership*: <<http://www.un.org/Overview/growth.htm>> (1 June 2003).

²⁰ Organization for Security and Co-operation in Europe (OSCE): <<http://www.osce.org>> (1 June 2003); see also Mosser, M.W., "Engineering Influence: The Subtle Power of Small States in the CSCE/OSCE", Gaertner, H., *Small States and Alliances* (2001).

²¹ Bartmann, B., *The Microstate Experience. Very Small States in the International System* (2000), chapter: Introduction; Central Intelligence Agency (USA), op. cit. n. 15; Malanczuk, op. cit. n. 1, p. 370; see also Crawford, J., "Islands as Sovereign Nations", 38 *International and Comparative Law Quarterly* (1989), pp. 227 et seq.; Mendelson, M.H., "Diminutive States in the United Nations", 21 *International and Comparative Law Quarterly* (1972), p. 612; Orlow, D., "Of Nations Small: The Small State in International Law", 9 *Temple International and Comparative Law Journal* (1995), pp. 115-140.

²² Bartmann, op. cit. n. 21, chapter: E; and *infra*, chapter 6: *International Relations* (...).

4 CREATION of STATES

4.1 Acquisition of Territory

4.1.1 Transfer of Sovereignty

Acquisition of territory is an abbreviated way of describing transfer of sovereignty over territory. The creation of states and transfer of sovereignty over territory are inseparable. Sovereignty is here used in a specialised sense. Sovereignty means the right to exercise therein, to the exclusion of any other state, the functions of a state. Thus, what are the modes of acquisition of territory? *Adjudication* and *arbitration*²³ before a tribunal or international court, for example the International Court of Justice, are sometimes listed as modes of acquisition, although they do not give a state any territory that it did not already own. *Operations of nature* are rare. Geological activity has nevertheless occurred on the Earth for about 4.6 billion years, thus territory can be acquired when rivers silt up or when volcanic islands emerge.²⁴ *Occupation* is the acquisition of *terra nullius*, that is, territory that immediately before acquisition belonged to no state. Nowadays there are hardly any parts of the world that could be considered as *terra nullius*. In addition, states have agreed not to make claims to particular territory, so that the territory in effect remains *terra nullius*, for example through the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies – the Outer Space Treaty of 27 January 1967, or the Antarctica Treaty of 1 December 1959 and the United Nations Convention on the Law of the Sea of 10 December 1982. The high seas, the deep sea floor, the outer space and Antarctica are therefore territory beyond any state jurisdiction. These areas are governed by the common heritage of mankind principle and thus remain *terra nullius*, although it should be mentioned that the principle is controversial.²⁵ *Construction* of artificial territory in international waters, or outer space, is in general not mentioned as a mode of acquisition of territory – yet.

In the 1960s, numerous artificial islands were declared independent. None

²³ See *infra*, 6.2., *Microstates and Conflicts*.

²⁴ Malanczuk, *op. cit.* n. 1, pp. 147-172; see also Munkman, H., “Adjudication and Adjustment, International Judicial Decision and the Settlement of Territorial and Boundary Disputes”, 46 *British Yearbook of International Law* (1973), pp. 1-116.

²⁵ Malanczuk, *op. cit.* n. 1, pp. 147-172, 207-208; Wolfrum, R., “Common Heritage of Mankind”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume I (1992), pp. 692-695.

of the projects was successful, although controversial jurisdictions²⁶ exist. In general, commentators dismiss that international law would permit a new sovereign territory to claim an artificial island on the high seas, although the common heritage of mankind principle remains untested.²⁷ Space and time literally emerged when the Universe was shaped more than 14 billion years ago. The geometry of the Universe, including billions of galaxies, suggests that it may have an infinite size and that it will expand *ad infinitum*. Nevertheless, considering the fact that more and more states have become involved in outer space and that space technology is continuously advancing, the discussion on *terra nullius* in the Universe is no longer exotic. Occupation, or construction of artificial territory, in international waters and outer space undeniably face formidable technical and legal barriers, but one cannot dismiss the possibilities. For instance, not more than 50 years ago communication satellites were science fiction.²⁸ It is probable that construction, alongside occupation, is going to confront the notion of *terra nullius* in the future.

Prescription is based on effective control, for a considerable period of time, over territory that once belonged to another state. Prescription is interlinked with the principle *ex factis ius oritur*, discussed in chapter five. *Conquest* means transfer of territory to the victor in case of war, which the victor can use to create new political entities. Conquest can be excluded due to the prohibition of the use of force and the fact that the international community of states, in general, do not recognise such acts.²⁹ *Imposed solutions*, or the creation of states under the authority of an international organization without the approval of the populations concerned, was used after the First and Second World War due to territorial disputes. It resulted in *The Free City of Danzig* and the *Free City of Trieste*. It is not an accepted mode of acquisition. For further aspects on conquest and imposed solutions, confer discussions³⁰ on illegal entities.³¹ It should be stressed that all the modes of acquisition mentioned above are either theoretical, or prohibited according to international law.³²

²⁶ For example, the *Principality of Sealand*, an artificial territory in the North Sea at Latitude 51.53 N, Longitude 01.28 E. Area (circa): 0.006 square kilometres. See Principality of Sealand, *Official Website of the Government*: <http://www.principality-of-sealand.org/welcome_e.html> (1 June 2003).

²⁷ Münch, F., "Artificial Islands and Installations", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 11 (1989), p. 38; see also Kardol, R., *Proposed Inhabited Artificial Islands in International Waters* (1999), passim; Papadakis, N., *The International Legal Regime of Artificial Islands* (1977), pp. 55-79, 113-115; Walker, C., "Jurisdictional Problems Created by Artificial Islands" (1973), 10 *San Diego Law Review*, pp. 638, 648-652.

²⁸ Malanczuk, op. cit. n. 1, pp. 201-207; *et al.*

²⁹ Fleischhauer, C.A., "Prescription", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 10 (1987), pp. 327-330; Kussbach, E., "Conquest", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume I (1992), pp. 756-759; Malanczuk, op. cit. n. 1, pp. 147-172, 207-208, 309-311; Wolfrum, op. cit. n. 25.

³⁰ See *infra*, 5.1.8., *Legality of Origin*.

³¹ Hannum, H., *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (1990), p. 375, 401-403; see also *supra* n. 29.

³² Malanczuk, op. cit. n. 1, p. 147.

A territory once acquired by occupation, prescription or conquest, and not questioned due to territorial control for a considerable period of time, may be seen as a specific mode of acquisition of territory – *historic evolution*, that is, the birth of a state and transfer of sovereignty over territory through the emergence from a longstanding traditional unit, for example the *Republic of San Marino*, established 301 A.D. On the other hand, in general the creation of new states does not correspond to what have been discussed.³³ *Cession* is a more realistic mode of transfer of sovereignty over territory from one state to another, and may occur through conflict or consensus. Cession through conflict is referred to as secession. *Secession* is the process by which a particular group seeks to separate itself from the state to which it belongs, and to create a new state on part of the territory of that state. Secession is not the same as conquest, although there are similarities. *Devolution* and *decolonisation* are consensual processes by which a state confers independence on a particular territory and people by legislative or other means. Thus, the key difference between secession and devolution, or decolonisation, is that the former is essentially a unilateral process, whereas the latter is bilateral and thus consensual. In contrast to the consensual processes, secession is a threat to peace and security. A new state, which comes into existence after cession, is referred to as the *successor state*, and the state that has lost territory is referred to as the *predecessor state*.³⁴

What are the results of acquisition of territory? In general *new states* are created on part of the territory of existing states as there is no *terra nullius* left, or only territory left that has to remain *terra nullius*. Sometimes existing states dissolve and the new entities remain independent or unite in another form. It is also possible to acquire territory without creating states. Alternatives to independence are, for example, integration or association. Association implies that the successor territory obtains internal self-government within, in general, another state than the predecessor state. States may also *enlarge* their territory through cession or, in theory, the other modes of acquisition. *State succession*, on the other hand, is a term used to refer to the legal consequences of acquisition, that is, the complex of legal issues that arise when there is a change of sovereignty with respect to a particular territory. State succession will not be examined.³⁵ There is no doubt that devolution, decolonisation and secession are the most common ways of creating states. However, are these modes of acquisition of territory justifiable in international law? Moreover, if devolution, decolonisation and secession are legitimate, who are then allowed to secede and under what circumstances? Since international law has to provide a peaceful alternative for the adoption of geopolitical changes, the questions raised are of the utmost importance, and therefore discussed in the subsequent chapters.

³³ Malanczuk, op. cit. n. 1, pp. 147-148; see also *supra* n. 29, passim.

³⁴ Crawford, J., *The Creation of States in International Law* (1979), passim; Crawford (1997), *infra*, n. 66. para. 6-10; Malanczuk, op. cit. n. 1, pp. 147-172.

³⁵ Crawford, op. cit. n. 34, pp 367-377, et passim; Malanczuk, op. cit. n. 1, pp. 147-172.

4.1.2 Theory of Self-Determination

The ancient theory of self-determination refers to the right of individuals living in a territory to determine the political and legal status of that territory. Is there then a *legal right* to self-determination in international law? The main interest is to find an international customary rule of law granting a right of self-determination to a defined subject of law. To that end, we have to establish a general state practice combined with an *opinio iuris sive necessitatis*. The philosophical idea behind the theory of self-determination has historically been that every human being is entitled to control his own destiny. Aristotle was one of the first to propagate this. The modern principle of self-determination had its origins in the atrocities of dominant regimes and annexations in wartime. At last, it was therefore invoked during the American independence, the French revolutions and after the First and Second World War. The principle was introduced before the Council of the League of Nations and before the Permanent Court of International Justice, as a principle applicable to all peoples. In the end, it was only applied to certain peoples. States feared that the principle would be invoked by peoples for whom they had not intended it, in particular peoples within an existing state, for a secession would lead to a diminution of the state's wealth, resources and power, thereby lowering its economic stamina, defensive capability and potential international influence. The principle remained limited. Before the Second World War, it comprised the freedom of an undefined people to choose its form of government and to opt for a certain degree of autonomy or self-government *not* implying independence.³⁶

The first official document embodying the principle of self-determination is the Joint Declaration of the President of the United States and the Prime Minister of the United Kingdom of 14 August 1941, or the Atlantic Charter. The second principle enunciated in the Charter is their desire "(...) to see *no territorial changes* that do not accord with the freely expressed wishes of the peoples concerned". The third principle proclaims "(...) the *right of all peoples* to choose the form of government under which they will live (...)", and that "(...) sovereign rights and self-government [should be] restored to those who have been forcibly deprived of them", n.b. emphasis added. At the time, only internal self-determination was an accepted principle, that is, the right to choose a form of government within a community, without changing the boundaries.³⁷

³⁶ Buchheit, L.C., *Secession: The Legitimacy of Self-Determination* (1978), pp. 27, 65 et seq; see also Connelly, A.M., "The Right of Self-Determination and International Boundaries", Constantopoulos, D.S. (ed.), *Thesaurus Acroasium*, volume XIV (1985), p. 549; Cristescu, *infra*, n. 43, *passim*, *et al.*

³⁷ Yale Law School, *The Avalon Project*: <http://www.yale.edu/lawweb/avalon/wwii/atlantic/at10.htm> (1 June 2003); see also American Society of International Law, *American Journal of International Law: Official Documents*, 35th Supplement (1941), p. 191-192.

4.1.3 Charter of the United Nations

The phrase *self-determination of peoples* is for the first time officially mentioned in the Charter of the United Nations of 26 June 1945. Hereinafter the UN Charter. The principle as such is referred to in article 1, which states: “The purposes of the United Nations are: (...) 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”. The principle is also referred to in article 55 which enumerates the objectives the United Nations shall promote “(...) based on respect for the *principle of equal rights and self-determination of peoples* (...)”, n.b. emphasis added. The text of the UN Charter does not elucidate the exact meaning of self-determination.³⁸ Questions were raised concerning the actual meaning of the principle of equal rights and self-determination of peoples, but an unambiguous answer could not be given at the time.³⁹ Article 73 and 76 applies to Non-Self-Governing and Trust Territories, that is, colonial territories. Article 73 provides: “Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government [accept the obligation to promote self-government]”. The term *self-government* is referred to in both article 73(b) and article 76(b). Does self-government include independence? Following the text of articles 73 and 76 literally, the answer would be in the negative. For example, article 76(b) refers to the “development towards self-government or independence”. Both terms seem to be alternative and different from each other. Article 73 and 76 will be further discussed.⁴⁰

At the time of the drafting of the UN Charter, no *right* of self-determination could be proved to exist in international law. The concept of self-determination did not include the right of dependent peoples to be independent, or even to vote, but was linked to the equal rights of states in the sense of protecting the people of one state against interference by another state. The principle of self-determination incorporated into the UN Charter brought nothing new to the principles enunciated in the Atlantic Charter. On the other hand, the principle found its place in a legally binding document and could begin to develop and define itself in international law through the activities of the United Nations.⁴¹

³⁸ United Nations, *Charter of the United Nations*, op. cit. n. 17.

³⁹ Malanczuk, op. cit. n. 1, pp. 326 et seq.; Zieck, *infra*, n. 62, p. 29.

⁴⁰ United Nations, *Charter of the United Nations*, op. cit. n. 17.

⁴¹ Buchheit, op. cit. n. 36, p. 73; Cassese, A., *UN Law / Fundamental Rights: Two Topics in International Law* (1979), p. 137-165; Malanczuk, op. cit. n. 1, pp. 326 et seq.

4.1.4 General Assembly Resolutions

On the basis of articles 1 and 55 of the UN Charter, the United Nations General Assembly formulated a number of recommendations in the form of resolutions that helped to form the notion of self-determination. These resolutions marked the new era of decolonisation, when dozens of diminutive states acquired territory, independence, membership and equal participation in the United Nations. One of the first of such recommendations was General Assembly Resolution 637 (VII) of 16 December 1952, in which the principle of *self-determination* was proclaimed as a *right* relating to peoples of Non-Self-Governing and Trust Territories.⁴²

The most famous resolution on the right of self-determination to which numerous later resolutions have referred, is General Assembly Resolution 1514 (XV) of 14 December 1960, or the Declaration on the Granting of Independence to Colonial Countries and Peoples. Hereinafter the Declaration. Paragraph 2 of the Declaration reads: “*All peoples* have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economical, social and cultural development”, n.b. emphasis added. In contrast to Resolution 637 (VII), the right to self-determination is conferred on *all peoples*, not just colonial⁴³ peoples, although the title of the Declaration could make us think otherwise. The Declaration extends clearly the scope of article 1 and articles 55, 73(b) and 76(b) of the UN Charter. Compared with the UN Charter, the Declaration sets a *right of self-determination for all peoples*, and according to its paragraph 3 and 5, the wishes of the peoples are the only condition determining the political status.⁴⁴ In conjunction with the UN Charter, the Declaration supports the view that self-determination is a legal principle.⁴⁵ The Declaration also sets forth the important principle of *territorial integrity*. Paragraph 6 specifies that the right of self-determination should not lead to a partial or total disruption of the national unity and the territorial integrity of a state. It would be incompatible with the purposes and principles of the UN Charter.⁴⁶ The Declaration is complemented by General Assembly Resolution 1541 (XV) of 15 December 1960 which, *inter alia*, explains that *self-government* includes independence, thus giving a

⁴² GA Res. 637 (VII) of 16 December 1952, document symbol: A/RES/637(VII); United Nations, *Official Document System of the United Nations*: <<http://www.ods.un.org/ods/>> (1 June 2003).

⁴³ Cristescu, A., *The Right to Self-Determination: historical and current development on the basis of United Nations instruments* (1981), p. 10, para. 52.

⁴⁴ GA Res. 1514 (XV) of 14 December 1960, document symbol: A/RES/1514(XV); United Nations, *Official Document System of the United Nations*, op. cit. n. 42.

⁴⁵ Brownlie, I., *Principles of Public International Law* (1995), p. 597; Detter, I., *The International Legal Order* (1994), p. 56.

⁴⁶ Cristescu, op. cit. n. 43, p. 40, para. 279; Detter, op. cit. n. 45, pp. 57 et seq; Hannum, op. cit. n. 31, p. 36; Malanczuk, op. cit. n. 1, pp. 326-340, et passim; Moore M., *National Self-Determination and Secession* (1998) p. 3.

more detailed interpretation of articles 73(b) and 76(b) of the UN Charter. It also upholds the principle of territorial integrity.⁴⁷

4.1.5 International Covenants on Human Rights

The initiative for including the right of self-determination in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 16 December 1966, hereinafter the Covenants, came from the General Assembly and its Resolution 545 (VI) of 5 February 1952. The article on self-determination, identical in both Covenants, became article 1 and reads: “1. All peoples have the right of self-determination (...)”. The Covenants do *not* specify that the right of self-determination should not lead to a partial or total disruption of the territorial integrity of a state. However, article 4, paragraph 1 of the International Covenant on Civil and Political Rights provides for the possibility of derogation from the obligations under the Covenant in time of public emergency, which threatens the life of the nation.⁴⁸ Article 1 declares the right of self-determination as a universal right, thus belonging to all peoples. The drafting states could easily have specified the right of self-determination by granting it only to the population of existing states and to the inhabitants of Non-Self-Governing and Trust Territories. They did however nothing of that sort, preferring to vest the right in *peoples*, a more universal and general concept. What a people was, was not clarified. Thus a legal instrument was created, without the knowledge of whom the precise holders of the right were. Nevertheless, the Covenants both strengthened and widened the right of self-determination. In addition, for the first time the *right of self-determination* had a *binding force*. The Covenants have been ratified by a large majority of the World’s states, and the formulation of the right in a legally binding instrument, permitted the development of state practice and the interpretation of the right.⁴⁹

⁴⁷ GA Res. 1541 (XV) of 15 December 1960, document symbol: A/RES/1541(XV); United Nations, *Official Document System of the United Nations*, op. cit. n. 42; and n. 46.

⁴⁸ GA Res. 545 (VI) of 5 February 1952, document symbol: A/RES/545(VI); United Nations, *Official Document System of the United Nations*, op. cit. n. 42; Malanczuk, op. cit. n. 1, pp. 215-217, 326-340.

⁴⁹ Cassese, op. cit. n. 41, pp. 55 et seq.; Cristescu, op. cit. n. 43, p. 9, para. 47 et seq.; Detter, op. cit. n. 45, pp. 57 et seq.; Malanczuk, op. cit. n. 1, pp. 215-217, 326-340.

4.1.6 General Assembly Resolution 2625

On 24 October 1970, the General Assembly adopted Resolution 2625 entitled the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the so-called Declaration on Friendly Relations (or General Assembly Resolution 2625). Hereinafter Resolution 2625. According to the preamble of Resolution 2625, the principles enunciated are codified and constitute basic principles of international law. Paragraph 1 reads: “By virtue of the principle of equal rights and self-determination of peoples (...) all peoples have the right freely to determine, without external interference, their political status (...), and every state has the duty to respect this right in accordance with the provisions of the [UN] Charter”. Paragraph 2 reads: “Every state has the duty to promote (...) [the] realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the [UN] Charter (...) and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples]”. However, paragraph 2 does not intend to restrict violations to the cases mentioned, that is, alien subjugation, domination and exploitation.⁵⁰

The recognition by the General Assembly of the principle of equal rights and self-determination as a principle of the UN Charter and a basic principle of international law was a very important step to put an end to the various disputes concerning the legal nature of the principle. All peoples should be included but no final definition of peoples was reached.⁵¹ Paragraph 6 reads: “The territory of a colony or other Non-Self-Governing Territory has, under the [UN] Charter, a status separate and distinct from the territory of the state administering it”. Consequently, the administering state cannot rely on the respect for its *territorial integrity*. The independence of a colony cannot be a case of secession for it never constituted a part of the metropolitan state. Paragraph 7 – the safeguard clause, reads: “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the *territorial integrity* or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race,

⁵⁰ GA Res. 2625 (XXV) of 24 October 1970, document symbol: A/RES/2625(XXV); United Nations, *Official Document System of the United Nations*, op. cit. n. 42; Malanczuk, op. cit. n. 1., pp. 326-340.

⁵¹ Brownlie, op. cit. n. 45, p. 596; Cristescu, op. cit. n. 43, p. 10, para. 54-63, 134-135.

creed or colour.”, n.b. emphasis added.⁵² Paragraph 7 is reaffirmed by the Vienna Declaration of 1993.⁵³

Consequently, in accordance with Resolution 2625, a state whose government represents the whole people of its territory without distinction of any kind, complies with the principle of self-determination in respect of its entire people and is entitled to the protection of its territorial integrity. The people of such a state can only exercise the right of self-determination through their participation in the government of the state on a basis of equality.⁵⁴ However, if a representative government does *not* exist; can the territorial integrity and political unity of a state be disregarded? Resolution 2625 will be further discussed in the subsequent chapters. The legal significance of the resolution lies, in particular, in the fact that it provides evidence of the consensus among member states of the United Nations on the meaning and the elaboration of the principles of the UN Charter.⁵⁵

⁵² GA Res. 2625 (XXV) of 24 October 1970, document symbol: A/RES/2625(XXV); United Nations, *Official Document System of the United Nations*, op. cit. n. 42; Malanczuk, op. cit. n. 1., pp. 326-340.

⁵³ See *infra*, 4.1.7., *Vienna Declaration and Recent Resolutions*.

⁵⁴ Cassese, A., *Self-determination of Peoples: Legal Reappraisal* (1995), pp. 109-125.

⁵⁵ *Ibidem*, and *infra*, 4.2.4., *Territorial Integrity*.

4.1.7 Vienna Declaration and Recent Resolutions

At the United Nations World Conference on Human Rights in Vienna, representatives of 171 states adopted by consensus the Vienna Declaration and Programme of Action of 25 June 1993. Chapter 1, paragraph 2 of the Vienna Declaration states: "All peoples have the *right of self-determination*. (...) [T]he World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right. In accordance with [Resolution 2625] this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the *territorial integrity* or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.", n.b. emphasis added.⁵⁶

In addition, every year resolutions are approved which mention the right of self-determination. Paragraph 1 of these resolutions of which the text is each time reiterated, reads: "Reaffirms that the universal realization of the rights of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights".⁵⁷

⁵⁶ United Nations, *Office of the High Commissioner for Human Rights*: <<http://www.unhchr.ch/html/menu5/wchr.htm>> (1 June 2003); see also American Society of International Law, 32 *International Legal Material* (1993), p. 1661 et seq.

⁵⁷ GA Res. 35/35B of 14 November 1980, *et al.*, document symbol: A/RES/35/35; United Nations, *Official Document System of the United Nations*, op. cit. n. 42.

4.2 Acquisition of Territory II

4.2.1 *Opinio iuris sive necessitatis*

After having been proclaimed as a right relating to peoples of Non-Self-Governing and Trust Territories, the right was formulated as a universal *right* for all peoples in the subsequent General Assembly Resolutions.⁵⁸ Such resolutions are not legally binding, but gained substantial support over the years. In addition, the right of self-determination of all peoples became binding between all states parties to the International Covenants on Human Rights, and other documents, ratified by a large majority of the world's states.⁵⁹ The right of self-determination of all peoples is at present regarded as a juridical rule that has to be respected. From the preceding chapters it can be established that an *opinio iuris sive necessitatis* has been formed and proved. Thus, the right of all peoples to self-determination is an accepted customary rule of public international law. First, the right is concerned to *all peoples* and all peoples should be treated equally, they have an *equal right to self-determination*. Secondly, the result of the exercise of the right of self-determination is dependent upon the value attributed to a clashing principle, the inviolability of a state's *territorial integrity*.

4.2.2 Right of Self-Determination

Self-determination implies the *external* right for all peoples to decide on their own international status, which entails direct access to independence. Nevertheless, not all peoples have been granted the right to *secede*. In all the instruments where self-determination is mentioned, territorial integrity of states is mentioned as well. The right to secede is debated because of its threat to the political unity of states and world peace. For that reason, the question on the legitimacy of transfer of sovereignty over territory is of outmost importance.⁶⁰ Political participation, free and fair elections, good governance and public accountability have been referred to as *internal* self-determination. Internal self-determination is a legal *right* of the whole population within a state. *Autonomy*, on the other hand, is directed towards a part of the population constituted in a state or other separate territorial unit only and not the whole population of the territory in question. It implies that the central government agrees to share power. Autonomy is not established in international instruments, and it is *not* a legal right granted a part of a population, but may be the best solution groups can expect within states.⁶¹

⁵⁸ See *supra*, 4.1.4.-4.1.7.

⁵⁹ See *supra*, 4.1.5., *International Covenants on Human Rights*, and 4.1.7., *Vienna* (...).

⁶⁰ Moore, *op. cit.* n. 46, p. 6 et seq.; see also *infra*, subsequent discussions.

⁶¹ Alfredsson G., "Different forms of and Claims to the Right of Self-Determination", Clark D. and Williamson R. (eds.), *Self-Determination, International Perspectives* (1996), pp. 71 et seq. et passim; Cristescu, *op. cit.* n. 43, p. 43, para. 288.

4.2.3 Beneficiaries

A fundamental question when it comes to the right of self-determination is the identification⁶² of the beneficiaries. It is certain that peoples are the beneficiaries of the right of self-determination. As we have seen not only peoples of Non-Self-Governing and Trust territories are the holders of the right of self-determination, and since the UN Charter and other legal instruments of the United Nations use the term peoples without any demarcation, it should be understood in its widest sense as a universal right and a right of all peoples whether or not they have attained independence and the status of a state. Consequently, peoples should not be interpreted as meaning a particular category of peoples but all peoples, although as to what constitutes a people there is no generally accepted definition.⁶³ What constitutes a *people*? Groups have been created to narrow the concept of peoples, for example minorities and indigenous peoples. These groups are not considered as peoples. There is no generally accepted definition, although three elements of the term people have emerged from debates within the United Nations, international conventions, judicial decisions and doctrine.

First, a people should have a connection to the *territory*. A connection to the territory is a fundamental element in the concept of peoples. It is often the population of fixed territorial entities instead of the composition and cultural characteristics of the people living within the territory that has been defined as peoples and thus been granted the right of self-determination. A people is a group with a special relationship to a territory in one way or the other. The borders of these self-determination units are determined by the dimensions of the people and its corresponding territory, thus the people may be enclosed in one state or extend over the territory of other states. Consequently, the difficulty of defining in detail a people with a full right of self-determination has been partly eliminated and replaced by the question of territorial delimitation.⁶⁴ *Secondly and third*, a people requires an *objective* element to identify the group, and a *subjective* element of awareness of, and a will to maintain a separate identity. In order to constitute a people, the group should be objectively distinct with features distinguishing it from other groups, such as ethnicity, religion and language. Other merits may also be significant, for example historical and traditional

⁶² Identification of the beneficiaries, see for example, Capotorti, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979), pp. 566-568; Chadwick E., *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (1996), pp. 32 et seq; Duursma, J., *Self-Determination, Statehood and International Relations of Micro-States* (1994); Franck T.M., "Post-Modern Tribalism and the Right to Secession", Zieck, M. et al. (eds.), *Peoples and Minorities in International Law* (1993), pp. 10 et seq.; Hadden T., "The Rights of Minorities and Peoples in International Law", Schulze K. E., Stokes M. and Campbell C. (eds.), *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East* (1996), pp. 15 et seq.; Musgrave T., *Self-Determination and National Minorities* (1997), pp. 149-160, 167-172.

⁶³ See *supra*, 4.1.1.-4.2.2.

⁶⁴ Alfredsson, op. cit. n. 61, pp. 59 et seq.; Cassese, op. cit. n. 54, pp. 118 et seq.; Cristescu, op. cit. n. 43, p. 12, para. 63, p. 37 et seq., para. 260-279; Detter, op. cit. n. 45, p. 57 et seq.; Moore, op. cit. n. 46, p. 3 et seq.; see also n. 62, et *ibidem*.

characteristics. Nevertheless, the main emphasis is placed not on the objective characteristics, which the population of a state should possess in order to be distinct from the population of another state, but on the subjective element that makes a group wish to decide on their shared political organisation and territory. Once the territorial unit has been delimited, the question of whether the unit comprises one or more homogeneous peoples or fractions of peoples becomes less important. The subjective element was set forth by the European Community Arbitration Commission on Yugoslavia, which left the choice to every individual to decide to which community he belongs. The subjective factor can never be neglected, for the objective characteristics of a group will only be maintained if the members of the group endeavour to maintain them. If a group does not try to preserve its objective characteristics, it does not intend to distinguish itself as a separate group. The existence of objective factors presupposes an underlying subjective will.⁶⁵ No subsequent conditions are imposed on a people in order to be the holder of the right of self-determination. Nevertheless, it should be noted that the term people is coming to be seen as more inclusive. On the other hand, the developments are still tentative and they do not affect the established rules and practices with respect to self-determination and the territorial integrity of states.⁶⁶

⁶⁵ Ibidem; see also American Society of International Law, 31 *International Legal Materials* (1992), pp. 1496-1499.

⁶⁶ Crawford, J., The Canadian Department of Justice (ed.), *State Practice and International Law in Relation to Unilateral Secession* (1997), para. 62; Wildhaber, L., The Canadian Department of Justice (ed.), *Comments on the Report by James Crawford regarding State Practice and International Law in Relation to Unilateral Secession* (1997), passim.

4.2.4 Territorial Integrity

We have concluded that the right of self-determination is counterbalanced by the *territorial integrity*. Thus, when does the right of self-determination take precedence over the obligation to respect the territorial integrity of a state?

All peoples have the right to self-determination, but who have the right to secede and under what circumstances? It is on these questions that one has to look for a consistent state practice and *opinio iuris sive necessitatis*. There is no doubt that *independent peoples*, as all peoples, have the right of self-determination. The population of a state may comprise one or more homogenous peoples or fractions of peoples within the territory. Independent peoples exercise the internal right of self-determination through their equal participation in the system of government. The international community accepts the exercise of the right of self-determination of peoples that find themselves within the borders of an existing state. These peoples, who have a relationship with the territory of an existing state, may exercise the right of self-determination over the whole territory. The population of a state may therefore decide its form of government and determine its international status.⁶⁷ If an independent people decides to *unite* with another independent people by a consensual process and thus creating a new independent state, the territorial integrity of both states remains untouched. International practice has never protested against such unifications, providing that it is the free choice of the peoples, or their parliamentary representatives.⁶⁸ Thus, independent peoples have the right to secede from their own political entities and unite. If a group of individuals wish to secede from the state to which it belongs through *devolution*, the international community do not object either. The territorial integrity is respected through consensus on the political and legal status of the territory concerned.⁶⁹

⁶⁷ See *supra*, 4.1.1.- 4.2.3, and in particular *infra*, subsequent discussions.

⁶⁸ For example the unification of Germany, see American Society of International Law, 29 *International Legal Materials* (1990) p. 1186; and the unification of Yemen, see American Society of International Law, 30 *International Legal Materials* (1991) p. 820; Hailbronner, K., "Legal Aspects of the Unification of the Two German states"(1991) 2 *European Journal of International Law*, pp. 18-41; Goy. R., "La Réunification du Yemen", 36 *Annuaire Francais de Droit International* (1990), pp. 249-265.

⁶⁹ See *supra*, 4.1.1.- 4.2.3., and in particular *infra*, subsequent discussions.

Peoples of Non-Self-Governing and Trust Territories and thus considered as colonial according to international law, have the right of self-determination irrespective of the territorial integrity principle, due to its status separate and distinct from the territory of the state administering it.⁷⁰ Decolonisation can be seen as a consensual process by which the administering state confers independence on a particular territory and people by legislative means. Consequently, colonial peoples have the right to secede. During the decolonisation process, some territories⁷¹ opted for an *association* arrangement with the former colonial power under which they achieved a form of separate status falling short of independence. Some associated territories⁷² have nevertheless been regarded as independent and admitted to the United Nations. Other colonial territories⁷³ have been *integrated* in a state following an act of self-determination. *Independence* has nevertheless been the most common result of the decolonisation process. All territories considered as colonial according to the UN Charter have now proceeded to self-government or independence, that is, with a few exceptions. For example a number of diminutive territories⁷⁴ as the *Pitcairn Islands*, and others.

Underlying the special status accorded to colonial territories is the idea that by achieving self-government or independence a colonised people achieves equality of rights with all other peoples. If it accedes to *independence*, the continued right of self-determination is reflected in control over the state, and is legally protected by the principles of territorial integrity and non-intervention. Decolonisation has always been exercised within colonial boundaries according to the principle of *uti possidetis juris*⁷⁵. When a colonial territory becomes independent, it succeeds to previously established boundaries. If a territory is *integrated* in an independent state, it thereafter shares on a basis of equality in the exercise of self-determination on the part of the people of that state as a whole.⁷⁶ Thus, decolonisation clash in principle with the respect for the territorial integrity of the administering states to which they were attached. However, the balance between self-determination and territorial integrity has been decided by the United Nations. The inhabitants of Non-Self-Governing and Trust Territories were granted the right of self-determination, because they were a people. They were the holders of that right by virtue of the general principle of self-determinations of all peoples.⁷⁷

⁷⁰ See *supra*, 4.1.6., *General Assembly Resolution 2625*, paragraph 6.

⁷¹ For example, Puerto Rico (USA) and the West Indies Associated States (UK).

⁷² For example, the Federated States of Micronesia, the Marshall Islands and Palau.

⁷³ For example, Greenland (Denmark) and the Northern Mariana Islands (USA).

⁷⁴ See *infra*, 4.2.7., *Diminutive Units*.

⁷⁵ *Uti possidetis juris*, i.e., have what you have had.

⁷⁶ Crawford, op. cit. n. 66, para. 11-25; Wildhaber, op. cit. n. 66, passim; see also Bleckmann, A., "Decolonization", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume I (1992), pp. 972-976; Crawford, op. cit. n. 34, p. 384; Wooldridge, F., "Uti Possidetis Doctrine", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 10 (1987), pp. 519-521.

⁷⁷ See *supra*, 4.1.1.- 4.1.7.

Another question regards *secession*, the unilateral process by which a particular group seeks to separate itself from the state to which it belongs, and to create a new independent state on part of the territory of that state. The term unilateral secession is sometimes used, although secession is by definition a unilateral process. The only *justification* of the partial or total disruption of the territorial integrity of an existing state through secession or dissolution, can be found in General Assembly Resolution 2625, paragraph 7. In theory, the full right of self-determination takes precedence if the government does not represent the whole people belonging to the territory.⁷⁸ State practice shows nevertheless an extreme reluctance of states to recognise or accept secession. Of the new states that have emerged since the Second World War, only one case can be classified as a successful secession, that is, Bangladesh. Nevertheless, the United Nations did not treat it as a case of self-determination, despite good grounds for doing so, but rather as a *fait accompli*⁷⁹ achieved as a result of foreign military assistance in special circumstances.⁸⁰ The key feature in a number of other cases was that separation was expressly *agreed* to by the parties directly concerned, and therefore not a question of secession.⁸¹ With the Baltic States, the essential basis was the recovery of independence forcibly suppressed. Even so, considerable importance was attached to the indication of *consent* given by the State Council of the Soviet Union.⁸² Another group of cases involved the Soviet Union, Yugoslavia and Czechoslovakia. With the exception of Yugoslavia, the emergence of the constituent units of these states took place on a basis of *agreement* by those concerned, and international recognition followed upon that agreement.⁸³

The position of Yugoslavia was different. Neither the European Union nor the United Nations proclaimed that the peoples of Yugoslavia had a prior

⁷⁸ See *supra*, 4.1.6., *General Assembly Resolution 2625*, paragraph 7.

⁷⁹ *Fait accompli*, i.e., an accomplished and presumably irreversible deed or fact.

⁸⁰ Crawford, *op. cit.* n. 34, pp. 115-117; see also Dugard, *op. cit.* n. 17, pp. 75-76; Nanda, V.P., "Self-Determination in International Law. The Tragic Tale of Two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan)", 66 *American Journal of International Law* (1972), p. 321.

⁸¹ *Senegal, Singapore and Eritrea*, see for example, Cohen, R., "Legal Problems Arising from the Dissolution of the Mali Federation", 36 *British Yearbook of International Law* (1960), p. 375; Haile, M., "Legality of Secessions: The Case of Eritrea", 8 *Emory International Law Review* (1994), p. 479; Iyob, R., *The Eritrean Struggle for Independence* (1995), *passim*.

⁸² See for example, Rich, R., "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", 4 *European Journal of International Law* (1993), p. 36.

⁸³ See for example, Mullerson, R., "The Continuity and Succession of States, by reference to the former USSR and Yugoslavia", 42 *International and Comparative Law Quarterly* (1993), p. 473; Rich, *op. cit.* n. 82, p. 36; Scharf, M., "Musical Chairs: The Dissolution of States and Membership of the United Nations", 28 *Cornell International Law Journal* (1995), p. 29; Young, R., *The Breakup of Czechoslovakia* (1994).

right to secede by virtue of the principle of self-determination. The emergence of the constituent republics was treated as a consequence of the dissolution of Yugoslavia, and early international recognition was seen as a way of containing the violence and limiting the issues to be resolved.⁸⁴ The examples⁸⁵ of attempted secession of non-colonial territories are numerous, and in many other cases⁸⁶ support for secession has existed in a territory, but has not risen to the level of a unilateral declaration of independence or some other formal attempt at secession with substantial popular support. In all of these cases, one common feature can be observed. Where the government of the state in question has maintained its opposition to the secession, such attempts have gained no international support.⁸⁷ In principle, self-determination for peoples or groups within the state is to be achieved by participation in its constitutional system. In international practice there is no recognition of a *unilateral* right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more peoples.

Faced with an expressed desire of part of its people to secede, it is for the government of the state to decide how to respond, for example by insisting that any change be carried out in accordance with constitutional processes. In addition, the United Nations is very reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede.⁸⁸ State practice is reflected in Resolution 2625, paragraph 7, and in the Vienna Declaration of 1993. A state whose government represents the whole people on a basis of equality complies with the principle of self-determination in respect of its entire people and is *entitled* to the protection of its territorial integrity. The people of such a state exercise the right of self-determination through their equal participation in its system of government.⁸⁹ If Resolution 2625 and the Vienna Declaration are taken to mean that *secession is permissible* where the government is constituted on a discriminatory basis, it is doubtful whether the proviso reflects international practice. International recognition of secession does not seem to accept that secession can be permissible, under any circumstances.⁹⁰ Some academics argue that secession must be supported by a large, genuine popular will. Others say that the denial of fundamental human rights does not as such legitimise secession. In addition,

⁸⁴ See *for example*, Bieber, R., "European Community Recognition of Eastern European States: A New Perspective for International Law?", 86 *Proceedings of the American Society of International Law* (1992), p. 374; Weller, M., "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 *American Journal of International Law* (1991), p. 596.

⁸⁵ *For example*: Tibet (China), Kashmir (India), Turkish Federated State of Cyprus (Cyprus), Tamil Elam (Sri Lanka), South Sudan (Sudan), Somaliland (Somalia), Kurdistan (Iraq/Turkey), Republika Srpska (Bosnia/Herzegovina), Chechnya (Russian Federation), Kosovo (Serbia-Montenegro), Nagorny-Kharabakh (Azerbaijan), *et al.*

⁸⁶ *For example*: Corsica (France), Basque Country (Spain/France), South Tyrol (Italy), Brittany (France), Alsace (France), Catalonia (Spain), Faroes (Denmark), Scotland (United Kingdom), Flanders (Belgium), Padania (Italy), Aaland Islands (Finland), *et al.*

⁸⁷ Crawford, *op. cit.* n. 66, para. 49-51; Wildhaber, *op. cit.* n. 66.

⁸⁸ Crawford, *op. cit.* n. 66, para. 63-83; Wildhaber, *op. cit.* n. 66.

⁸⁹ See *supra*, 4.1.6.-4.1.7., Resolution 2625, paragraph 7 and 1993 Vienna Declaration.

⁹⁰ Crawford, *op. cit.* n. 66, para. 67; Wildhaber, *op. cit.* n. 66.

besides the fact that it is doubtful whether a rule exists which permits the disruption of a state in case of a non-representative government according to Resolution 2625, resistance against any political ideology has not been advanced as a justification for secession.⁹¹ There is a distinction between cases of secession and dissolution. If it becomes clear that the process of dissolution of the state as a whole is irreversible, the consent of the *government*⁹² of the predecessor state may cease to be required for the separation of its constituent parts. In such a case, the government will itself be in the process of dissolution, and may have ceased to represent the former state. The international community is left no choice but to accept newly seceded entities. The factual situation leaves no other possibility. However, there is a strong presumption against dissolution, and the only case of successful separation under these circumstances is that of the constituent republics of the former Yugoslavia.⁹³ Consequently, if the *territorial integrity* of an existing state is *not* disrupted, a people may freely exercise its right to self-determination, including a degree of autonomy, provided that the autonomous territory still constitutes an integral part of the state. As we have seen, state practice has not established an *opinio iuris sive necessitatis* under which a material justification for secession has been accepted in international law, and no material customary rule of international law can decide the balance process between the right of self-determination and the principle of respect for the territorial integrity of a state. It is not prohibited by international law to seek secession if one constitutes a people within a certain delimited territory. At the same time, state practice confirms that customary international law does *not* recognise the general legality of secession as a consequence of the right of self-determination.

4.2.5 Territorial Conflict

If a seceding unit is not internationally *recognised*⁹⁴ the territory remains integrated. If the seceding unit is recognised, it is the territorial integrity

⁹¹ See for example, Bigo, D. and Hermant, D., *Approches polemologiques: Conflits et Violence dans le Monde au tournant des Années quatre-vingt-dix* (1991), pp. 99-144.

⁹² See *infra*, 5.1.4., *Government*.

⁹³ Bieber, op. cit. n. 84, p. 374; Crawford, op. cit. n. 66, para. 63-83; Weller, op. cit. n. 84, p. 569-607; Wildhaber, op. cit. n. 66; see also American Society of International Law, 31 *International Legal Materials* (1992), pp. 1496-1499.

⁹⁴ See *infra*, 5.1.1., *Recognition*.

of the newly recognised state that has to be respected. The predecessor state can no longer claim that the successor state constitutes an integral part of its territory. This conclusion can be drawn as soon as it can be demonstrated that the international recognition of the new state is sufficient under international law. If international recognition does not exist, the seceding unit may still constitute a state according to the criteria for statehood, although if the predecessor state regains effective control over a non-recognised successor state, the world community will most likely *not* regard this action as an act of international aggression.⁹⁵ The predecessor state may regain control, even by force, over the seceding territory, because of its right to establish internal law and order. The seceding people in question may not use force under the internal legislation, as this will generally be prohibited by national criminal law. However, international law does not seem to prohibit the use of force by seceding peoples against state authorities that try to prevent the secession. Outside the colonial context, the use of force by secessionists has neither been consistently prohibited nor legitimised by international law.

As there is no international law regulating secession the disputed secession becomes the object of political negotiations, and there is no international judicial body to which a seceding unit can turn. In the absence of international recognition of the seceding entity, the civil war, once started, will continue until a *de facto* solution has been imposed by force. Either the predecessor state has regained effective control over the seceding territory, or the secessionists have stabilised their authority and have managed to secure the exercise of all elements of statehood. If the secessionists have vanquished the predecessor state authorities or if in the end the state has accepted the secession, the seceded unit will have acquired international status. International recognition will then be granted more easily. The balance between self-determination and territorial integrity has thus been solved by the law of the strongest, one of the first principles to be rejected by international law. The struggle for secession will only legally end when the territorial integrity of the seceding territory deserves international protection, that is, when the territory constitutes a state or part of a third state.⁹⁶

4.2.6 *Ius Cogens*

Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969 defines *ius cogens* as a peremptory norm of general international law accepted and recognised by the international community of states as a whole

⁹⁵ Frowein, J.A., "Recognition", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 10 (1987), pp. 340-348; see also Menon, P.K., *The Law of Recognition in International Law: Basic Principles* (1994), passim; Warbrick, C., "Recognition of States", 41 *International and Comparative Law Quarterly* (1992), pp. 473-482, and 42 *International and Comparative Law Quarterly* (1993), pp. 433-442; and n. 96.

⁹⁶ Akehurst, M., "Civil War", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume I (1992), pp. 597-603; Haverland, C., "Secession", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 10 (1987), pp. 384-389; see also Wilson, H.A., *International Law and the Use of Force by National Liberation Movements* (1988), passim; and *infra*, 5.1.1.-5.1.8., *Status of States*, in particular 5.1.4., *Government*.

as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁹⁷ At the preceding discussions on the drafting of article 53 of the Vienna Convention, self-determination was cited as an example of *ius cogens*.⁹⁸ The 1976 Draft Articles on State Responsibility, adopted by the International Law Commission, makes reference to the international obligations of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination. The 1980 Draft Articles on State Responsibility, adopted by the International Law Commission, aims at qualifying the violation of essential obligations relating to the right of self-determination of peoples as an *international crime*. These obligations are therefore regarded as essential for the protection of fundamental interests of the international community.⁹⁹

In the *Barcelona Traction Case*, the International Court of Justice refers to obligations of a state towards the international community as a whole. All states can be held to have a legal interest in their protection, they are *obligations erga omnes*. The Court gives the example, *inter alia*, of the basic rights of the human person. As the right of self-determination is generally regarded as a fundamental human right and a prerequisite for the effective enjoyment of all other human rights, it can be argued that of all human rights, the right of self-determination must be a rule of *ius cogens*.¹⁰⁰ The 2001 Draft Articles on State Responsibility, adopted by the International Law Commission, article 40 reads: "1. This chapter applies to the international responsibility which is entailed by a serious breach by a state of an obligation arising under a peremptory norm of general international law." The commentary to the article states that the concept of peremptory norms of general international law is recognised in international practice, in the jurisprudence of international and national courts, and in legal doctrine. The commentary refers to the International Court of Justice in the *East Timor Case*.

It declares that among the peremptory norms, the right of self-determination is one of the essential principles of contemporary international law, which gives rise to an obligation to the international community as a whole to

⁹⁷ United Nations, *The Vienna Convention on the Law of Treaties*: <http://www.un.org/law/ilc/texts/treaties.htm> (1 June 2003).

⁹⁸ Brownlie, I., *Principles of Public International Law*, 4th edn. (1990), p. 515; see also United Nations, *Yearbook of the International Law Commission*, volume II (1963), pp. 198-199; United Nations, *Yearbook of the International Law Commission*, volume II (1966), pp. 247-249.

⁹⁹ United Nations, *Yearbook of the International Law Commission*, volume II, part 2 (1976), p. 75; United Nations, *Yearbook of the International Law Commission*, volume II, part 2 (1980).

¹⁰⁰ Hannikainen, L., *Peremptory Norms (Jus Cogens) in International Law* (1988), pp. 357 et seq.; see also United Nations, *Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice: Barcelona Traction Case* (1970), p. 32, para. 33.

permit and respect its exercise.¹⁰¹ The preceding conclusions reflect that the right of self-determination is a right from which one cannot derogate as long as the territorial integrity of an existing state is not disrupted. On the other hand, as we have seen, derogation from the right of self-determination leading to secession is allowed, for the existing state may try to regain control over the seceding territory, thus overruling the secession. Therefore, it can be concluded that the right of self-determination of peoples living within an existing state, and peoples living in Non-Self-Governing and Trust Territories is a rule of *ius cogens*. If the right of self-determination is used to disrupt the territorial integrity of a state, it will not have the status of *ius cogens*, but that of an ordinary norm of international law.¹⁰² A treaty that conflicts with a peremptory norm of general international law, whether at its conclusion or because a new rule of *ius cogens* has emerged, can be declared void within the meaning of article 64 of the Vienna Convention¹⁰³ on the Law of Treaties. As demonstrated, the people of a state have the right of self-determination with force of *ius cogens*. Consequently, if a people holds the right of self-determination with force of *ius cogens*, a treaty implying an abandonment of independence in violation of the right of self-determination can be declared void. It should nevertheless be mentioned that according to article 66 (a) only states parties to the convention could be brought before the International Court of Justice in event of a possible dispute on the nullity of a provision.¹⁰⁴

4.2.7 Diminutive Units

How small a people can exercise the right of self-determination? In 1946 eight member states of the United Nations identified 72 territories under

¹⁰¹ United Nations, *2001 Draft articles on Responsibility of States for Internationally Wrongful Acts – adopted by the International Law Commission at its 53rd session*: <http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm> (1 June 2003).

¹⁰² Frowein, J.A., “Jus Cogens”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 7 (1984), pp. 327 et seq.; Hannikainen, op. cit. n. 100, pp. 357 et seq.; Malanczuk, op. cit. n. 1, pp. 57-60, 326 et seq.; see also Brownlie, I., *Basic Documents in International Law*, 4th edn. (1995), pp. 431-432; Danilenko, G.M., “International Jus Cogens: Issues of Law-Making”, 2 *European Journal of International Law* (1991), pp. 42-65; Kasto, J., *Jus Cogens and Humanitarian Law* (1994), passim; Paust, J., “The Reality of Jus Cogens”, *Connecticut Journal of International Law* (1991), pp. 81-85; Strydom, H.A., “Ius Cogens: Peremptory Norm or Totalitarian Instrument?”, *South African Yearbook of International Law* (1989), pp. 42-58.

¹⁰³ United Nations, op. cit. n. 97.

¹⁰⁴ Hannikainen, op. cit. n. 100, p. 178 et passim; Malanczuk, op. cit. n. 1, pp. 57-58, 140-141, 145; see also Kontou, N., *The Termination and Revision of Treaties in the Light of New Customary Law* (1994); Reuter, P., *Introduction to the Law of Treaties* (1995).

their administration that they considered to fall under the UN Charter provisions as non-self-governing. By 1963, the General Assembly approved a revised list of 64 Non-Self-Governing Territories, but as a result of the decolonisation process, most of the territories were removed from the list. Currently there are 16 Non-Self-Governing Territories.¹⁰⁵ The Special Committee in the situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, abbreviated for common use Special Committee on Decolonisation, or Special Committee of Twenty-Four, was established in 1961. The work of the Committee, and its Sub-Committee on Small Territories, has helped to interpret the right of self-determination of colonial people and in particular the right of self-determination of very small peoples. The smallest people is to be found in the Non-Self-Governing Territory of the *Pitcairn Islands*¹⁰⁶ with 47 inhabitants (estimated 2002), administered by the United Kingdom.

Every year, since its establishment, the Special Committee of Twenty-Four reaffirms the inalienable right of the peoples of the Non-Self-Governing Territories to self-determination and independence. The Special Committee of Twenty-Four has not fixed any limits as to the size of the colonial population or their territory. The right of self-determination is recognized without numerical conditions and all options, association, integration or independence, are left open. In addition, the General Assembly of the United Nations endorses the recommendations of the Special Committee of Twenty-Four in annual resolutions.¹⁰⁷ Consequently, questions of territorial size, geographical isolation and limited resources do not prevent the realisation of a full right to self-determination, and as stated there is no numerical limitation as to the number of persons of which a people consists. The inhabitants of the smallest Non-Self-Governing Territories, even if they amount to less than one hundred as in the case of the Pitcairn Islands, are still entitled to the right of self-determination. Thus, the United Nations has helped to interpret the right of self-determination of very small colonial peoples, although as discussed, the right of self-determination was not meant to be restricted to colonial territories, it is a right for all peoples.¹⁰⁸ Considering the map of Non-Self Governing Territories,¹⁰⁹ it can be concluded that non-self-governing peoples often live in small isolated islands. Isolation accentuates their distinctness from other peoples and

¹⁰⁵ *United Nations' Non-Self-Governing-Territories* (16): American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guam, Monserrat, New Caledonia, Pitcairn, St Helena, Tokelau, Turks and Caicos Islands, US Virgin Islands, Western Sahara; see *infra* n. 106.

¹⁰⁶ United Nations, *Map of Non-Self-Governing Territories*:
<<http://www.un.org/spanish/descolonizacion/folleto/UN/page2.html>> (1 June 2003);
Central Intelligence Agency (USA): op. cit. n. 15, see *Pitcairn Islands*.

¹⁰⁷ United Nations, *Special Committee on decolonisation*:
<<http://www.un.org/spanish/descolonizacion/folleto/UN/page6.html>> (1 June 2003);
see also: GA Res. 3156 (XXVIII), 3157 (XXVIII) of 14 December 1973, GA Res. 3289 (XXIX), 3290 (XXIX) of 13 December 1974, document symbols: A/RES/3156(XXVIII), A/RES/3157(XXVIII), A/RES/3289(XXIX), A/RES/3290(XXIX), available at:
United Nations, *Official Document System of the United Nations*, op. cit. n. 42.

¹⁰⁸ See *supra*, 4.1.1.- 4.2.3.

¹⁰⁹ United Nations, *Map of Non-Self-Governing Territories*, op. cit. n. 106.

facilitates their special identification. Small mainland peoples, *a priori*, will have difficulties in remaining distinct from the rest than diminutive island peoples. The smaller the people, the more easily it is integrated and assimilated with the surrounding peoples. This does not preclude that there are circumstances under which a small people can still qualify as a people entitled to the right of self-determination, because they have managed to preserve their own identity.¹¹⁰ A diminutive people entitled to the right of self-determination has a particular interest in using this right for the maintenance of its independence against external pressure.¹¹¹ External political influence is a situation to be avoided, but no obstacle to the right of self-determination. However, it may constitute a practical problem for actual independence, examined in chapter five.¹¹² A diminutive people entitled to the right of self-determination and incorporated into a larger state, may try to secede under the same conditions as other peoples. However, it seems only realizable after a consensual process. In case of refusal, a diminutive people will generally not be capable to stand up by force against the state authorities. The situation might be different if the seceding people receive external support.¹¹³ In any case, the diminutive people in question may nevertheless demand a maximum degree of autonomy.¹¹⁴

¹¹⁰ See *supra*, 4.2.3., *Beneficiaries*, on the objective, subjective, and territorial criteria.

¹¹¹ See *supra*, 4.2.6., *Ius Cogens*, and *infra*, 6.1.4., *Political Relations*.

¹¹² See *infra*, 5.1.6., *Independence*, and *infra*, 6.1.4., *Political Relations*.

¹¹³ See *supra*, 4.2.4., *Territorial Integrity*, and *supra*, 4.2.5., *Territorial Conflict*.

¹¹⁴ See *supra*, 4.2.2., *Right of Self-Determination*, regarding autonomy.

5 STATUS of STATES

5.1 Criteria for Statehood

5.1.1 Recognition

As concluded, the birth of a state and transfer of sovereignty over territory are inseparable. Territory is an essential criterion for statehood. Nevertheless, as there are further criteria for statehood, the subsequent chapters are devoted to the international rules determining the legal status of states.¹¹⁵ As discussed, international law is primarily concerned with the rights and duties of states. It is therefore necessary to have a clear idea of what a state is. When a new state comes into existence, other states are confronted with the problem of deciding whether or not to recognise the new state. Recognition means a willingness to deal with the new state as a member of the international community.¹¹⁶ The recognition of a government has the consequence of accepting the statehood of the entity of which the regime is governing, while the recognition of a state can be accorded without also accepting that a particular regime is the government of that state. We are concerned with the recognition of states, not of governments or factual situations.¹¹⁷ At the beginning of the twentieth century, it was argued that a new state would create obligations for existing states and should therefore be accepted by those states. This argument developed into the *constitutive theory*, in other words, a state is and becomes an international person through recognition only and exclusively.¹¹⁸ In contemporary international law, the constitutive theory is opposed by the *declaratory theory*, according to which recognition has no legal effects. The existence of a state is question of pure fact, and recognition is merely an acknowledgement of the facts. If an entity satisfies the requirements of a state objectively, it is a state with all international rights and duties and other states are obliged to treat it as such.

¹¹⁵ Criteria for statehood, see *for example*, Crawford, J., "The Criteria for Statehood in International Law", 48 *British Yearbook of International Law* (1977), pp. 92-182; Crawford, *op. cit.* n. 34, pp. 30-86; Menon, P.K., "The Subjects of Modern International Law", 3 *Hague Yearbook of International Law* (1990), pp. 30-86; Mosler, H., "Subjects of International Law", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 7 (1984), pp. 442-459; Wallence-Bruce, N.L., *Claims to Statehood in International Law* (1994).

¹¹⁶ Frowein, *op. cit.* n. 95, pp. 340-348.

¹¹⁷ American Law Institute: *Restatement (Third) of the Foreign Relations Law of the United States*, volume I (1987), pp. 84-85, para. 202.

¹¹⁸ Crawford, *op. cit.* n. 34, p. 12; see also Oppenheim, L. and Lauterpacht, H. (ed.), *International Law: A Treatise*, 8th edn., volume I (1955), p. 125.

Under the declaratory theory it is left to other states to decide whether an entity satisfies the criteria for statehood, and the theory leaves the question unsolved on who ultimately determines whether an entity meets the objective test of statehood or not. The relevance of the constitutive theory, on the other hand, has been diminished by the acceptance of the obligation of other states to treat an entity with the elements of statehood as a state. In contemporary international law the majority of publicists do *not* see recognition as a *conditio sine qua non*¹¹⁹ of a state's international personality.¹²⁰ There are several documents reflecting the declaratory theory. The often cited Montevideo Convention on Rights and Duties of States of 26 December 1933, article 1, defines a state according to objective criteria only, viz., “(a) a permanent population; (b) a defined territory; (c) a government and (d) the capacity to enter into relations with other states.”¹²¹ The first three criteria correspond to established international practice and the doctrine of the three elements, *Drei-Elementen-Lehre*.¹²² Recognition is usually no more than evidence that the three requirements are satisfied. In most cases, the facts will be so clear that recognition will not make any difference.¹²³

The General Assembly Resolution 3314 (XXIX) of 14 December 1974, article 1, explains that “(...) the term ‘state’: (a) Is used without prejudice to questions of recognition (...)”,¹²⁴ and the Charter of the Organization of American States of 30 April 1948 has also been cited as a document reflecting the declaratory theory. Under this charter, states, even before recognition, have certain rights and duties such as the right to defend their integrity and independence, and to organise their internal juridical system. Article 9 reads: “The political existence of the state is independent of recognition by other states (...)”. It should be noted that only the political existence of a state is independent of recognition. The legal existence could still depend on recognition. Article 10 explains that “[r]ecognition implies that the state granting it accepts the personality of the new state, with all the rights and duties that international law prescribes for the two states”. The recognition does therefore not establish or create the personality of the new state, but accepts it, which presumes that it existed before acceptance. If a state is not recognised it seems to enjoy only the rights enumerated in article 9, which does not include all state rights and duties.¹²⁵

¹¹⁹ *Conditio sine qua non*, i.e., an essential condition.

¹²⁰ Frowein, op. cit. n. 95, pp. 340-348; Malanczuk, op. cit. n. 1, pp. 80-90; see also Menon, op. cit. n. 95, passim; Shaw, M.N., *International Law*, 3rd edn. (1991), p. 138; Warbrick, op. cit. n. 95, pp. 473-482.

¹²¹ Yale Law School, *The Avalon Project*:

<<http://www.yale.edu/lawweb/avalon/intdip/interam/intam03.htm>> (1 June 2003); see also League of Nations, *League of Nations Treaty Series*, volume CLXV, p. 19.

¹²² Jellinek, G., *Allgemeine Staatslehre*, 3rd edn. (1914), pp. 396 et seq.

¹²³ Frowein, op. cit. n. 95, passim; *et al.* n. 120.

¹²⁴ GA Res. 3314 (XXIX) of 14 December 1974, document symbol: A/RES/3314(XXIX); United Nations, *Official Document System of the United Nations*, op. cit. n. 42.

¹²⁵ Yale Law School, *The Avalon Project*:

<<http://www.yale.edu/lawweb/avalon/decade/decad062.htm>> (1 June 2003); see also United Nations, *United Nations Treaty Series*, volume CXIX (1952), p. 54 et seq.

Despite numerous attempts the definition of a state remained a controversial and politically loaded subject for a long time. Neither the International Law Commission nor the International Court of Justice could give a generally acceptable definition. Nevertheless, in 1991 the European Community Arbitration Commission on Yugoslavia declared that the existence or disappearance of a state is a question of fact, and that the effects of recognition by other states are purely declaratory.¹²⁶ Doctrine has deduced from the general practice of states some criteria for statehood, which have become general rules of international law, and in principle the declaratory theory is adopted, although recognition can have a constitutive and decisive effect in certain cases. This is the situation of entities that under the general criteria do not possess statehood or in borderline cases where the facts are unclear. Nevertheless, the declaratory effect of recognition on the international personality of a state has a relative value. For what are the legal results if the international community refuses to recognise an entity which nevertheless complies with the objective criteria of statehood? Can states legitimately refuse to treat entities as states that do in fact qualify? State practice has not accepted a right of recognition and a duty to recognise.¹²⁷

Recognition, being within the discretion of every state, can therefore be withheld, for political or alleged legal reasons, from an entity that qualifies as a state under general international law. This is the consequence of the declaratory theory. As a result, legitimate but non-recognised states will have more difficulties in being accepted as member states of international organizations and relations with the international community will be restricted, as they cannot enter into diplomatic relations. These are practical, not legal effects.¹²⁸ The question becomes more serious if we examine new states born of secession. There is no general rule of international law that forbids a group of people from overthrowing the government of their state, or as we have seen in the preceding chapters, to secede and form a new state if they have the strength to do so. If recognition is withheld, this new state can still be re-gained by the old state by force, without being qualified by the international community as an act of international aggression or a crime against peace. It is not the territorial integrity of a state that is attacked. If in this case an international judicial body could be seized, the aggression would be given international legal effects, but otherwise the legal effects and responsibility will be disregarded by the international community.¹²⁹

¹²⁶ American Society of International Law, 31 *International Legal Materials* (1992), pp. 1496-1499.

¹²⁷ Crawford, *op. cit.* n. 34, *passim*; Menon, P.K., "Some Aspects of the Law of Recognition; Part II: Recognitions of States", *Revue de Droit International de Science Diplomatiques et Politiques* (1990), pp. 9-16; Frowein, *op. cit.* n. 95, *passim*; *et al.* n. 120.

¹²⁸ Malanczuk, *op. cit.* n. 1, pp. 80-90; Frowein, *op. cit.* n. 95, *passim*; *et al.* n. 120.

¹²⁹ See *supra*, 4.2.5., *Territorial Conflict*.

As mentioned, the majority of publicists support the declaratory theory under which the international personality of a state is determined by objective criteria of international law only.¹³⁰ Even if a state is not recognised, it will have international rights and duties opposable to the international community. Whether an entity is a state is a matter of fact, not of recognition.¹³¹ As a practical matter, however, an entity will fully enjoy the status and benefits of statehood only if a significant number of states consider it to be a state and treat it as such, in bilateral relations or by admitting it to major international organizations. If an entity is not a state according to the accepted international legal criteria for statehood, recognition is even more important because it can have a reparative effect in certain cases.¹³² We shall now examine the criteria for statehood.

5.1.2 Territory

The functions of a state, that is, a political and legal community, should first of all be exercised in a given territory.¹³³ In 1928 the Permanent Court of

¹³⁰ See for example, Brownlie, I., *Principles of Public International Law*, 3rd edn. (1979), pp. 90-93; Crawford, op. cit. n. 34, p. 23; James, A., *Sovereign Statehood: The Basis of International Society* (1986), p. 147; Menon, op. cit. n. 115, pp. 30-86; Mosler, op. cit. n. 115, pp. 442-459.

¹³¹ Menon, P.K., "Some Aspects of the Law of Recognition; Part I: Theories of Recognition", *Revue de Droit International de Science Diplomatiques et Politiques* (1989), pp. 161-182.

¹³² American Law Institute, op. cit. n. 117, para. 202; Frowein, op. cit. n. 95, pp. 342.

¹³³ Rozakis, C.K., "Territorial Integrity and Political Independence", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 10 (1987), pp. 481-487; Torres

Arbitration noted on the concept of territorial sovereignty: “Territorial sovereignty (...) involves the exclusive right to display the activities of a state. This right has as a corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war, together with the rights that each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other states, for it serves to divide between the nations the space upon which human activities is employed, in order to assure them at all points the minimum of protection of which international law is the guardian.”¹³⁴ There is no doubt that the existence of a territory remains a *conditio sine qua non* for statehood. The concept of territory is defined by geographical areas separated by borderlines from other areas and united under a common government.

The territory of a state comprises land territory and, in theory, more than six thousand (6378) kilometres of earth beneath it, reaching to the centre of the globe, including internal waters, twelve international nautical miles territorial sea adjacent to the coast, equivalent to more than twenty (22,224) kilometres, and air space above this territory. The atmosphere reaches an altitude of five hundred kilometres, from where the exosphere continues until it merges with interplanetary gases, that is, outer space, about fifty thousand kilometres above the planet. However, the precise location of the point where air space ends and outer space begins, including the international law governing the activities of states in the exploration and use of outer space, is uncertain. On the other hand, it is certain that the minimum height at which satellites can remain in orbit is at least twice the maximum height at which aircraft can fly, which makes the problem less important.¹³⁵ The exclusive economic zone is not taken into account, as a state does not exercise full sovereignty over this sea area.¹³⁶ Other areas that cannot be part of a state, besides outer space and the exclusive economic zone, are the high seas, the deep sea floor and Antarctica, that is, *terra nullius*.¹³⁷ In addition, definitions of the term state demand a defined¹³⁸ or

Bernandez, S., “Territorial Sovereignty”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 10 (1987), pp. 487-494; and *supra*, 4.1.1., *Transfer of Sovereignty*.

¹³⁴ Lagoni, R., “Palmas Islands Arbitration”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 2 (1981), pp. 223-224; see also Permanent Court of Arbitration, “Island of Palmas Case (Netherlands v. USA) of 4 April 1928”, 2 *Reports of International Arbitral Awards* (1928), p. 838.

¹³⁵ Goedhart, R.F.A., *The Never Ending Dispute: Delimitation of Air Space and Outer Space* (1996), passim; Malanczuk, op. cit. n. 1., p. 76; see also Nationalencyclopedia: *Internet*: <<http://www.ne.se>> (1 June 2003).

¹³⁶ United Nations Convention on the Law of the Sea of 10 December 1982, articles 56 and 73; The United Nations, *Oceans and Law of the Sea*: <<http://www.un.org/Depts/los/index.htm>> (1 June 2003).

¹³⁷ Treves, T., “High Seas”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume II (1995), pp. 705-710; Vitzthum, W.G., “International Sea-Bed Area”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume II (1995), pp. 1372-1376; Wolfrum, R. / Klemm, U.D., “Antarctica”, Bernhardt, R. (ed.), *Encyclopedia of Public*

fixed¹³⁹ territory. In practice, it is required that the state must consist of a certain coherent territory effectively governed.¹⁴⁰ The delimitation of state boundaries is of crucial importance, although absolute certainty about a state's frontiers is not required. Many states have long-standing frontier disputes with their neighbours. For example, the *Principality of Andorra*¹⁴¹ have, although not a dispute, in sections an undemarcated border, and in the *North Sea Continental Shelf Cases*, the International Court of Justice held that "[t]here is for instance no rule that the land frontiers of a state must be fully delimited and defined, and often in various places and for long periods they are not."¹⁴² The existence of states with a minimal land territory like the *State of the Vatican City* (0.44 square kilometres) has led many theorists to conclude that no minimal size is required for territory.¹⁴³ This conclusion cannot be accepted, without any uncertainty, if one has not ascertained whether or not the recognition was meant to be declaratory on this specific territorial requirement. In other words, one has to ascertain whether the State of the Vatican City was recognised as a normal state or whether the recognition created statehood.

5.1.3 Population

The criterion of a permanent population is connected with that of territory and constitutes the physical basis for the existence of a state.¹⁴⁴ A state is an organization of individuals living together as a community. The population of a state comprises all individuals who, in principle, inhabit the territory in a permanent way. It may consist of nationals and foreigners. As has repeatedly been pointed out by doctrine the requirement of a population is not an equivalent of the requirement of nationality. Nationality is a matter of

International Law, volume I (1992), pp. 173-182; and *supra*, 4.1.1., *Transfer of Sovereignty*.

¹³⁸ The Montevideo Convention (...) of 26 December 1933, see *supra*, 5.1.1., *Recognition*.

¹³⁹ See for example, Whiteman, M.J., *Digest of International Law* (1963), p. 223.

¹⁴⁰ Crawford, op. cit. n. 34, p. 40.

¹⁴¹ Central Intelligence Agency (USA), op. cit. n. 15.

¹⁴² Jaenicke, G., "North Sea Continental Shelf Cases", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, instalment 2 (1981), pp. 205-208; see also United Nations, *Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice: North Sea Continental Shelf Cases* (1969), p. 32, para. 46.

¹⁴³ Central Intelligence Agency (USA), op. cit. n. 15; Crawford, op. cit. n. 34, p. 36; Menon, op. cit. n. 115, p. 5; and *infra*, chapter 7: *State of the Vatican City*.

¹⁴⁴ Brownlie, op. cit. n. 98, p. 73.

domestic jurisdiction and a consequence of statehood, not a precondition. The permanency of the population differentiates between established or fixed populations and nomadic ones. The fact that large numbers of nomads¹⁴⁵ are moving in and out of the country is in itself no bar to statehood, as long as there are a significant number of permanent inhabitants. If a nomadic people wonder within the state boundaries, it will be considered a permanent inhabitant of that state.¹⁴⁶ The population of a state need not be homogeneous. Indeed, it is even rare to find a state with a homogeneous population.¹⁴⁷

Thus, it would be absurd to legally require any ethnic, linguistic, historical, cultural or religious homogeneity in the sense of the antiquated political concept of the nation state. Such factors are not relevant as criteria to determine the existence of a state.¹⁴⁸ A state exercises territorial jurisdiction over its inhabitants and personal jurisdiction over its nationals when abroad. The essential aspect, therefore, regarding the criterion of a permanent population, is the government, which governs individuals and diverse groups inhabiting the territory in a permanent way.¹⁴⁹ The size of the population may be very small. As mentioned, this raises the problem of diminutive states that have been admitted as equal members to the United Nations. As with the criterion of territory, some publicists have deduced from the existence of states, for example the *Principality of Monaco*, that no minimum limit of the size of a state's population has been fixed. Although doubts have been raised with regard to acceptance of the *State of the Vatican City* population, the international community does not seem to preclude statehood for minimal peoples.¹⁵⁰ As we have seen, small Non-Self-Governing Territories as the *Pitcairn Islands* (47 inhabitants) could, in theory, opt for statehood. This statehood only depends on the wishes of the people, not on recognition.¹⁵¹

5.1.4 Government

The criterion of government is the central requirement of statehood on which all other criteria depend. It combines the territory and permanent population into a state for the purposes of international law.¹⁵² The Montevideo Convention demands a government. Publicists¹⁵³ have required an effective government exercising control over the territory. Thus, a central issue of the government criterion is the degree of effective control

¹⁴⁵ American Law Institute, op. cit. n. 117, p. 73, para. 201.

¹⁴⁶ Crawford, op. cit. n. 34, p. 40 et seq.; United Nations, *Yearbook of the International Law Commission* (1949), p. 68, para. 63; Menon, op. cit. n. 115, p. 5.

¹⁴⁷ Central Intelligence Agency (USA), op. cit. n. 15 – see “ethnic groups” in 192 states.

¹⁴⁸ See for example, Franck, M., “Clan and Superclan: Loyalty, Identity and Community in Law and Practice”, 90 *American Journal of International Law* (1996), pp. 359-383.

¹⁴⁹ Malanczuk, op. cit. n. 1, pp. 110-111.

¹⁵⁰ Crawford, op. cit. n. 34, pp. 40 et seq.; see also Crawford, op. cit. n. 21, pp. 227 et seq; Mendelson, op. cit. n. 21, p. 612; Menon, op. cit. n. 127, p. 4; Orlow, op. cit. n. 21, pp. 115-140; and *supra*, chapter 3: *States / Microstates*, chapter 7: *State of the Vatican City*.

¹⁵¹ See *supra*, 4.2.7., *Diminutive Units*.

¹⁵² Magiera, S., “Government”, Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, volume II (1995), pp. 603-607.

¹⁵³ See for example, Whiteman, op. cit. n. 139, p. 223.

demanded. In general, new states seem to need more effective control over a territory than established states, unless the previous sovereign has granted them the right to govern.¹⁵⁴ There are two aspects following from effective control by a government, one external the other internal. Externally, it means the ability to act autonomously on the international level without being legally dependent on other states within the international legal order. Internally, the existence of a government implies the capacity to establish and maintain order within the state.¹⁵⁵ This chapter is mainly devoted to the internal effective control. Statehood is not automatically lost when a state is illegally occupied by a foreign power or in cases of civil war. The former situation reflects the principle ¹⁵⁶ *ex injuria ius non oritur*. Such has been the practice regarding the annexations of the Second World War. However, after fifty years of relatively quiet occupation, it is not impossible that the statehood of the occupied state will disappear by virtue of the principle ¹⁵⁷ *ex factis ius oritur*. A conflict relating to secession, does not lead to the extinction of a state either, unless the seceding entity fulfils a strictly construed requirement of effectiveness.¹⁵⁸ The fact that temporary ineffectiveness of a government does not immediately affect the legal existence of the state reflects the interest of the international system, the interest in stability and in avoiding a premature change of the status quo. The other side of the same coin, as mentioned, is that the requirement of government is strictly applied when part of the population wish to secede to form a new state.¹⁵⁹ As concluded, there is no rule of law that forbids the state from crushing the secessionists, if it can. Whatever the outcome of the struggle, it will be accepted as legal in the eyes of international law. So long as the state is still struggling to crush the secessionary movement, it cannot be said that the secessionary authorities are strong enough to maintain control over their territory with any certainty of performance. Intervention by third states in support of the insurgents is prohibited. Traditionally therefore, states have refrained from recognising secessionary movements as states until their victory has been assured.

In recent years, however, states have abused recognition as a means of showing support for one side or the other in civil wars of a secessionary character. Particularly controversial in the context of the Yugoslavian conflict, mentioned in chapter four, has been the drive for early recognition, justified as being an attempt to contain the civil war, but which was seen by other states as premature action which actually stimulated it.¹⁶⁰ In 1991, the

¹⁵⁴ Crawford, op. cit. n. 34, pp. 42-46; Malanczuk, op. cit. 1, pp. 77-79.

¹⁵⁵ Magiera, op. cit. n. 152, pp. 603-607; Malanczuk, op. cit. 1, pp. 77-79.

¹⁵⁶ *Ex injuria ius non oritur*, i.e., illegal acts do not create law.

¹⁵⁷ *Ex factis ius oritur*, i.e., facts have a tendency to become law.

¹⁵⁸ Crawford, op. cit. n. 34, pp. 46, 419-420; see also *supra*, 4.2.5., *Territorial Conflict*.

¹⁵⁹ Crawford, op. cit. n. 34, pp. 103-106, 247-268; Haverland, op. cit. n. 96, pp. 384.

¹⁶⁰ Craven, M.C.R., "The European Community Arbitration Commission on Yugoslavia", 66 *British Yearbook of International Law* (1995), pp. 357-375; Craven, M.C.R., "The Problem of State Succession and the Identity of States under International Law" 9 *European Journal of International Law* (1998), pp. 142-162; Radan, P., "Secessionist Self-Determination: The Cases of Slovenia and Croatia", 48 *Australian Journal of International Affairs* (1994), pp. 183-195; Weller, op. cit. n. 84, pp. 569-607; and n. 83.

European Community Arbitration Commission on Yugoslavia concluded ¹⁶¹ that the Socialist Federal Republic of Yugoslavia was in process of dissolution. It stated that the state is commonly defined as a community that consists of a territory and a population subject to an organised political authority, that such a state is characterised by sovereignty and that it had to determine the government's control over the population and the territory. As the federal organs no longer met the criteria of participation and representativeness inherent in a federal state and had shown themselves to be powerless to enforce respect for the succeeding cease-fire agreements, the Commission concluded that the federation, that is, the government, was in process of dissolution. It lacked effective power. This conclusion was drawn before recognition of the seceding republics. The presumption of continuity of power does not seem to be strictly followed.

There is no evidence that in order to be recognised, the seceding Yugoslav Republics had to wield more effective power than was demanded on the federation itself. On the contrary, with the loss of effective control by the federal government, effective authority seems to be presumed in the hands of the seceding entities. To a large extent the dissolution depended on the internal political organisation of the Socialist Federal Republic of Yugoslavia. Although, for the purpose of statehood, international law does not prescribe any special form of government, the form of internal political organisation will affect the possibility of exercising effective powers.¹⁶² Thus, a federal state structure will more easily lose effective control, when the composite communities no longer participate in the exercise of political power, than much centralised state structures. The loss of effective control also depends on the number of communities that terminate their participation in the central power, and effective power will be more difficult to dismantle in state structures that do not depend on the cooperation of composite parts.¹⁶³ As mentioned, the government of a state does not need recognition in order to fulfil the criteria for statehood. Non-recognition of a government may constitute proof that it lacks effective control over the territory and population, but can also be inspired by political reasons.

Some states adhere to the policy of only recognising states, not governments.¹⁶⁴ It could be required that the government and inhabitants of the state in general must have attained a degree of civilisation, although as mentioned, in principle, international law is indifferent towards the nature of the political structure of states, be it based on democracy and the rule of law, undemocratic ideologies or other authoritarian systems.¹⁶⁵ The idea of democratic intervention, that is, intervention to support or establish a democratic system of government in another state against illegitimate regimes, for instance the invasion of Iraq in 2003, has caused

¹⁶¹ American Society of International Law, *op. cit.* n. 126, pp. 1494-1497 and the Arbitration Commission on Yugoslavia, Opinion No. 1 of 29 November 1991.

¹⁶² Craven, *op. cit.* n. 160, pp. 357-375; Craven, *op. cit.* n. 160, pp. 142-162; Radan, *op. cit.* n. 160, pp. 183-195; Weller, *op. cit.* n. 84, pp. 569-607.

¹⁶³ *Ibidem.*

¹⁶⁴ Malanczuk, *op. cit.* n. 1, pp. 86-88.

¹⁶⁵ Malanczuk, *op. cit.* n. 1, pp. 77-79.

controversy.¹⁶⁶ Nevertheless, the European civilisation is for example not the only form of civilisation, and if we accept that our democratic values¹⁶⁷ and regulatory systems are unaccepted, or even appropriate, in other parts of the globe, there is no reason for us to accept undemocratic ideologies in Europe, or threats from them. In international law, on the other hand, various forms of political structures and uncivilised perceptions of state and society are, as mentioned, accepted and do not exclude statehood. The rule demands that a government must have established itself in fact. The legitimacy of such an establishment is not decisive for the criteria of a state. The choice of a type of government belongs to the domestic affairs of states.

Thus, general international law, in contrast to the law¹⁶⁸ of the European Union, is not concerned with the actual form of government, democratic in one sense or another or not so. As mentioned above certain qualifications¹⁶⁹ in this respect may arise from the right of self-determination of peoples, but this is not pertinent to the question of whether or not a state exists.¹⁷⁰ It not only could but also has been required that the government and the inhabitants of the state in general must have attained a degree of external civilisation, such as to enable them to observe with respect to the outside world those principles of law which are deemed to govern the members of the international society in their relations with each other.¹⁷¹ However, it seems difficult to imagine what degree of civilisation is needed to observe international law. So far, regimes that do not observe human rights or international law in general have been condemned, for instance the resolutions on Iraq in 1990, but this has not led to the extinction of statehood.¹⁷² This argument is without prejudice to entities that have been illegally formed and therefore cannot claim statehood.¹⁷³

5.1.5 Sovereignty

The notion of effective government has been interlinked with the idea of independence termed state sovereignty. It is doubtful whether any single word has ever caused so much intellectual confusion and international lawlessness as sovereignty. The theory of sovereignty began as an attempt to analyse the internal structure of a state. Over time the word came to be used to describe, not only the relationship of a superior to his inferiors within a state – internal sovereignty, but also the relationship of the state itself towards other states – external sovereignty, or state sovereignty, unfortunately with its overtones of unlimited power above the law. Thus,

¹⁶⁶ See for example, Crawford, J., "Democracy and International Law", 64 *British Yearbook of International Law* (1993), pp. 113-134; and politics (war) in 2003.

¹⁶⁷ Malanczuk, op. cit. 1, pp. 31-32.

¹⁶⁸ Treaty on European Union (2002/C 325/01) consolidated version as in force from 1 February 2003, article 6, point 1 and 2, available at:

European Union: *Treaties*: <http://europa.eu.int/abc/treaties_en.htm> (1 June 2003).

¹⁶⁹ See *supra*, 4.1.6., *General Assembly Resolution 2625*, paragraph 7.

¹⁷⁰ Malanczuk, op. cit. n. 1, pp. 77-79.

¹⁷¹ See for example, Whiteman, op. cit. n. 149, p. 223; and n. 170.

¹⁷² See for example, SC Res. 660 (1990) of 2 August 1990, document symbol: S/RES/660 (1990); United Nations, *Official Document System of the United Nations*, op. cit. n. 42.

¹⁷³ See *infra*, 5.1.8., *Legality of Origin*.

the emphasis on sovereignty encourages states to abuse its power. In contemporary international law sovereignty is an emotive term, not a legal term with any fixed meaning. If sovereignty has any legal meaning today, it signifies independence in relations between states as a consequence of statehood, not a prerequisite thereof.¹⁷⁴

5.1.6 Independence

In contemporary international law, the notion of effective government is also interlinked with the idea of independence in the sense that such government only exists if it is free from legal authority, direct orders from and control by other governments, that is, as mentioned, has the ability to act autonomously on the international level without being legally dependent on other states within the international legal order, or in other words, has the ability to exercise external effective control. The independence of a state is demanded in order to prove that the entity can lead a separate existence. It should not be a continuation of another state, although, as mentioned, it is not so much the independence of states but of governments that is required. Indeed, some authors require independence as an additional criterion for

¹⁷⁴ Malanczuk, op. cit. n. 1, pp. 17-18.

statehood.¹⁷⁵ What degree of independence is necessary under general state practice? Independence concentrates on the rights that an entity has to the exclusion of other states.¹⁷⁶ A substantial limitation of sovereignty in favour of a third state, leads to loss of independence and therefore loss of statehood.¹⁷⁷ However, not every alienation of independence will lead to the extinction of statehood. As long as contractual obligations and restrictions do not place the state under the legal authority of another state, the former remains an independent state however extensive and burdensome those obligations may be. A state loses its independence if it loses the right to exercise its own judgement in coming to the decisions, which the government of its territory entails.¹⁷⁸ One should therefore not fall under the legal authority of another state. The government should be able to take decisions without having to abide by external rules and have an original title to power, not delegated by a third state. Independence is generally divided in formal and actual independence.¹⁷⁹ *Formal* independence exists where the powers of government of a territory, both in internal and external affairs, are vested in the separate authorities of the putative state. Whereas *actual* independence is defined as the minimum degree of real governmental power at the disposal of the authorities of the putative state, necessary for it to qualify as independent. When formal *and* actual independence exists, the entity may qualify as a state. If only formal independence occurs, it is a denial of statehood. In case of a lack of formal independence, but substantial actual independence, statehood seems to be generally withheld too.¹⁸⁰

Certain factors do *not* derogate from *formal independence*. These are 1.) Constitutional restrictions upon freedom of action: For instance, if a state has undertaken to ensure its independence and prohibit union with any other political entity. As long as no other state can amend the constitution, the formal independence of the state is justified.¹⁸¹ 2.) Treaty obligations: Nevertheless, such treaty obligations should not become so burdensome that formal independence disappears, like under treaties establishing protectorates.¹⁸² 3.) Internal illegality of the actual government of a state: Revolutions and coups d'état do not affect statehood. 4.) The existence of military bases or other territorial concessions: States will still have the ability to cancel such concessions, whether or not legally. 5.) The exercise of governmental competence on a basis of agency: One state may act on

¹⁷⁵ Brownlie, op. cit. n. 6, pp. 73-74.

¹⁷⁶ Crawford, op. cit. n. 34, pp. 26-27, 71.

¹⁷⁷ Crawford, op. cit. n. 34, pp. 51; see also

Rousseau, C., *Droit International Public*, volume III (1977), p. 330.

¹⁷⁸ League of Nations, *Collection of Judgements and Collection of Advisory Opinions of the Permanent Court of International Justice: Wimbledon Case* (1923), Series A, no. 1, p. 25; League of Nations, *Collection of Judgements and Collection of Advisory Opinions of the Permanent Court of International Justice: Austro-German Customs Union Case* (1931), Series A/B, 22nd secession, pp. 57-58, 77; see also Crawford, op. cit. n. 34, pp. 51.

¹⁷⁹ Crawford, op. cit. n. 34, pp. 52-71; see also Menon, op. cit. n. 127, p. 8;

Rousseau, op. cit. n. 177, p. 171-253

¹⁸⁰ Crawford, op. cit. n. 34, pp. 52, 56-57, 69-70.

¹⁸¹ Crawford, op. cit. n. 34, pp. 53-55, 166-169.

¹⁸² Crawford, op. cit. n. 34, pp. 51; see for example, Kamanda, A., *A Study of the Legal Status of Protectorates in Public International Law* (1961), pp. 182-183; see also League of Nations, op. cit. n. 178.

behalf of another state by delegation. This does not eliminate the latter state's formal independence, as long as the mandatory cannot exercise its competence independently of the mandatory. 6.) The possession of joint organs for certain purposes: Thus the European Union does not preclude statehood of its members, provided that the joint organs do not cover all or substantial state activities, establishing a federal state structure. 7.) Membership of international organizations: This may be a situation under point six or comprise international organizations as the United Nations.¹⁸³ 8.) The existence of special legal relations between two states as a result of devolution, decolonisation and secession: Certain common regulations may exist between a predecessor state and a successor state.¹⁸⁴

However, two situations *do* derogate from *formal independence*. These are A.) The existence, as a matter of international law, of a special claim of right, irrespective of consent, to the exercise of governmental powers. One state believes as of right, that it has exclusive competence to act for another entity without the latter's consent. B.) Discretionary authority, such as undetermined powers of intervention possessed by one state in respect of another, which can lead to doubt concerning the latter's independence. Discretionary authority to determine upon and effect intervention in the internal affairs of the putative state, is a power of intervention that can also affect the external affairs of an entity.¹⁸⁵

Certain factors do *not* derogate from *actual independence*. These are 1.) Diminutive size and resources: Thus, small Non-Self-Governing Territories¹⁸⁶ may become independent without being hampered by a small territory and limited resources. This can probably also be sustained for microstates in general, provided that their recognition is meant to be declaratory with regard to this point. The existence of diminutive territory, population and resources can nevertheless cause a greater political vulnerability to external interference. 2.) Political alliances: Policy orientation between states does not derogate from actual independence. 3.) Belligerent occupation: This is based on the maxim *ex injuria ius non oritur*, discussed above. Belligerent occupation is not only a violation of the *ius cogens* prohibition of the use of force but also of the right of self-determination of the people of the occupied state. Belligerent occupation, or by analogy the *threat* or use of coercive measures, cannot create a legal title. The UN Charter, chapter 1, article 1, point 4¹⁸⁷ reads: "All Members shall

¹⁸³ Crawford, *op. cit.* n. 34, pp. 53-55.

¹⁸⁴ Crawford, *op. cit.* n. 34, pp. 215 et seq.

¹⁸⁵ Crawford, *op. cit.* n. 34, pp. 55-56.

¹⁸⁶ See *supra*, 4.2.7., *Diminutive Units, on Pitcairn Islands*.

¹⁸⁷ United Nations, *Charter of the United Nations*, *op. cit.* n. 17.

refrain (...) from the *threat* or use of force against the territorial integrity or political independence of any state”, n.b., emphasis added. The fact that the treat or use of force cannot create a legal title is without prejudice to possible cases in which the principle of *ex factis ius oritur* applies or in which a final settlement has been reached. 4.) Illegal intervention: It contrasts with the already discussed legal intervention that can derogate from formal independence, but does not preclude the extinction of statehood in case of an illegal occupation for a sufficiently long time after the cessation of hostilities.¹⁸⁸

Conversely, three situations *do* derogate from *actual independence*. These are A.) Substantial illegality of origin: The putative state has been created in violation of basic rules of international law or *ius cogens*. Although the statehood of this entity will probably be denied, because of its illegality of origin alone, the entity will be presumed to lack actual independence. B.) Entities created under belligerent occupation: There is a strong presumption that these entities do not enjoy actual independence from the occupying power. C.) Substantial external control of the state. This category is of the utmost importance for microstates, because even if formal independence is proved, they must show sufficient control over their external and internal affairs.¹⁸⁹ Such independence will not be demonstrable in case of foreign control overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis.¹⁹⁰

As mentioned, the European Union does not preclude statehood of its members, provided that the union does not cover all or substantial state activities, establishing a federal state structure. It is important to emphasise that a federal state is regarded as a state for the purposes of international law, but the member states of the federation are not. The European Union is not a federal state – yet, and is therefore regarded as an organization *sui generis*. Consequently, the member states of the European Union *are* regarded as states, although the line between states and member states is not fixed and there is, after all, no uniform model of a (federal) state controlling various forms of dependencies.¹⁹¹ In addition, the term *dependent states* has often been used for states which by treaty have placed themselves under the control of a third state or organ, like the composite states of a federation,

¹⁸⁸ Crawford, op. cit. n. 34, pp. 57-58, 419-420.

¹⁸⁹ Crawford, op. cit. n. 34, pp. 58-69.

¹⁹⁰ Brownlie, op. cit. n. 6, p. 76.

¹⁹¹ Malanczuk, op. cit. n. 1, p. 81; and *supra*, 5.1.6., *Independence*, formal independence, point 6; see also Hancher, L., “Constitutionalism, the Community Court and International Law”, 25 *Netherlands Yearbook of International Law* (1994), pp. 259-258.

colonies in the process of becoming independent and protectorates.¹⁹² It is however a *contradictio in terminis* to speak of dependent states, since states are by definition independent entities.

5.1.7 Dependence

The distinction between states and dependent entities is often based on external appearances. After all, as long as a state appears to perform the functions which states normally perform, that is, sending and receiving ambassadors, signing treaties, making and replying to international claims and so on, international law treats the state as independent and does not investigate the possibility that the state may be acting under the direction of another state. As we have seen, a state becomes dependent if it, for example, enters into a treaty or some other legal commitment whereby it agrees to act under the direction of another state, or if it is obvious that a state lacks actual independence. However, if international law tried to take all the political realities into account, it would be impossible to make a clear distinction between dependent entities and states, because all states, even the strongest, are subject to varying degrees of pressure and influence from

¹⁹² See for example, Akehurst, M., *A Modern Introduction to International Law*, 5th edn. (1984), pp. 55-56.

other states.¹⁹³ Of course, one can imagine relations containing such comprehensive obligations as depriving a state of its independence, for instance, a treaty whereby one state becomes a protectorate of another state. Although, as discussed¹⁹⁴ there is no fixed dividing line between independence and loss of independence – it is, as mentioned, a matter of degree, and even independence shares some of the emotive qualities of the word sovereignty. For instance, the idea of joining a supranational organization like the European Union, would most likely have been regarded as an intolerable restriction upon independence a century ago.¹⁹⁵

5.1.8 Legality of Origin

It is possible that an entity that fulfils the conditions for statehood is not recognised by the international community because its creation violates a peremptory norm of international law. The problem that arises is whether this entity can be considered a state that violates international law, or whether statehood is precluded by definition because of the illegal origin. In the former case, non-recognition would only function as a political sanction without prejudicing the statehood. In the latter case, non-recognition denies the statehood, because it regards the legality of origin as a constitutive criterion for statehood. Both positions have been supported by doctrine.¹⁹⁶ There are reasons why preference should be given to the argument that an entity cannot claim statehood if its creation was founded and made possible by the violation of a rule of *ius cogens*. Whatever the value of the maxim *ex injuria ius non oritur*¹⁹⁷ in general, especially in the case of a breach of

¹⁹³ Malanczuk, op. cit. n. 1, pp. 77-79.

¹⁹⁴ See *supra*, 5.1.6., *Independence*.

¹⁹⁵ Malanczuk, op. cit. n. 1, pp. 18.

¹⁹⁶ Crawford, op. cit. n. 34, pp. 105 et seq.; Dugard, op. cit. n. 17, p. 127-131; see also Devine, D.J., “The Requirements of Statehood re-examined”, 34 *Modern Law Review* (1971), pp. 410-414; Fawcett, J.E.S., *The Law of Nations*, 2nd edn. (1971), pp. 38-39.

¹⁹⁷ See *supra*, 5.1.4., *Government*.

peremptory norms of international law¹⁹⁸ no legal consequences should be accepted which are to the advantage of those who infringed the rules of *ius cogens*.¹⁹⁹ The state is therefore under the obligation to bring the situation to an end, which may have to lead to the dissolution of the illegal entity, including problems of state succession²⁰⁰ et cetera. It deserves to be mentioned that existing states may have been created through *historical evolution*, under circumstances which at present would have been regarded illegal, but which at the time were justified. It reflects the principle²⁰¹ *nullum crime sine lege*.²⁰² The subsequent norms of general international law have been invoked with respect to the illegality of the creation of states.

First, the prohibition of aggression and of acquisition of territory by means of force: Acts of aggression are generally accepted to be outlawed by a rule of *ius cogens*.²⁰³ The General Assembly Resolution 3314 of 14 December 1974, or the Definition of Aggression, article 1,²⁰⁴ states: “Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state (...)”. Resolution 3314, article 5, paragraph 3 specifies: “No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful”. Thus, the United Nations have condemned numerous occasions of aggression.²⁰⁵ The only exception to this rule seems to be a justification under another rule of *ius cogens*. As a consequence, entities which wish to secede from an existing state and which do not have the right of self-determination with force of *ius cogens*, as in most cases when territorial integrity is involved, cannot claim statehood if the putative state has been founded with the help of armed force by a third state. The legal situation will be different if the seceding entity can demonstrate its statehood before the external help and

¹⁹⁸ See *supra*, 4.2.6., *Ius Cogens*.

¹⁹⁹ United Nations, *op. cit.* n. 100, p. 32, para. 33.

²⁰⁰ See *supra*, 4.1.1., *Transfer of Sovereignty*.

²⁰¹ *Nullum crimen sine lege*, i.e., no crime without a law.

²⁰² Crawford, *op. cit.* n. 34, pp. 105-106.

²⁰³ Hannikainen, *op. cit.* n. 100, p. 323 et seq.

²⁰⁴ GA Res. 3314 (XXIX) of 14 December 1974, document symbol: A/RES/3314(XXIX); United Nations, *Official Document System of the United Nations*, *op. cit.* n. 42.

²⁰⁵ Vyver, J.D. van der: “Statehood in International Law”, 5 *Emory International Law Review* (1991), p. 46 at n. 187; see also numerous Security Council Resolutions at United Nations, *Official Document System of the United Nations*, *op. cit.* n. 42.

aggression. The creation of the state would then not have depended on a breach of *ius cogens*.²⁰⁶

Secondly, the right of self-determination: A new state cannot be created without the consent of the peoples living in self-determination units who hold the right of self-determination as a rule of *ius cogens*.²⁰⁷ Furthermore, some academics demand that the wishes should be observed even of those peoples who have the right of self-determination by virtue of a general rule of international law, and not a rule of *ius cogens*. Possibly, secessions without popular support in the seceding units could therefore, be seen as illegal and should not lead to the creation of a state.²⁰⁸ In addition, it has been suggested that the establishment of a discriminatory regime hinders the creation of a state.²⁰⁹ As discussed, the criterion of effective government leaves the choice of the form of government to the population of the state, and it does not punish it with the disappearance of the statehood if the government violates a norm of *ius cogens*. However, the creation of a state in order to establish a government based on discrimination will in most cases be in contravention of the right of self-determination of the whole population.²¹⁰

5.2 Additional Criteria

Doctrine and the practice of states have on occasion prompted other criteria for statehood in addition to or in place of the criteria discussed above. Nevertheless, these norms are often rather a prerequisite for recognition, not statehood.

First, the condition of *permanence*: For instance, recognition can be granted if a state shows indications that it will continue to satisfy the criteria for statehood. Permanence can be of evidence as to the possessions of the attributes of statehood. Permanence may be of special value to prove the effectiveness of a government and the degree of independence, which both have to bear a certain test of time.²¹¹ *Secondly, the capacity to enter into relations with other states* according to the state definition given by the Montevideo Convention.²¹² In general, such a capacity is a legal consequence of statehood not a prerequisite, unless it is regarded as a demand for a certain degree of independence. However, the capacity to enter into relations with other states is not decisive for independence.²¹³

²⁰⁶ See *supra*, 4.2.6., *Ius Cogens*.

²⁰⁷ *Ibidem*; see also Hannum, *op. cit.* n. 31, pp. 375, 401-403.

²⁰⁸ See *supra*, 4.2.4., *Territorial Integrity*; see also American Society of International Law, *op. cit.* n. 126, pp. 1501-1503; Weller, *op. cit.* n. 84, p. 593.

²⁰⁹ Crawford, *op. cit.* n. 34, pp. 226-227; Vyver, J.D. van der, *op. cit.* n. 205, p. 65.

²¹⁰ Hannikainen, *op. cit.* n. 100, pp. 471-476; United Nations, *op. cit.* n. 100, p. 32, para. 34; see also *supra*, 4.2.1.-4.2.7.

²¹¹ Crawford, *op. cit.* n. 34, pp. 71-72.

²¹² League of Nations, *op. cit.* n. 121, p. 19;

Yale Law School, *The Avalon Project*, *op. cit.* n. 121.

²¹³ Malanczuk, *op. cit.* n. 1, p. 80.

Third, it could be suggested that a state needs a constitution, legal system or *legal order*.²¹⁴ Although the existence of a legal order, et cetera, most likely will simplify the effectiveness of a government, it is not so much a separate criterion for statehood, but rather an element of governmental power. A government may, for example, well be effective without a (written) legal system / constitution, as in the case of the United Kingdom,²¹⁵ but may also exercise control over its territory without any legal order, as in the case of authoritarian regimes, or when new states may not yet have established a legal order. The condition of legal order, et cetera, can help to establish statehood, although it is not a *conditio sine qua non* in international law.²¹⁶ *Fourth*, the *European criteria*: Following the recognition practice of the members of the European Union with regard to the new states²¹⁷ in Eastern Europe and in the Soviet Union, one can wonder whether additional criteria for statehood have been established. However, the condition that the new states should be, for instance, democratic, can be regarded as a political condition, for as we have seen it does not prejudice the legal existence of the state. *Finally*, it should be emphasised that *state activities* like granting nationality, issuing passports and signing treaties, et cetera, are not necessarily proof of the existence of statehood. One should distinguish between conditions that are considered indispensable for statehood, and activities that are a possible result of it.

²¹⁴ Legal philosophy may add to the definition of a state, see various theorists, *for example*, Kelsen, H., *The Pure Theory of Law*, 2nd edn. (1964), although it cannot be discussed here.

²¹⁵ U.S. Department of State, and Central Intelligence Agency (USA), *op. cit.* n. 15.

²¹⁶ See *infra*, chapter 8: *Analysis*, for further discussions.

²¹⁷ EPC Declaration of 16 / 17 December 1991 on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union; see also American Society of International Law, *op. cit.* n. 126, pp. 1485-1487; Treaty on European Union, *op. cit.* n. 168, regarding criteria for membership in the European Union.

6 INTERNATIONAL RELATIONS

6.1 International Relations of Microstates

6.1.1 Cooperation

International relations are of importance for all states, although in particular for microstates due to their diminutive size and resources. To a certain extent all relations between states are *political*, but in order to study international law from the perspective of diminutive states, one can observe three main fields in which cooperation is sought with larger (often neighbouring) states and organizations, that is, *practical*, *economic* and *political* relations. We have concluded that microstates are accepted as full members of the international community, but to understand the legal importance of international relations, how diminutive states function in the European community and what law can learn from their existence – Andorra, Liechtenstein, Monaco and San Marino – none of them members of the European Union or extending 500 square kilometres, are here used as *examples*. They emerged from a longstanding traditional unit outside the colonial context and are confronted with a growing European integration. Before focusing on international relations, certain hard facts should be emphasised, see *infra*.

Principality of Andorra: area: 468 square kilometres, population: 68 403, Andorrans: circa 35 per cent. The Valleys of Andorra was granted to the count of Urgell by the son of Charlemagne in 819 A.D. Established in the 13th century.

Principality of Liechtenstein: area: 160 square kilometres, population: 32 842, Liechtensteiners: circa 65 per cent. Once part of the ancient Roman province of Rhaetia, existing territory defined in 1434 A.D. Established in the 18th century.

Principality of Monaco: area: 1.95 square kilometres, population: 31 987, Monegasques: circa 15 per cent. A strategic and natural harbour under Roman domination until the fall of the Empire. Established in the 13th century.

Republic of San Marino: area: 61.2 square kilometres, population: 27 730, Sammarinenses: circa 85 per cent. According to the legend founded by Saint Marinus 3 September 301 A.D. Established in the 4th century.

State of the Vatican City (see chapter 7): area: 0.44 square kilometres, population: 774, that is, 165 citizens residing, 266 citizens abroad, 343 non-citizens residing, estimated 1991. The Apostolic See, established in the 4th century, had extensive territory until the annexation in 1870 A.D. (Re-) Established in 1929 A.D.²¹⁸

²¹⁸ Blaustein, A.P. and Blaustein, P.M., *Constitutions of Dependencies and Special Sovereignties: Vatican City State* (1988), p. 1 et seq.; Central Intelligence Agency (USA), op. cit. n. 15; Duursma, op. cit. n. 62, p. 457 et passim; U.S. Department of State (USA), op. cit. n. 15; see also Labande, L.H., *Histoire de la Principauté de Monaco*, 2nd edn. (1934), p. 19 et seq.; Raton, P., *Liechtenstein: History and Institutions of the Principality* (1970), p. 20 et seq.; Raton, P., *Le Statut international de la Principauté d'Andorre*, 2nd edn. (1990), p. 11 et seq.; Robert, J., *Histoire de Monaco*, 2nd edn. (1997), passim.

6.1.2 Practical Relations

Practical relations concern cooperation that facilitates the everyday functioning of states, in particular customs cooperation (a relation that also can be characterized as economic). The member states of the European Union, along with the applicant countries, cover almost the breadth of the European continent, but some entities, in particular microstates, have not opted for membership.²¹⁹ Dependencies of the member states are, in general, members of the European Union and therefore part of the customs territory. Nevertheless, some entities that are *not* members often have distinctly defined relations with the European Union as a consequence of the European integration. In most cases these relations concern customs unions and other cooperation, which for examples enables microstates to participate in the single market, while not assuming the full responsibilities of membership of the European Union.

For example, the *Principality of Liechtenstein*²²⁰ has a customs union with Switzerland since 1924. Liechtenstein uses the Swiss franc, and Swiss customs officers secure its border with Austria. Both are members of the European Free Trade Association, an arrangement that has defined their trade relations with the European Communities / European Union for decades. However, Liechtenstein, but not Switzerland, is also a member of the European Economic Area, which enables Liechtenstein to participate in the single market while not assuming the full responsibilities of membership of the European Union. Thus, it is the European Economic Area that now defines trade relations between the European Union and Liechtenstein. Similar circumstances, that is, distinctly defined and amicable relations with the European Union, applies to Andorra, Monaco and San Marino.²²¹ Nevertheless, privileged positions are not only reserved to microstates, but also to various forms of similar entities that are *not* states.

²¹⁹ *Member States of the European Union* (15): Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, the Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom, including the *microstate* Luxembourg; *Applicant States of the European Union* (13): Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Romania, Slovenia, Slovakia, Turkey, including the *microstates* Cyprus and Malta; *European States not members of the European Union* (16): Albania, Belarus, Bosnia and Herzegovina, Croatia, Moldavia, Norway, Russian Federation, Former Yugoslavian Republic of Macedonia, Ukraine, Serbia and Montenegro, including the *microstates* Andorra, Iceland, Liechtenstein, Monaco, San Marino and the State of the Vatican City. See *infra* n. 224, European Union: *European Commission, European Union in the World*.

²²⁰ See for example, Gstöhl S., "Successfully Squaring the Circle: Liechtenstein's Membership of the Swiss and European Economic Area", Hösli, M. and Saether, A.: *Free Trade Agreements and Customs Unions: Experiences, Challenges and Constraints* (1997), pp. 163-176; Nell, P.G., "Liechtenstein: Strategy for Joining the European Economic Area while Remaining Part of the Swiss Monetary Union", 51 *Aussenwirtschaft* (1996), pp. 101-114; and *infra* n. 221, Europe Magazine: *Status and Relations with the European* (...).

²²¹ Europe Magazine: *Status and Relations with the European Union*: (1 June 2003) <<http://www.eurunion.org/legislat/extrel/PrincipalityEtc/PrincIsDepRepObl.htm>>; see also Armstrong, H. and Read, R., "Small States and the European Union: Issues in the Political Economy of International Integration", 11 *Current Politics and Economics of Europe* (2002), pp. 31-47; and *infra* n. 222, 224, 226.

Areas of various legal status, in general *diminutive* in territorial size and population, also have distinctly defined relations with the European Union or its member states.²²² The European Overseas Countries and Territories²²³ are dependent territories outside the European Union and excluded from the customs territory although constitutionally linked to some of the member states of the European Union. Several of these entities are, according to the United Nations, also Non-Self-Governing Territories. The autonomous Finnish Aaland Islands, the Portuguese Azores, the Spanish Canary Islands and the semiautonomous Portuguese Madeira Islands are all members of the European Union and parts of the customs territory. The same applies to the French Overseas Departments, that is, the French Caribbean islands of Guadeloupe and Martinique, the island of Reunion and French Guiana. However, the semiautonomous Spanish entities Ceuta and Melilla are members of the European Union but *not* part of the customs territory.

In general, the same applies to the British Gibraltar peninsula. Furthermore, the Faeroe Islands, a self-governing overseas administrative division of Denmark, has a trade agreement with the European Union, *but* are neither member nor part of the customs territory. The same applies to the semiautonomous Danish territory Greenland – also one of the European Overseas Countries and Territories. The British Channel Islands, that is, the self-governing jurisdictions of Alderney, Guernsey, Herm, Jersey and Sark are all part of the customs territory, although *not* members of the European Union. The British Channel Islands, including the Isle of Man, have special agreements with the Union. In addition, the Kaliningrad oblast, that is, the political subdivision of the Russian federation, is subject to special legislation between the European Union and Russia.²²⁴ It should be mentioned that practical relations also comprise post, telegraph, telephone, Internet and other forms of communication, including cooperation for the proper functioning of radio, television and other domains for practical purposes, such as water, gas and electricity.²²⁵ These aspects cannot be examined here.

²²² See for example, Armstrong, H. and Read, R., "Western European Micro-States and EU Autonomous Regions: The Advantages of Size and Sovereignty", 23 *World Development* (1995), pp. 1229-1245; and *supra* n. 221.

²²³ *Dependent European Overseas Countries and Territories*: British (11) Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, St Helena including Ascension Island and Tristan da Cunha, (British Antarctic Territory), British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands; French (6): Mayotte, New Caledonia, French Polynesia, St Pierre et Miquelon, French Southern (and Antarctic) Territories, Wallis and Futuna; Dutch (2): Aruba, Netherlands Antilles, i.e., Curacao, Bonaire, St Martin, St Eustache and Saba; Danish (1): Greenland. See *infra*, n. 224, European Union, *SCADPlus*.

²²⁴ Eurisles: *Overseas Countries and Territories*:

<http://www.eurisles.com/Textes/statut_iles/Annexe10EN.htm> (1 June 2003);

European Union: *European Commission, European Union in the World*:

<<http://europa.eu.int/comm/world/>> (1 June 2003);

European Union: *EUR-Lex, European Union Law*:

<<http://europa.eu.int/eur-lex/>> (1 June 2003);

European Union: *SCADPlus, Overseas Countries and Territories*:

<<http://europa.eu.int/scadplus/leg/en/lvb/r12300.htm>> (1 June 2003); and n. 221.

²²⁵ Central Intelligence Agency (USA) and U.S. Department of State (USA), op. cit. n. 15.

6.1.3 Economic Relations

The economic relations of diminutive states are not only designed to facilitate the economic survival of these states, but also the result of the reconciliation of the economic interests of the European microstates on the one hand, and of larger (often neighbouring) states and organizations, on the other.²²⁶ Economic collaboration may comprise general financial cooperation and monetary, banking and fiscal coordination. The economic relations of diminutive states are *not* a question of achieving immediate and full economic independence, for that is not a realistic prospect for most states in the world. It is rather a question of dependence management through economic diversification that can ease the burdens of dependency both materially and psychologically. It is important to stress that dependence management is not a challenge confined only to diminutive open economies. Canada, one of the World's largest economies, is dependent on its relationship with the United States by every index of economic activity. With few exceptions, the actual experience of diminutive states, and in particular European microstates, has been one of impressive rates of economic growth and diversification.

The sources of income of microstates vary in general between natural resources, tourism and the service sector, and globalisation offers opportunities, just as it presents constraints for diminutive economies.²²⁷ Critical here is the *exploitation of jurisdiction* itself as a resource. Whether it is a question of using fiscal levers to attract investment and to open new areas of economic activity or whether it is access to national capitals and multilateral agencies, the legal independence, or sovereignty, of microstates has proven to be a major tool in itself in reducing a state of dependency.²²⁸ For example, the diminutive *Republic of San Marino* illustrates the importance of jurisdiction and legal status as state, which alone make the development of the service sector possible. In fact, besides the tourism industry San Marino makes most of its income from the service sector. The financial and insurance sectors of the diminutive Republic's economy have grown impressively, directly as a result of the lack of confidence in the political stability of its all-surrounding neighbour.²²⁹ The gross domestic product per capita, that is, the value of all final goods and services produced within San Marino, in 2001, on a purchasing power parity basis divided by population as of the same year, stood at \$ 34,600²³⁰.

²²⁶ See for example, Armstrong, H. and Read, R., "A Comparison of the Economic Performance of Different Micro-States, and Between Micro-States and Larger countries", 26 *World Development* (1998), pp. 639-656; Armstrong, H. and Read, R., "Comparing the Economic Performance of Dependent Territories and Sovereign Microstates", 48 *Economic Development and Cultural Change* (2000), pp. 285-306.

²²⁷ Bartmann, op. cit. n. 21, chapter B and D.

²²⁸ Palan, Ronen P., "Tax Havens and the Commercialization of State Sovereignty", 56 *International Organization* (2002), pp. 151-176; and Bartmann, op. cit. n. 21.

²²⁹ Prati, A. et al., *San Marino: Recent Economic Developments* (1996), passim; Repubblica di San Marino: *Sintesi Statistica Anno 2000*:

<<http://www.esteri.sm/italiano2000.pdf>> (1 June 2003).

²³⁰ See for example, per capita GDP of the USA: \$ 36,300, or Germany: \$ 26,600, n. 15.

San Marino maintains the lowest unemployment rate in Europe, a state budget surplus, and no national debt. The main issues confronting San Marino include economic and administrative questions related to San Marino's status as a close financial and trading partner with Italy while at the same time remaining separated from the European Union. San Marino bases its relations with the European Union on the Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino of 1991, signed the same year and recently entered into force. Similar circumstances, that is, economic growth, distinctly defined and economic / amicable relations with the European Union, applies to Andorra, Liechtenstein and Monaco.²³¹ Nevertheless, sometimes there is a dissatisfaction of the neighbouring state or organization, with the economic cooperation, which incites the neighbour to put pressure on a microstate in order to compel it to make certain concessions. For example, in 1949 San Marino opened a casino in order to attract tourism. This measure, combined with the considerable increase in the number of limited liability companies in the microstate, was considered by Italy prejudicial to its fiscal system. Italy took countermeasures that were maintained for two years, for instance, establishing passport controls and frontier posts, paralysing tourism and disturbing postal traffic. San Marino closed the casino and was constrained to accept the obligation not to permit the exploitation of gambling houses on its territory.²³²

Another issue is that microstates often seek to either share a monetary system or use that of another state. Outside the European context, there are numerous examples. Until recently, the French franc was used in Monaco and along the Spanish peseta in Andorra, while the Italian lira was used in San Marino and the State of the Vatican City. Today, most of the diminutive European states outside the union use Euro notes and coins. Once again, microstates enjoy privileges without assuming the full responsibilities of membership of the European Union.²³³

²³¹ Bartmann, op. cit. n. 21, chapter B; Europe Magazine: *Status and Relations with the European Union*, op. cit. n. 221.

²³² Giogeri, P., *Conflittualità nelle Relazioni Italo – Sammarinesi* (1987), pp. 118-119; Vedovato, G., *Le Relazioni Italia – San Marino*, Seconda Serie X (1960), pp. 28-37.

²³³ Bartmann, op. cit. n. 21, chapter B; Europe Magazine: *Status and Relations with the European Union*, op. cit. n. 221.

6.1.4 Political Relations

As mentioned, to a certain extent all relations between states are *political*, although in order to study international law from the perspective of diminutive states, the political relations between microstates and larger (often neighbouring) states and organizations, comprehend for the purpose of the study: diplomatic representation, general restrictions on external and / or internal political affairs, and constitutional relations. Political relations do not include relations without legal obligation by reason of political affiliation. *Diplomacy*: Diminutive states give priority to diplomacy both at the regional and international level. Practically all microstates are full members of the United Nations and belong to, or have distinctly defined relationships with, their major respective regional organizations. The majority of microstates give priority to the United Nations, the regional organization, the regional mentor state, and in cases of former colonies – the previous administering power. Sometimes even one diplomatic mission can mean large signature. For example, the microstate Tonga's High Commission to Great Britain is accredited to seven major European states, including the European Union. Along with the British Commonwealth of Nations membership, much more is not needed. Joint representation on the other hand, has never facilitated diplomatic missions or improved to emphasise independence.

Most common are relations with the larger neighbouring state undertaking representation of the diminutive state's interest when so directed or requested.²³⁴ The *Principality of Liechtenstein*²³⁵ is, once again, an interesting example. Liechtenstein has three missions abroad; elsewhere its limited overseas interests are represented by Switzerland. This does *not* imply an abandonment of the principality's right of legation or treaty power. It is, as the Swiss have insisted, an arrangement of convenience for Liechtenstein with Switzerland acting in response to instructions from the government in Vaduz. Another way of extending international engagement is through consular representation. Liechtenstein has no consular mission because of the agreement with Switzerland, but most European microstates rely to a large extent on career or honorary consuls. Smallness, isolation and the resource and personnel limitations of microstates would have surely confined them at one time to the margins of international life. But in the contemporary global system with its universal and regional institutions and egalitarian values, for instance, the United Nations and the European Union, even the smallest states has access to the opportunities which the international network provides.²³⁶

²³⁴ Bartmann, op. cit. n. 21, chapter C; Mohamed, A.N., *The Diplomacy of Micro-States* (2002), passim.

²³⁵ Ludlow, P., *Liechtenstein in the New European and Global Order: Challenges and Opportunities* (2000), passim.

²³⁶ Bartmann, op. cit. n. 21, chapter C; Ludlow, op. cit. n. 235; Mohamed, op. cit. n. 234.

Treaty Restrictions: Sometimes the internal and / or external policies of a diminutive state are brought in line with those of a larger neighbouring state or organization. When focusing on European microstates, it is especially relevant for the *Principality of Monaco* that has undertaken certain obligations in this sense. The Franco-Monegasque Treaty of 17 July 1918 and the complementary exchange of letters of the same date, is often mentioned as the treaty on which the political relations between Monaco and France are founded.²³⁷ Monaco's obligation to conform its sovereign rights to French political, military, naval and economic interests, could be interpreted as prejudicial to Monaco's formal independence, and some academics have stated that the undetermined powers of intervention possessed by France in respect of Monaco according to the Treaty of 17 July 1918 should lead to doubts concerning the principality's statehood.²³⁸ Nevertheless, Monaco and France recently signed an agreement that replaces the Treaty of 17 July 1918. The Treaty Designed to Adapt and Uphold the Friendly and Co-operative Relations Between the French Republic and the Principality of Monaco of 24 October 2002, reaffirms the independence of Monaco and establishes equality of Franco-Monegasque relations.²³⁹

The new treaty centres on contemporary international law. In general, two fundamental principles are evident in the Treaty of 24 October 2002, that is, sovereignty / independence and reciprocity. The previous text referring to the protective friendship of France has been changed to traditional friendship, thereby signifying that the two states are equal. In addition, the old article allowing France to establish a protectorate over Monaco has been omitted, and in terms of political cooperation, the treaty insures the defence of Monaco's independence and guarantees the territorial integrity. It specifies that the states are distinct and separate, although the treaty maintains that Monaco, to a certain extent, has to consult with France to make sure that its actions are in accordance with the interests of French politics, economics, security and defence. French forces are allowed on the territory of Monaco in the event of a threat to the security of Monaco and France, but the Prince must agree beforehand. These and other legal issues are focused in the Franco-Monegasque Treaty of 24 October 2002.²⁴⁰ The question is whether the *new* treaty can be interpreted as prejudicial to Monaco's formal independence and statehood. A closer examination of the treaty is not possible here.

²³⁷ Ministère des Affaires étrangères (France): *Les Archives Diplomatique*: (1 June 2003) <<http://www.doc.diplomatie.gouv.fr/BASIS/pacte/webext/bilat/DDD/19180003.pdf>>; Gallois, J.P., *Le Régime international de la Principauté de Monaco* (1964), p. 224-225.

²³⁸ Crawford, op. cit. n. 34. pp. 55-56

²³⁹ Consulate General of Monaco in New York: *News & Events*:

<http://www.monaco-consulate.com/news_1024.htm> (1 June 2003);

Principality of Monaco: *Official Site*: <<http://www.gouv.mc/>> (1 June 2003).

²⁴⁰ Consulate General of Monaco in New York: *News & Events*, op. cit. n. 239; Principality of Monaco: *Official Site*: op. cit. n. 239.

Constitutional Relations: Sometimes the governmental institutions of states are subject to foreign influence. For more than 700 years the *Principality of Andorra* has been shared between the co-Princes of the French Comte de Foix and the Spanish Bishop of Urgell. Until recently Andorra's political system had no clear division of power among executive, legislative, and judicial branches. A constitution ratified and approved in 1993 changed this. The constitution establishes Andorra as a sovereign parliamentary democracy. Under the 1993 constitution, the President of the French Republic, as successor to the French Crown, itself successor to the Comte de Foix, and the Spanish Bishop of Urgell continue as heads of state and co-Princes of Andorra, but the head of government retains executive power. The co-Princes are represented in Andorra by a delegate and serve equally with limited powers that do not include veto over government acts. Since the Andorran Constitution of 1993, it is clear that the co-Princes in no way compromise the independence of the Andorran government. It is a symbolic and formal role. The previous uncertainty concerning the governmental representation of Andorra in the international community led to a paralysis of its international activities. The Andorran Constitution of 1993 thus increased the chances to be accepted as a state. Since the establishment of sovereignty with the ratification of the constitution, Andorra has become a member of the international community.²⁴¹

Andorra is a full member of the United Nations since the Constitution of 1993, and today the principality has extended relations to other states. However, in addition to the Constitution of 1993, Andorra signed the Treaty of Vicinage, Friendship and Cooperation²⁴² between France, Spain and Andorra of 3 June 1993. The treaty defines the framework of the principality's relations with its two neighbouring states. In accordance with the treaty, France and Spain recognize Andorra as a sovereign state and respects its independence. Andorra has to respect the internal and external fundamental interests of France and Spain, which in turn will respect fundamental interests of Andorra. This obligation is relativised by its reciprocal application and by the obligation of France and Spain to respect Andorra's independence. The question is if the Treaty of 3 June 1993 between France, Spain and Andorra is prejudicial to the formal independence of Andorra, or indeed of France and Spain. It seems as the mutual respect for each other's fundamental interest implies that France and Spain may not in law demand more from Andorra than Andorra from them. Andorra's obligations toward France and Spain seem to depend on a restrictive interpretation of the principle of respect for fundamental interests of both states.²⁴³ However, as with the new Franco-Monegasque treaty, a further analysis is not possible.

²⁴¹ Centre Nacional d'Informàtica (original source): *Constitution of Andorra*: <http://www.andorramania.com/constit_gb.htm> (1 June 2003);

Bartmann, op. cit. n. 21, chapter D; U.S. Department of state (USA), op. cit. n. 15.

²⁴² Ministère des Affaires étrangères (France): *Les Archives Diplomatique*: (1 June 2003) <<http://www.doc.diplomatie.gouv.fr/BASIS/pacte/webext/multinde/DDD/19930095.pdf>>.

²⁴³ Treaty of 3 June 1993, article 1 and 3, article 4, paragraph 1, and article 5.

6.2 Microstates and Conflicts

The International Court of Justice is an organ of the United Nations. Nevertheless, it has a special position as an independent court and is not integrated into the hierarchical structure of the other organs. The International Court of Justice settles legal disputes submitted to it by states in accordance with international law. The Statute of the International Court of Justice of 26 June 1945, article 36, point 1, provides: “The jurisdiction of the Court comprises all cases which the parties refer to it (...)”. The reference can take various forms, although it is important to stress that *all* the parties to the dispute must agree that the case should be referred to the court.²⁴⁴ Because of their negotiation positions, the International Court is especially advantageous for diminutive states, provided that the states concerned have accepted its compulsory jurisdiction. Treaties often provide for adjudication. *Adjudication*, mentioned in chapter four, implies that states refer disputes to a standing international court or tribunal, for example, the International Court of Justice, the Court of Justice of the European Communities, or other courts where the judges are already selected, the procedure is fixed and the law, which the court has to apply, is predetermined.

Sometimes treaties provide for *arbitration* between states, or between states and organizations. One example is that the European Union at times replaces the larger neighbouring state in customs issues with the possibility of arbitration²⁴⁵ or adjudication in case of conflicts.²⁴⁶ In general, microstates either have diplomatic and friendly relations with other states and organizations, or disputes solved through adjudication or arbitration – *war* is not a microstate solution.²⁴⁷ The typical view of sovereignty a century ago was that a state, which could not draw its sword when it saw fit, may be a kingdom for conventional or courtly purposes but in fact could not longer rank as a state.²⁴⁸ There is no doubt that diminutive states have faced direct military threats.²⁴⁹ Nevertheless, the vast majority of microstates do not face any conventional military threat and for most their security vulnerability are bundled within those of their partners, for instance, the North Atlantic Treaty Organization, the European Union, the United Nations and larger neighbouring states with which most microstates have excellent relations. Conventional military defences are more or less irrelevant in microstates. What is more common is the larger agenda of security threats, such as organised crime, illegal trade in migrants and drug

²⁴⁴ Malanczuk, op. cit. n. 1, pp. 281-283.

²⁴⁵ See for example, Agreement on Cooperation and Customs Union between the European Economic Community and the *Republic of San Marino*, article 24; Agreement between the European Economic Community and the *Principality of Andorra* in the form of an exchange of letters, article 18; see Europe Magazine, op. cit. n. 221, and n. 231.

²⁴⁶ Malanczuk, op. cit. n. 1, pp. 281-283.

²⁴⁷ Bartmann, op. cit. n. 21, passim.

²⁴⁸ Von Treitschke, Heinrich., “Politics I”, Cox, H. (ed.): *The State in International Relations* (1965), pp. 53-54.

²⁴⁹ See for example, Harden, Sheila (ed.): *Small is Dangerous: Micro States in a Micro World: A Report from the David Davies Memorial Institute for International Studies* (1985), passim.

running. These are the security issues for microstates, not the threat of imminent invasion from a larger state, in part because an invasion would be condemned and sanctions implemented by the international community. Besides the fact that acts of aggression are prohibited, the economic growth from relations with the occupied microstate would probably be lost. A neighbouring state, or any other state or organization, would therefore most likely assist a microstate in case of invasion. If refusing assistance, the international community would be forced to accept the new geopolitical situation, for instance an unstable region, a hostile enclave or illegal entity. Consequently, a defence agreement initiated by a microstate, or a larger neighbouring state, is a question of self-preservation. Nevertheless, in most cases, tough domestic regulations and effective law enforcement are sufficient, and the microstates' recognised status as states also allows them to call upon international support if required. However, it is important to stress that microstates in general enjoy supportive and congenial relations with other states and organizations.²⁵⁰

²⁵⁰ Bartmann, op. cit. n. 21, chapter C (II); Sutton P. and Payne, A., "Lilliput under Threat: the Security Problems of Small Island and Enclave Developing States", 41 *Political Studies* (1993), pp. 579-593.

7 STATE of the VATICAN CITY

The *State of the Vatican City* does not meet the criteria for statehood. Thus, it is not, from a legal perspective, a state according to international law. The State of the Vatican City, indeed a “freak of freedom”²⁵¹, is for that reason of interest. The State of the Vatican City, hereinafter the Vatican, has been created in order to guarantee independence to another legal person, the Holy See. The Holy See is the central government of the Roman Catholic Church and not the government of the Vatican. The Holy See and the Vatican are two separate international legal persons, although the Pope exercises supreme legislative, executive and judicial power over the Holy See, including the Vatican. Ultimately, the government of the Vatican is subordinated to possible decisions of the Holy See and the Pope. There is however no doubt that the government of the Vatican exercise effective authority in the territory, that the Vatican is not subject to more external influence than other states in the international community, and that the Vatican is recognised.²⁵² Although it has been said that “[i]f the Vatican is a state, then Euro Disney deserves a seat on the Security Council”²⁵³, the Holy See has in fact had territory and diplomatic relations for centuries. Nevertheless, the question remains. *Why* does not the Vatican meet the criteria for statehood?

The Apostolic See became a territorial entity in the fourth century A.D. and existed until 1870 when the remaining areas were annexed. Eventually, Italy and the Holy See signed the Lateran Agreements of 11 February 1929 under which the church acquired its present land territory of 0.44 square kilometres and created the Vatican through a consensual process.²⁵⁴ Even if the Vatican is an accepted member of the international community through diplomatic relations and international organizations,²⁵⁵ it does not determine the character of the international recognition.²⁵⁶ Therefore, certain facts should be retained. First, Italy and the Holy See were convinced that the Vatican territory was a necessary and sufficient element in order to fulfil the territorial criterion for statehood in international law. Secondly, no third state has ever made a reservation concerning the territorial element of the Vatican. Consequently, there is therefore no proof acceptable under international law, that the smallness of the territory of the Vatican precludes its statehood, that is, without reparative recognition.²⁵⁷ So *why* does not the Vatican meet the criteria for statehood? There are approximately 500 persons effectively residing in the Vatican of which 30 per cent are Vatican citizens. The Vatican includes high dignitaries, priests,

²⁵¹ Luke, H.C., “Freaks of Freedom”, 131 *Fortnightly Review* (1932), pp. 600-621.

²⁵² Duursma, op. cit. n. 62, pp. 457-463; U.S. Department of State (USA), op. cit. n. 15.

²⁵³ Kissling, F., “Catholics for a Free Choice”, *Catholic World Report* (May, 1999).

²⁵⁴ Blaustein and Blaustein, op. cit. n. 218, p. 1 et seq.; and *supra*, 4.1., *Acquisition* (...).

²⁵⁵ U.S. Department of State (USA), op. cit. n. 15.

²⁵⁶ See *supra*, 5.1.1., *Recognition*.

²⁵⁷ Binchy, D.A., *Church and State in Fascist Italy* (1941), p. 229; Duursma, op. cit. n. 62, p. 457.

nuns, a ceremonial military force – the Swiss Guards, administrative personnel, Vatican security corps and others. The fact that 3000 workers are moving in and out of the country is in itself no bar to statehood, as long as there are a significant number of permanent inhabitants. It cannot be maintained that the inhabitants of the Vatican are not a population within the meaning of the criteria for statehood, because they are all in the service of the Holy See or because the population is not capable of maintaining and reproducing itself. *A priori*, these elements do not exclude the permanent establishment of the Vatican citizens, although in the long run one cannot speak of a permanent succession of generations.²⁵⁸ However, every inhabitant of the Vatican, whether or not possessing Vatican citizenship, can be expelled from the territory at any time according to Vatican national law. This factor prejudices the development of a permanent population and demonstrates that the Vatican government does not consider the inhabitants of the Vatican a fixed population on whose presence it attaches distinctive value for the governmental structure. The Vatican inhabitants do *not* have a permanent attachment to the Vatican territory.²⁵⁹ Recently a new Fundamental Law of the Vatican has replaced the Lateran Treaty of 1929. The new constitution was promulgated by Pope John Paul II on 26 November 2000 in order to make it correspond ever more closely to the institutional aims of the Vatican “which exists as a suitable guarantee for the freedom of the Apostolic See and as a way to ensure the real and visible independence of the Roman Pontiff in the exercise of his mission in the world”, n.b. free translation.²⁶⁰ It is obviously not the object of the Holy See to wield effective power over a permanent population in the Vatican territory. Consequently, the microstate in question does *not* have a population within the meaning of the criteria for statehood. Thus, any political acceptance and international recognition of the Vatican’s statehood would have a constitutive and reparative effect.

²⁵⁸ Central Intelligence Agency (USA) and U.S. Department of State (USA), op. cit. n. 15; and *supra*, 5.1.4., *Population*; *supra*, 6.1.1., *Cooperation*.

²⁵⁹ Duursma, op. cit. n. 62, p. 458.

²⁶⁰ Vatican City State: *The New Fundamental Law*:

<http://www.vatican.va/vatican_city_state/legislation/index.htm> (1 June 2003).

However, do the Vatican citizens constitute a people with the right to self-determination? Two factors preclude the development of common *objective* characteristics among the Vatican citizens. First, every Vatican citizen is originally a foreigner, and secondly, there is no succession of generations of Vatican citizens. Admittedly, the Vatican citizens share common elements, because they are all Roman Catholics and in the service of the Roman Catholic Church, but these elements are not reinforced by a common tradition, culture or history linked to the Vatican – the *territorial emphasis*, and passed on from generation to generation. The absence of ancestors and descendants implies that, apart from their religious beliefs, Vatican citizens, each with their different cultures, traditions and historical backgrounds of origin, do not develop a common Vatican history, culture, tradition or even language, proper to the Vatican. As a consequence, Vatican citizens do not feel like a Vatican people and have no objective characteristics to preserve – the *subjective* criteria. Whatever the importance of the Vatican for its citizens from a religious point of view, Vatican citizens have no personal attachment to the Vatican territory; in fact, they can be expelled at any time. Considering the lack of objective and subjective characteristics, and the absence of a personal link with the Vatican territory, it should be inferred that the Vatican citizens are *not* a people within the meaning of the right of self-determination.²⁶¹

Reflections: We have concluded that the Vatican inhabitants are not a permanent population and that the population does not constitute a people with the right of self-determination. The permanence of living together over a long period of time, from generation to generation, generates common objective characteristics that include at least historical, traditional and cultural elements. A permanent establishment of the population does not necessarily bring about a feeling of subjective togetherness. However, when dealing with the population of a state, the existence of *objective* characteristics will most probably entail a *subjective* identification. It can therefore be accepted that a permanent population will comprise communities with objective and subjective characteristics. In addition, the permanence of living together over a long period of time will lead to the development of a link and attachment to the *territory*. The permanent population of a state will necessarily constitute a people with the right of self-determination. As concluded, it was the absence of permanence of the Vatican population that prevented it from becoming a people. The problem is linked to the element of time. It needs a period of time to develop characteristics and feelings of togetherness between human beings and between a group and its territory. Therefore, the permanent establishment of a population is a *conditio sine qua non* for the development of a people with the right of self-determination. A permanent population within the meaning of the criteria for statehood will by definition constitute an independent people. Therefore, the notions of permanent population and independent people are, in general, interchangeable.

²⁶¹ Blaustein and Blaustein, *op. cit.* n. 218, *passim*; Duursma, *op. cit.* n. 62, p. 463-464; Vatican City State: *The New Fundamental Law*, *op. cit.* n. 260, and *supra*, 4.2.3.

Finally, it is interesting to observe that individuals and groups worldwide are involved in the creation of states. The political entities not yet independent are hundreds, if not thousands. The objectives²⁶² vary. Some obviously have economic / juridical projects in mind, while others, for examples independent movements, governments-in-exile and insurgents, struggle for freedom. The existence of the Vatican makes one wonder how many individuals and groups that could acquire territory and establish statehood if it would not have been for the common heritage of mankind principle, the territorial integrity of existing states, and other legal obstructions discussed in the preceding chapters.

²⁶² See *Internet* for a general idea – e.g. the Principality of Sealand, and units in n. 85 / 86.

8 ANALYSIS

8.1 Analysis

8.1.1 Creation of States

How are states created according to public international law?

Acquisition of Territory and the Right of Self-Determination: The creation of states and transfer of sovereignty over territory are inseparable. Today there are hardly any parts of the world that could be considered as *terra nullius*, and the unoccupied territories are governed by the common heritage of mankind principle, so that they remain *terra nullius*. *Occupation* can therefore be excluded. *Construction* of artificial territory in international waters and outer space is not mentioned as a mode of acquisition of territory. However, it is probable that construction, alongside occupation, is going to confront the rather vague common heritage of mankind principle. *Conquest* and *imposed solutions* are prohibited according to *ius cogens*, and other modes of transfer of sovereignty over territory are often either theoretical or not considered as acquisition. Nevertheless, *historic evolution* can be seen as a specific mode, and *cession* is a general term for devolution, decolonisation and secession. *Devolution* and *decolonisation* are consensual processes by which a state confers independence on a particular territory and people by legislative or other means. *Secession* is the process by which a particular group unilaterally seeks to separate itself from the state to which it belongs, and to create a new state on part of the territory of that state.

Secession is therefore a threat to peace and security. The more probable modes of acquisition, that is, devolution, decolonisation and secession, can be justified by the right of self-determination. We have established a general state practice combined with an *opinio iuris sive necessitatis*. The right of self-determination is an accepted customary rule of international law, granting an equal right of self-determination to all peoples. The result of the exercise of the right of self-determination is dependent upon the value attributed to a clashing principle, the *territorial integrity*. Self-determination should be regarded as an absolute right from which one cannot derogate as long as the territorial integrity of an existing state is not disrupted by the exercise of this right. A distinction has to be made between those peoples who hold the right of self-determination as an *ius cogens* and those who possess this right as an ordinary international customary norm. The former category comprises the whole permanent population of territorial entities which are considered separate from the territory of any other entity, in general the peoples of a state or of a Non-Self-Governing or Trust Territory. The peoples of these territorial entities do *not* disrupt the territorial integrity of a state through a full exercise of their right of self-determination. The basis on which to define a territorial unit, which possesses both an internal and an external right of self-determination, remains the people. The

difficulty of defining in detail a people with a full right of self-determination has been partly eliminated and replaced by the question of territorial delimitation. It is not a people who has the right of self-determination with force of *ius cogens*, but a people living within a separate territorial unit. Once the territorial unit has been delimited, the question of whether the unit comprises one or more homogeneous peoples or fractions of peoples becomes less important. The main emphasis is placed not on the objective characteristics which the population of a state should possess in order to be distinct from the population of another state, but on the subjective element that makes a group wish to decide on their shared political organisation. Often, the right of self-determination is not exercised in a state by one people but by several peoples and fractions of peoples together. The subjective element – the will to form a community, and the attachment to the territory are the fundamental factors that determine the recognition of the right of self-determination of peoples. In addition, there seems to be no minimum for the number of individuals constituting a people with a full right of self-determination. The other issue concerns the use of the right of self-determination by *a part* of the population constituted in a state or other separate territorial unit. The most important conclusion is that the right of self-determination of these fractions of populations has a force of *ius cogens* if it is used for internal purposes only, and is an ordinary international customary norm if exercised to change the international status of the territory concerned and thus confronting the territorial integrity.

The conclusions above raise a number of questions that cannot be discussed here. Nevertheless, one of the essential questions is how to define the individuals who, as a part of a population, can exercise its own right of self-determination within the borders of a state, that is, internal self-determination, and who therefore may claim a certain degree of autonomy. Territorial delimitations do not help us. There is *no* international legal justification to grant a right to autonomy, and there is in particular no international legal justification to grant a right to autonomy to regions rather than to villages or vice versa. The basis of the internal right of self-determination remains therefore the people. Individuals who are a fraction of a people, combines its separate right of self-determination with that of the others in the state to determine the internal organisation and international status of that state. It is according to that same separate right of self-determination that a fraction of a people can claim an internal self-determination including a right to autonomy and a right to trace the internal borders of its territory in the state. It should be observed that minorities are not peoples or fractions of peoples with a separate right of self-determination unless they have a strong attachment to a territory. In addition, as the right of self-determination, including the internal right, is a customary rule of international law, the definition of the holders of that right, and of its legal content, is therefore to be determined by *international* law.

Territorial Integrity: Once it has been ascertained that a part of the population of a state has a separate right of self-determination this fraction of the population also has a right to secede. Self-determination refers to the right of individuals living in a territory to determine the political and legal status of that territory. However, the right of self-determination can be restricted by other rules and principles of international law. We are forced to conclude that no rules of international law have been accepted to solve the problem of how to balance the right of secession and respect for territorial integrity, that there is no international judicial body to which a seceding unit can turn, that this legal vacuum encourage the use of force to impose a *de facto* situation which can be unstable in the long run, and that until a firm international rule has been established which defines the balancing-process between the right of secession and the respect for territorial integrity, international recognition of the new status of a territory after secession remains of overriding importance to determine the legitimacy of the secession. A *solution* of the balancing-process between secession and territorial integrity cannot be given here, although one cannot help reflecting over the possibility that secession, whether leading to independence or any kind of integration with another state, should only be achieved, in the absence of the consent, after a period of maximum autonomy. This idea flows, in the first place, from the already existing possibility to autonomy which can eliminate to a certain extent criticism which otherwise would lead to claims for an immediate secession. In the second place, from the practice that autonomous regions and member states of federations, as in the case of Yugoslavia, probably have more chance to see their secession recognized and, as the case may be, their statehood established than regions that had no serious autonomy prior to the secession. As mentioned in chapter one, state structures have always been subject to change. It is not the purpose of international law to maintain the status quo, but to provide a peaceful alternative for the adoption of modifications. We have concluded that the international community has gradually accepted the notion of self-determination of peoples, thus breaking the authority of the states in determining the legal status and development of a territory and its people.

It is not surprising that states, which are creators of an *opinio iuris sive necessitatis*, have so far been reluctant to accept any international rule concerning the right of self-determination that could facilitate or encourage secessions and endanger the continued existence of the states themselves. However, the absence of a rule can endanger the use of force and create unstable legal situations.

8.1.2 Status of States

What is a state according to public international law?

Recognition: The *constitutive theory* denotes that a state is and becomes an international person through recognition only and exclusively. In contemporary international law, the constitutive theory is opposed by the *declaratory theory*, according to which recognition has no legal effects – the existence of a state is question of pure fact. Under the declaratory theory, it is left to other states to decide whether an entity satisfies the criteria for statehood. The question who ultimately determines whether an entity meets the objective test of statehood or not, is left unsolved by the declaratory theory. In principle, the declaratory theory is adopted, although recognition can have a constitutive and decisive effect in certain cases. This is the situation of entities that under the general criteria do not possess statehood or in borderline cases where the facts are unclear. The declaratory effect of recognition on the international personality of a state has a relative value. As to the question of what the legal results are if the international community refuses to recognise an entity that complies with the objective criteria of statehood, and if such refusal are legal, state practice has not accepted a right of recognition and a duty to recognise. For non-recognized, although legitimate, states, relations with the international community will be restricted as they cannot enter into diplomatic relations. These are practical, not legal effects. The question becomes more serious in cases of new states born of secession – aggression from the predecessor state would not be given international legal effects. When examining states one has to ascertain whether they were recognized as normal, legitimate, states or whether the recognition created statehood. From a legal perspective, the question whether an entity is a state is a matter of fact, not of recognition. Nevertheless, a state will only enjoy the status and benefits of statehood if a significant number of states consider it to be a state and treat it as such. If an entity needs international political acceptance to become a state, it may discourage states from recognising the entity before it has established statehood according to law.

Doctrine of the Three Elements: The existence of a territory remains a *conditio sine qua non* for statehood. The concept of *territory* is defined by effectively governed geographical areas, separated by borderlines from other areas and united under a government. The territory of a state comprises land territory, internal waters, territorial sea and air space. The exclusive economic zone, the high seas, the deep sea floor, Antarctica and outer space are beyond state jurisdiction. Absolute certainty about a state's frontiers is not required. The *population* of a state comprises all individuals who, in principle, inhabit the territory in a permanent way. It may consist of nationals and foreigners. Nationality is a matter of domestic jurisdiction and a consequence of statehood, not a precondition. The fact that large numbers of nomads are moving in and out of the country is in itself no bar to statehood, as long as there are a significant number of permanent inhabitants. The population of a state need not be homogeneous in culture, language or otherwise. Indeed, it is rare to find a state with a homogeneous people. Thus, it would be absurd to legally require any homogeneity in the sense of the antiquated political concept of the nation state. The essential aspect, therefore, is the government, which governs individuals and diverse groups inhabiting the territory in a permanent way.

The criterion of an effective *government* is the central requirement of statehood on which all other criteria depend. Externally it means the ability to act autonomously on the international level without being legally dependent on other states within the international legal order. Internally it implies the capacity to establish and maintain order within the state. The fact that temporary ineffectiveness of a government does not immediately affect the legal existence of the state reflects the interest of the international system in stability and to avoid a premature change of the status quo. The other side of the same coin is that the requirement of effective government, in general, is applied when a part of the population wish to secede to form a new state. As we have seen, cases of dissolution may be different. The loss of effective control by the federal government of Yugoslavia much depended on the internal political organisation. Although, for the purpose of statehood, international law does not prescribe any special form of government, the form of internal political organisation will affect the possibility of exercising internal effective powers. Probably, a federal state structure will more easily lose effective control, when the composite communities no longer participate in the exercise of political power, than very centralized state structures. International law demands that a government must have established itself in fact. Thus, general international law, in contrast to the law of the European Union, is not concerned with the actual form of government, civilised or not, democratic in one sense or another or not so. International law demands effectiveness. It does not demand any degree of civilisation, such as to enable a government to observe with respect to the outside world those principles of law that are deemed to govern the members of the international society.

Sovereignty – Independence – Dependence: State sovereignty is considered a consequence of statehood, not a prerequisite thereof. A state must be independent to claim state sovereignty. In contemporary international law, the notion of effective government is interlinked with the idea of independence in the sense that such government only exists if it is free from control by other governments, that is, proves external effectiveness.

Independence concentrates on the rights that a state has to the exclusion of other states. A substantial limitation of sovereignty in favour of a third state, leads to loss of independence and therefore loss of statehood, but as long as contractual obligations and restrictions do not place the state under the authority of another state, the former remains a state however extensive and burdensome those obligations may be. Independence is generally divided in formal and actual independence. When both formal and actual independence exists, the entity may qualify as a state. Certain factors do *not* derogate from *formal* independence: constitutional restrictions; internal illegality; territorial concessions; the exercise of governmental competence on a basis of agency; the possession of joint organs for certain purposes – provided that a federal state structure is not established; membership of international organizations; special legal relations between two states as a result of division; and treaty obligations – as long as they do not place the state under the legal authority of another state. Two situations *do* derogate from *formal* independence: the existence of a special claim of right, irrespective of consent, to the exercise of governmental powers – one state believes as of right, that is has exclusive competence to act for another entity without the latter's consent; and discretionary authority, such as undetermined powers of intervention possessed by one state in respect of another, which can lead to doubt concerning the latter's independence. Certain factors do *not* derogate from *actual* independence: diminutive size and resources – although they can cause a greater political vulnerability to external interference; political alliances; illegal intervention, and belligerent occupation – due to the fact that it is a violation of *ius cogens*, that is, the prohibition of the use of force, or the threat or use of coercive measures, and the right of self-determination of a people. Three situations *do* derogate from *actual* independence: substantial illegality of origin; entities created under belligerent occupation; and substantial external control of the state – which is of the utmost importance, because even if formal independence is proved, states must show sufficient control over their external and internal affairs.

Legality of Origin: An entity cannot claim statehood if its creation was founded and made possible by the violation of a rule of *ius cogens*. Whatever the value of the maxim *ex injuria ius non oritur* in general, especially in the case of a breach of peremptory norms of international law no legal consequences should be accepted which are to the advantage of those who infringed the rules of *ius cogens*. Nevertheless, existing states may have been created through *historical evolution*, under circumstances, which at the time were absolutely justified. Certain norms of general international law have been invoked with respect to the illegality of the creation of states: *First*, the prohibition of aggression and of acquisition of territory by means of force, for example, secessionists who do not have the right of self-determination with force of *ius cogens* cannot claim statehood if the putative state has been founded with the help of armed force by a third state. *Secondly*, the right of self-determination, for example, a new state cannot be created without the consent of the peoples living in self-determination units who hold the right of self-determination as a rule of *ius cogens*.

Additional Criteria for Statehood: Doctrine and the practice of states have on occasion prompted other criteria for statehood. Nevertheless, these norms are often rather a prerequisite for recognition, not statehood. For example permanence, the capacity to enter into relations with other states, a legal order, and political conditions, for instance democracy. In addition, one should distinguish between conditions that are considered indispensable – *conditio sine qua non*, and activities that are a possible result of statehood.

8.1.3 Microstates

How do diminutive states function in the European community and what can law learn from their existence?

General Considerations: The international relations of European microstates can be divided into relations with larger (often neighbouring) states, and international organizations. *First*, diminutive states are one of the first entities to benefit from the advancement of law. Given the relative weakness of their negotiation positions, the existence of international dispute settlement mechanisms ameliorates the relations of microstates with larger states and organizations. Advantageous for microstates is, for example, the existence of the International Court of Justice, provided that the states concerned have accepted its compulsory jurisdiction. As diminutive states in general do not face any threats from other states, the security issues can in most cases be solved with effective government and national law. *Secondly*, the international community and as a consequence international organizations, have accepted full participation of microstates in every domain of activities. International organizations no longer object to the admission of microstates. Andorra, Liechtenstein, Monaco and San Marino are given the same right to vote as larger states in the United Nations General Assembly, and they participate also, for example, in the Conference on Security and Co-operation in Europe, which bases its decisions on consensus. Thus, the potential strength of a diminutive state as a member of an international organization lies in the use of its vote in favour of the development of international law.

Third, the European Union respects the particular positions of European microstates. The existence of the European Union has strengthened the international legal position of diminutive states, in part because the European Union replaces larger neighbouring states in customs matters with the possibility of arbitration, and due to the fact that the microstates concerned have not been absorbed by the integration. All the European microstates outside the Union, including various forms of dependencies – in general diminutive in territorial size and population, have distinctly defined relationships with the European Union. The European Union enables these territories to participate in the single market while not assuming the full responsibilities of membership. At the same time, the concessions of the European Union made to microstates and other entities, independent or not, are mutually reinforcing. The international relations between microstates and larger (often neighbouring) states, and organizations, have in general grown from the political and economic interests that all parties have in the existence of each other. The existence of microstates and states in general, depends on their international legal survival and economic viability. The European Union respects the financial positions of microstates in Europe and, as regards the international legal survival the advancement of law contributes strongly to the juridical maintenance of microstates. The more national and international law advances the less diminutive states will need tacit or explicit protector states.

Creation of States: Microstates do not have specific rights or duties which international law confers solely upon them. They do not form by themselves a separate subject of law – they are states. The creation and legal status of states, including international relations, are of interest independently of microstates. On the other hand, when approaching international law from the existence of diminutive states, certain conclusions are of interest. There seems to be no minimum for the number of individuals constituting a people with a full right of self-determination. The smallest number of individuals known to possess this right, according to international law, is the population of the *Pitcairn Islands*, in total 47 inhabitants. There seems to be no limit either to the smallness of the territorial unit in which the right of self-determination can be fully exercised. If one, besides the diminutive Pitcairn Islands, assumes that the *Principality of Monaco* has a permanent population, and that a permanent population in general have the right of self-determination, that unit would be 1.95 square kilometres. Furthermore, non-self-governing peoples often live in small isolated islands. Small mainland peoples will have more difficulties in remaining distinct from the rest than diminutive island peoples. The smaller the people, the more easily it is integrated and assimilated with the surrounding peoples, although it does not preclude that there are circumstances under which a very small people can still qualify as a people entitled to the right of self-determination.

At least in theory the continued separate existence of diminutive self-determination units remains possible. These units have a particular interest in using the right of self-determination for the maintenance of its actual and formal independence against external pressure. Diminutive states have successfully been created through *historical evolution* and, in particular, *decolonisation*. Today the most probable modes of transfer of sovereignty over territory are *decolonisation* for the remaining Non-Self-Governing Territories and *devolution*. A diminutive people entitled to the right of self-determination and incorporated into a larger state, may try to secede under the same conditions as other peoples. It seems only realizable after a consensual process, that is, *devolution* or *decolonisation* by which a state confers independence on a particular territory and people by legislative or other means. In case of *secession* – the process by which a particular group unilaterally seeks to separate itself from the state to which it belongs, and to create a new state on part of the territory of that state, a diminutive people will generally not be capable to stand up by force against the state authorities. The situation might be different if the seceding people receive external support. In any case, the diminutive people in question may nevertheless demand a maximum degree of autonomy, although there is no international justification to grant a right to autonomy. The other modes of transfer of sovereignty over territory are often controversial and, in most cases, theoretical or prohibited.

Legal Status of States and the Doctrine of the Three Elements: The existence of microstates adds to the international definition of a state. *First*, there is no lower limit to the territorial size of a state. The smallest microstate whose statehood has been established and recognised without particular objections concerning its territorial size is the *State of the Vatican City* with a territory of 0.44 square kilometres. As concluded, the existence of a territory remains a *conditio sine qua non* for statehood, though no minimum territorial size is required. International recognition will therefore have no reparative effect as the smallness of the territory is concerned. *Secondly*, international law does not require a minimum number of inhabitants constituting a state. Thus, some small Non-Self-Governing Territories as the *Pitcairn Islands* could, in theory, opt for statehood. This statehood only depends on the wishes of the people, not on recognition. One of the smallest numbers of nationals can be found in the *Principality of Monaco*. On the basis of the particular composition of the population of the *State of the Vatican City*, a permanent population within the meaning of the criteria for statehood seems to be practically the same as an independent people with the right of self-determination. An independent people may comprise one or more homogeneous people or fractions of peoples living within the state. If the population of a state does not have the right of self-determination, the state will not fulfil the condition of a permanent population within the meaning of the criteria for statehood and vice versa.

Third, there is no reason to believe that the governmental organisation of European microstates differ substantially from those encountered in larger European states. In any case, the form of government may be of importance for membership in, or recognition by, the European Union, although general international law is indifferent towards the nature of the political structure of states. On the other hand, international practice expects an effective government. To a certain extent, the powers of the governmental institutions of a microstate are determinant for their degree of independence, especially if the governmental institutions in question are subject to foreign influence. The presence of foreign elements in the governmental organisation of a microstate is however not inherent in the *size* of the state, but results from the relations of the microstate with its neighbours. The absence of a (written) legal system / constitution, or in extreme cases, any legal order, does not necessarily prevent the existence of an effective government. Nevertheless, in the case of the *Principality of Andorra*, the previous uncertainty concerning the governmental representation in the international community led to a paralysis of its international activities, but since the Andorran Constitution of 1993 the Co-princes in no way compromise the independence of the effective government, and Andorra has moved to become an active member of the international community. As a consequence, a detailed legal framework for a state's governmental organisation seems to facilitate the evaluation of its independence and statehood.

Sovereignty – Independence – Dependence: Several aspects of independence are in particular relevant for microstates. *First*, the smallness of a territory, a limited number of nationals and few or no natural resources do not, by definition, have to lead to loss of formal and actual independence. *Secondly*, the degree of independence depends, in general, on the international relations between microstates and larger (often neighbouring) states, and organizations. One can distinguish three main fields in which a relation has been sought: practical, economic and political cooperation. Agreements concluded for the purposes of practical relations are not prejudicial to the independence of a microstate. Any other conclusion would be absurd, due to the fact that all states are dependent on practical cooperation with other states. Economic relations do not substantially limit the independence of a microstate either. On the other hand, dissatisfaction of larger (often neighbouring) states, and organizations, with the economic relation, can incite them to put pressure on the microstate in order to compel it to make certain concessions. This has, for instance, been the case for the *Republic of San Marino* in the casino dispute, and could, in theory, have been the case for any European microstate in relation to the European Union. Instead, these entities are on excellent terms. Furthermore, political relations through treaty obligation, for example diplomatic representation by a third state, while maintaining control over foreign affairs, do not impair the independence of a microstate under general international law, neither do defence agreements.

As discussed, the *Principality of Liechtenstein* uses the diplomatic services of Switzerland, but without losing control over the conduct of their international relations. Political relations by treaty obligation, and not only by reason of political affiliation, also comprehend general restrictions on political affairs. In fact, the most important problem with regard to the formal independence of microstates is to what extent the internal and / or external policies have to be brought in line with those of other states and organizations. This question is especially relevant for the principalities of *Monaco* and *Andorra*, which recently have undertaken *new* obligations in this sense. Whether the Franco-Monegasque Treaty of 24 October 2002 and the Treaty of Vicinage between France, Spain and Andorra of 3 June 1993 should lead to doubts concerning the principalities' independence is a central question. To what degree the internal and / or external policies of these states are brought in line with those of France and Spain, and if the obligations concerned should lead to loss of formal independence, cannot be examined here. Nevertheless, it is obvious that international relations, and in particular political relations, have a close connection to international law and the criteria for statehood. A state becomes dependent if it enters into a legal commitment whereby it agrees to act under the direction of another state. However, if international law tried to take all the political realities into account, it would be impossible to make a clear distinction between dependencies and states, because all states, even the strongest, are subject to varying degrees of pressure and influence from other states.

Independence of Microstates and the Right of Self-Determination: If a microstate has an established statehood and the people of that state has the right of self-determination with the force of *ius cogens*, the *formal* independence of that state is not impaired if the state in question has been forced by legal means of pressure. As we have seen, a treaty is void when it conflicts with a peremptory norm of general international law. Thus, if the policies of a state were brought in line with those of another state, the obligations concerned would probably lead to an abandonment of independence in violation of the right of self-determination, for example a treaty establishing the right for a larger state to create a protectorate of a microstate. Such legal means of pressure can be declared void if the people with the right of self-determination so wishes. In addition, belligerent occupation of a state does not affect its *actual* independence due to the principle *ex injuria ius non oritur*. Belligerent occupation is not only a breach of the prohibition of the use of force but also of the right of self-determination of the people of the occupied state. Because of the peremptory nature of a norm of *ius cogens*, the breach of *ius cogens* cannot create a legal title. Consequently, if a state violates the right of self-determination of the people of another state by using force or any other means, including legal measures, the statehood of this latter state would not be prejudiced; if without this violation, the state has formal and actual independence.

By analogy with a belligerent occupation it can be accepted in international law that the *threat* or use of coercive measures, not involving the use of force and irrespective of their legality, cannot derogate from the actual independence of another state if these measures have forced that state to give up certain elements of its formal or actual independence against its will and against the wishes of its people under the right of self-determination. Nevertheless, an official protest by the people in question against the concessions it has been compelled to make is a *conditio sine qua non*. Otherwise, the principle of *ex factis ius oritur* can be applied. In addition, one should distinguish between lack of actual independence, for instance substantial illegality of origin, entity formed under belligerent occupation or substantial external control, and lack of economic and functional independence which can be used by a larger state as a means of pressure to enforce its demands, as long as the larger state do not control the microstate's internal functions in a considerable way. Consequently, the *actual* and *formal* independence of a state is not impaired if the state in question has been forced, even by legal means of pressure not involving the use of violence, to make concessions to another state leading to an abandonment of independence in violation of the right of self-determination. This applies to all states but in particular to microstates or any other state of which the negotiation position is particularly weak.

Recognition: For most microstates international recognition has only a declaratory effect, but the existence of that recognition has facilitated the development of their international relations. In general, there is no reason to believe that recognition is more likely to have a constitutive effect for microstates than for larger states. However, the *State of the Vatican City* is not a state according to the criteria for statehood. Thus, any recognition of the Vatican's statehood would have a constitutive and reparative effect. Conversely, before the promulgation of the Andorran Constitution of 1993, international recognition of the principality would have been constitutive, although probably too weak to counterbalance its lack of formal independence. For most microstates, recognition is however more of political than of legal importance.

8.2 Conclusions

Some of the most important conclusions with respect to the creation and legal status of states are, *inter alia*, that:

Devolution, decolonisation and secession can be justified by the right of self-determination. A distinction has to be made between those peoples who hold the right of self-determination as an *ius cogens* and those who possess this right as an ordinary international customary norm. The right of self-determination is not exercised in a state by one people, but by several peoples and fractions of people together. There is no lower limit to the number of individuals who can constitute a people with the right of self-determination. The result of the exercise of the right of self-determination is dependent upon the value attributed to a clashing principle, the territorial integrity. No rules of international law have been accepted to solve the problem of how to balance the right of secession and respect for territorial integrity. A diminutive people entitled to the right of self-determination and incorporated into a larger state, may try to secede under the same conditions as other peoples – although it seems only realizable after a consensual process. International recognition of the new status of a territory after secession remains of overriding importance to determine the legitimacy of the secession. An entity cannot claim statehood if its creation was founded and made possible by the violation of a rule of *ius cogens*. The accepted declaratory theory denotes that, from a legal perspective, the existence of a state is question of fact, not of recognition, although recognition can have a constitutive and decisive effect.

A state will only enjoy the status and benefits of statehood if a significant number of states consider it to be a state and treat it as such. State practice has not accepted a right of recognition and a duty to recognise. The existence of a territory remains a *conditio sine qua non* for statehood. The territory of a state is confined to land territory, internal waters, territorial sea and air space, but there are no legal limits to the smallness of a territory or to the number of inhabitants. The population of a state must be permanent. The criterion of an effective government is the central requirement of statehood on which all other criteria depend. Although for the purpose of statehood, international law does not prescribe any special form of government, the form of internal political organisation will affect the possibility of exercising effective powers. In contemporary international law, the notion of effective government is interlinked with the idea of formal and actual independence in the sense that such government only exists if it is free from control by other governments. A detailed legal framework for a state's governmental organisation seems to facilitate the evaluation of its independence and statehood. Smallness does not, by definition, lead to loss of independence, though it may make practical, economic and political cooperation more necessary. Independence and statehood are not impaired if a state, against its will, has been compelled by another state, even by legal means, to abandon its absolute independence and therefore its statehood.

Some of the most important conclusions with respect to microstates are, in addition to what have been stated above, *inter alia*, that:

Today microstates are able to present themselves to foreign governments and multilateral organizations directly and on their own terms. In part, this is the consequence of exploiting jurisdiction as a resource unto itself. The establishment of regional communities of various natures with ever-expanding areas of concern and the extension of international functionalism in inter-governmental organizations and agencies have all served to reinforce the independence of microstates. The forces of integration – membership of international organizations and distinctly defined relationships with regional communities as the European Union, and World fragmentation – the creation of new states in the international community, are not in conflict as much as they are mutually reinforcing. The relations of microstates with larger (often neighbouring) states, and organizations, are governed by interests that all parties have in the existence of each other. The international community has gradually accepted the notion of self-determination of peoples, thus breaking the authority of the states in determining the legal status and development of a (diminutive) territory and its people, and microstates have a particular interest in using the right of self-determination for the maintenance of its independence against external pressure. Microstates are one of the first entities to benefit from the advancement of law and particularly from the possibilities of international control on its implementation. Today microstates are equal subjects of international law.

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June 2003

ADDENDUM

Creation of a Microstate

Since the preceding chapters set forth more than abstract theories, a few words on the first newly independent state in the 21st century may to a certain extent “reflect” what has been discussed. In 1960, the United Nations General Assembly rejected the Portuguese claim to retain East Timor as an overseas province, and declared the colony a Non-Self-Governing Territory. A coup in Portugal led to a policy of decolonisation and the administration left East Timor in 1975. However, a hand-over of power did not take place and the decolonisation process remained incomplete. Indonesia occupied East Timor on 7 December 1975 and soon thereafter, the Indonesian government decided to integrate the territory officially as its 27th province. On 5 August 1998, an agreement to undertake negotiations on a special status based on a wide-ranging autonomy for East Timor was reached between the governments of Indonesia and Portugal. International pressure and long discussions between Indonesia, Portugal and the United Nations finally led to a referendum. A United Nations mission successfully conducted the popular consultation on 30 August 1999, and the electorate rejected the offer to remain under a special autonomy status within Indonesia, thus implying the preference for independence. Following the result of the consultation, a campaign of destruction and violence was triggered by armed pro-integration militia groups. The United Nations Security Council voted to set up a peace force. On 19 October 1999, the Indonesian parliament recognised the outcome of the consultation and relinquished links with the former 27th province. Following this decision, the United Nations established the United Nations Transitional Administration in East Timor, tasked to administer the territory and to prepare for independence. On 20 May 2002, East Timor became the first newly independent state in the 21st century. The new state changed its name to Timor-Leste and was, as the youngest of *microstates*, admitted to the United Nations on 27 September 2002. It is now the 191st member. The Timorese people, a small population with no effective army and no allies, was able to discard the repression of Indonesia. Not by terrorism, but by working within the international community to achieve justice through international law. Timor-Leste's independence is a triumph for the United Nations who assisted the Timorese people through more than 20 years of illegal occupation, who organised and oversaw the referendum, mobilised and organised the peacekeepers, and worked to create a new democracy.²⁶³

²⁶³ Central Intelligence Agency (USA): *The World Factbook 2002*:
<<http://www.odci.gov/cia/publications/factbook/geos/tt.html>> (1 June 2003);
European Union: *External Relations, East Timor*:
<http://europa.eu.int/comm/external_relations/east_timor/history.htm> (1 June 2003);
United Nations: *Mission of Support in East Timor*:
<<http://www.un.org/Depts/dpko/missions/unmiset/index.html>> (1 June 2003).

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