2.1 Introduction

2.2 The classical criteria for statehood: ex factis jus oritur

1. Defined territory
2. Permanent population
3. Government
4. Capacity to enter into relations with other States
5. Independence
2.1 Introduction

If the effect of positivist doctrine in international law was to place the emphasis in matters of statehood on the question of recognition, the effect of modern doctrine and practice has been to return the attention to issues of statehood and status independent of recognition. Nevertheless there has long been no generally accepted and satisfactory legal definition of statehood.

Attempts to declare rules about recognition within the framework of international codification have always been rejected. For example during the ILC’s work on the proposed Declaration on the Rights and Duties of States, Panama proposed the following articles:

2. Every State is entitled to have its existence recognized. The recognition of the existence of a State merely signifies that the State recognizing it accepts the person of the State recognized, together with all the rights and duties which arise out of international law. Recognition is unconditional and irrevocable.

3. The political existence of the State is independent of its recognition by other States. Even before it has been recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and, consequently, to organize itself as it sees fit, to legislate in regard to its interests, to administer its services and to
To this over-ambitious proposal India proposed an alternative: ‘Every State has the right to recognize another State. The recognition of the existence of a State signifies that a State recognizing it accepts the person of the State recognized together with all the rights and duties which arise out of international law.’ During debate on these proposals Brierly again argued that ‘the definition [of ‘State’] would be difficult to establish and highly controversial’, though he added that ‘the word was commonly used in documents and speech, and its meaning had been understood without definition.’ Scelle was more emphatic: he ‘had been active in international law for more than fifty years and still did not know what a State was and he felt sure that he would not find out before he died. He was convinced that the Commission could not tell him.’ Neither article was included in the Draft Declaration. The ILC concluded that: ‘the proposed article [2] would go beyond generally accepted international law in so far as it applied to newborn States... [T]he whole matter of recognition was too delicate and too fraught with political implications to be included... in this draft Declaration.’

A similar issue arose during the drafting process leading to the Vienna Convention on the Law of Treaties, article 6 of which reads: ‘Every State possesses capacity to conclude treaties.’ An earlier draft, prepared by Fitzmaurice, included the following ‘related definition’:

For the purposes of the present Code (a) In addition to the case of entities recognized as being States on special grounds, the term ‘State’ (i) means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf of any given State must be negotiated—depending on its status and international affiliations; (ii) includes the government of the State.

But even this unremarkable attempt was deleted. The ILC’s commentary on the Draft Articles records, with fine circularity, that the ‘term “State” is used... with the same meaning as in the Charter of the UN, the Statute of the Court, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations: that is, it means a State for the
Nor was any attempt made to define the term for the purposes of the General Assembly’s ‘Definition of Aggression’, Article 1 of which reads: Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

(p.40)
Explanatory Note; In this definition the term ‘State’ (a) is used without prejudice to questions of recognition or to whether a State is a Member of the UN, and (b) includes the concept of a ‘group of States’ where appropriate.

The topic of recognition of States and governments has remained on the ILC work programme since 1949, but little interest has been shown in pursuing the matter.

It may be asked how a concept as central as statehood could have gone without a definition, or at least a satisfactory one, for so long. This may be because the question normally arises only in the borderline cases, where a new entity has emerged bearing some but not all characteristics of statehood. The resulting problems of characterization cannot be resolved except in relation to the particular facts and circumstances. But, it may be asked, are there any legal consequences that attach to statehood as such, which are not legal incidents of other forms of international personality? To put it another way, is there a legal concept of statehood at all or does the meaning of the term vary indefinitely depending on the context? In the previous chapter, I discussed the attempt to dispense with criteria for statehood by reference to recognition. Some writers, by contrast, come close to denying the existence of statehood as a legal concept in the interests of a thoroughgoing functionalism. Such views may be understandable as a reaction against absolutist notions of statehood and sovereignty. But statehood is nonetheless a central concept of international law, even if it is one of open texture.

The following exclusive and general legal characteristics of States may be instanced.
(1) In principle, States have plenary competence to perform acts, make treaties, and so on, in the international sphere: this is one meaning of the term ‘sovereign’ as applied to States.\(^\text{16}\)

• (p.41)
(2) In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter.\(^\text{17}\) This does not of course mean that international law imposes no constraints: it does mean that their jurisdiction over internal matters is prima facie both plenary and not subject to the control of other States.
(3) In principle States are not subject to compulsory international process, jurisdiction, or settlement without their consent, given either generally or in the specific case.\(^\text{18}\)
(4) In international law States are regarded as ‘equal’, a principle recognized by the Charter (Article 2(1)). This is in part a restatement of the foregoing principles, but it has other corollaries.\(^\text{19}\) It is a formal, not a moral principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations: States may consent to unequal voting rights by becoming members of organizations with weighted voting (the United Nations, the World Bank…). Still less does it mean that they are entitled to an equal voice or influence. But it does mean that at a basic level, States have equal status and standing: ‘A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.’\(^\text{20}\)
(5) Derogations from these principles will not be presumed: in case of doubt an international court or tribunal will tend to decide in favour of the freedom of action of States, whether with respect to external\(^\text{21}\) or internal affairs,\(^\text{22}\) or as not having consented to a specific exercise of international jurisdiction,\(^\text{23}\) or to a particular derogation from equality.\(^\text{24}\) This presumption—rebuttable in any case—has declined in importance, but is still invoked from time to time and is still part of the hidden grammar of international legal language. It will be referred (p.42) to as the \textit{Lotus} presumption—its classic formulation being the judgment of the Permanent Court in \textit{The Lotus}.\(^\text{25}\)

These five principles, it is suggested, constitute in legal terms the core of the concept of statehood, the essence of the special position of States in general international law. As a matter of interpretation the term ‘State’ in any treaty or other instrument prima facie refers to States having these attributes; but
again (p.43) this is subject to the context. The term ‘State’ should be more strictly interpreted where the context indicates plenitude of functions—as for example in Article 4(1) of the United Nations Charter. Conversely, if a treaty or statute is concerned with a specific issue, the word ‘State’ may be construed liberally—that is, to mean ‘State for the specific purpose’ of the treaty or statute.26 This is in accordance with the principle that where a legal document uses some technical term, even if it is capable of a wider meaning, prima facie the technical meaning is the one intended.

These five principles appear nominal, but it is difficult to find more substantive candidates. Thus the possession of a nationality is not conclusive for statehood. ‘A’ Mandates, which were not States, had nationality; so too did Andorra at a time when it was not generally considered a State.27 That an entity has rights and obligations under international law or may be responsible for conduct that is internationally wrongful does not make it a State: international organizations,28 insurgent or devolving governments,29 the International Committee of the Red Cross30 and a range of other entities are accounted (p.44) subjects of international law, generally or for particular purposes. Article 2(4) of the Charter (which enjoins the use of force by States in international relations except in self-defence), or at least its customary equivalent, applies to certain non-State entities.31 It is sometimes said that States only are competent to develop or change customary international law:32 this is not true, but even if it were, it would be useless as a criterion because it is not equally true of all States.

Indeed, statehood is rather a form of standing than a set of rights. States exist ‘at the international level’ or ‘on the international plane’, but this is a concept rather than a place, since in fact there is only one world. To be a State is to have a range of powers and responsibilities at that level. Though entities other than States can make treaties, not to have treaty-making power is conclusive against being a State.33 That an entity is not internationally responsible for its acts is conclusive against its being a State,34 though which of two entities is responsible in a situation of divided competences may be a question of some difficulty.35 Not being a State is to be denied independent access to those forums that States—themselves or through international organizations—still control.

If there is then a legal concept of statehood, there must be means of determining which entities are ‘States’ with these attributes; in other words, of establishing the criteria for statehood. Two preliminary points should, however, be made. First, it will be noted that the exclusive attributes of
States do not prescribe specific rights, powers or capacities that all States must, to be States, possess: they are presumptions as to the existence of such rights, powers (p.45) or capacities, rules that these exist unless otherwise stipulated. This must be so, since the actual powers, rights and obligations of particular States vary considerably. The legal consequences of statehood are thus seen to be—paradoxically—matters of evidence or rather of presumption. Predicated on a basic or ‘structural’ independence, statehood does not involve any inherent substantive rights. Further, the law recognizes no general duty on a State to maintain its independence: independence is protected while it exists, but there is no prohibition on its partial or permanent alienation.36 The legal concept of statehood provides a measure for determining whether in a given case rights have been acquired or lost.

Second, the criteria for statehood are of a special character, in that their application conditions the application of most other international law rules. As a result, existing States have tended to retain for themselves as much freedom of action with regard to new States as possible. This may explain the reluctance of the International Law Commission to frame comprehensive definitions of statehood when engaged on other work—albeit work that assumed that the category ‘States’ is ascertainable. It follows that, at the empirical level, the question must again be asked whether, given the existence of international law rules determining what are ‘States’, those rules are sufficiently certain to be applied in specific cases or have been kept so uncertain or open to manipulation as not to provide any standards at all. And this question is independent of the point that States may on occasions treat as a State an entity that does not come within the accepted definition of the term.37 The question is rather—can States effectively refuse, under cover of the ‘open texture’ of the rules, to treat entities as States that do in truth qualify as such? To avoid that is the point of having—if we do have—‘objective’ criteria for statehood.

2.2 The classical criteria for statehood: *ex factis jus oritur*

The best known formulation of the basic criteria for statehood is that laid down in Article I of the Montevideo Convention on the Rights and Duties of States, 1933: ‘The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (p.46) (d) capacity to enter into relations with other States.’38 It is a characteristic of these criteria—and of the others to be examined in this section—that they are based on the principle of
effectiveness among territorial units. By contrast, criteria to be examined in Chapter 3 either supplement or in certain cases contradict this principle on grounds of legality or legitimacy. But they operate only in exceptional cases: the general criteria based on effectiveness must first be dealt with.

(1) Defined territory

Evidently, States are territorial entities. 'Territorial sovereignty... involves the exclusive right to display the activities of a State.' Conversely, the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory. But, although a State must possess some territory, there appears to be no rule prescribing the minimum area of that territory. States may occupy an extremely small area, provided they are independent in the sense to be explained. The ten smallest States at present are as set out in Table 1.

Table 1. Areas of some small States

<table>
<thead>
<tr>
<th>Country</th>
<th>Area (sq km)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vatican City</td>
<td>0.4</td>
</tr>
<tr>
<td>Monaco</td>
<td>1.5</td>
</tr>
<tr>
<td>Nauru</td>
<td>21</td>
</tr>
<tr>
<td>Tuvalu</td>
<td>26</td>
</tr>
<tr>
<td>San Marino</td>
<td>61</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>160</td>
</tr>
<tr>
<td>Marshall Islands</td>
<td>181</td>
</tr>
<tr>
<td>St. Kitts &amp; Nevis</td>
<td>267</td>
</tr>
<tr>
<td>Maldives</td>
<td>298</td>
</tr>
<tr>
<td>Malta</td>
<td>315</td>
</tr>
</tbody>
</table>

Nor is there any rule requiring contiguity of the territory of the State. The separation of East Prussia from Germany between 1919 and 1945, of East Pakistan from West Pakistan before 1971, or of Alaska from the 'lower Forty-Eight', cast no doubt on the statehood of Germany, Pakistan or the United States. Some archipelagic States—e.g., the Federated States of Micronesia, the Marshall Islands, São Tomé e Príncipe—consist of minute areas of land territory separated by wide expanses of ocean, the ocean nonetheless legally...
under the aegis of the land. Little bits of States can be enclaved within other States. Sovereignty comes in all shapes and sizes.

No doubt small size and fragmentation make independence difficult to achieve and maintain. One reason given by the United Kingdom for non-recognition of one of the Bantustans, Bophuthatswana, was its disconnected and fragmented territory: ‘the fragmentation of the territory of Bophuthatswana within South Africa, the pattern of the population and the economic dependence on South Africa more than justify our refusal to recognise Bophuthatswana.’ But none of the Bantustans was internationally recognized, fragmented or not. Fragmentation may be an indication of some other disability, but it is not in itself determinative against a claim of statehood.

(p.48) Given that statehood implies exclusive control over some territory, small or large, the relation between statehood and territorial sovereignty appears to be of a special kind—a point that nineteenth-century international law failed to emphasize since it concentrated on problems of acquisition of territory by already existing States, on the view that territorial sovereignty was analogous to the ownership of land. That analogy was of limited value even in an era of colonialism; in the case of acquisition of territory by new States it was positively misleading. The issues will be discussed further in Chapter 6: it is enough to posit here that the category of statehood has priority over the category of acquisition of territory. In other words, the definitive establishment of a new State on certain territory defeats claims by other States that relate to the whole of that territory; where the claims relate to part only of the territory, they may survive but they become dependent for settlement on the consent of the new State.

A new State may exist despite claims to its territory, just as an existing State continues despite such claims. Two different situations may be distinguished: first, where the claim relates to the entire territory of a new State; secondly, where it relates to the boundaries of the State. In particular cases the two types of claim may coexist. This was so with Israel in 1948. It was argued that the partition resolution, GA resolution 181(II) of 29 November 1947, in some way conferred territory on the new State, so that the case was merely one of undefined frontiers, but the other view is tenable. In the event Israel was admitted to the United Nations on 11 May 1949. Ambassador Jessup, arguing for Israel’s admission on behalf of the United States, discussed the requirement of territory in the following terms:
One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers... The formulae in the classic treatises somewhat vary,... but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit... [T]here must be some portion of the earth’s surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement...50

(p.49) The question of Israel is discussed in Chapter 9.

Claims to the entire territory of a State have commonly been raised in the context of admission to the United Nations: this was the case with Israel, and also with Kuwait, Mauritania and Belize.51 The alleged independence or autonomy of Oman from the Sultanate of Muscat and Oman in a sense raised the issue, but more important problems were whether the territory constituted a protectorate, and whether the matter was one for the Committee of Twenty-Four.52 The proposition that a State exists despite claims to the whole of its territory was not challenged in these cases.

It should be noted that the question of admission to the United Nations raises somewhat different issues from those simply of statehood. Thus the obligations of a State towards a fellow Member are greater than those towards a non-Member State: there would seem to be grounds for refusing United Nations membership to any State the territory of which was subject to a serious and genuine unresolved territorial claim of another Member. But of the two instances referred to, Iraq’s claim to Kuwait was hardly ‘serious and genuine’, whatever means Iraq used to pursue it. In any event, customary international law prohibits the settlement of territorial disputes between States by the threat or use of force, and a State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to, or is claimed by, another State.53

It is only to be expected then that claims to less than the entire territory of a new State, in particular boundary disputes, do not affect statehood. A German–Polish Mixed Arbitral Tribunal stated the rule succinctly:
Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatever... In order to say that a State exists... it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.

And the International Court in the *North Sea Continental Shelf* cases confirmed the rule *en passant*:
The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.

The Court has tacitly affirmed this in subsequent cases involving territorial disputes, such as that over the boundary between Libya and Chad.

In Croatia, the borders of the new State in 1991 were sufficiently certain (insofar as the principle of *uti possidetis* was taken to preserve the former inter-republican boundaries of the SFRY), but effective control fluctuated with military conflict between the new State and Serbian forces, local and federal. The rule applied in the cases noted above was reasserted in 1992 when Croatia was recognized notwithstanding the occupation of Eastern Slavonia by the Yugoslav National Army and operations by Serbian irregulars elsewhere. Again, this was hardly a new situation, both Polish republics—inter-war and post-war—having had uncertain borders, especially in 1918. The rule thus is seen to apply in a range of situations, from boundaries still to be resolved to violations of a boundary defined in principle in accordance with the *uti possidetis*.

The question is whether there are any exceptions to this rule. Higgins states that 'when the doubts as to the future frontiers [are] of a serious nature, statehood [becomes] in doubt. Thus when in 1919 Estonia and Latvia were recognized by the Allied Powers, no recognition was granted to Lithuania on the express ground, that owing to the Vilna dispute, its frontiers were not yet fixed.' In view of what has been said, the general proposition is
doubtful, and in any event Lithuania does not provide an example. It is true that *de jure* recognition of Lithuania by the Allies was refused because of the Vilna dispute, but this appears to have been politically motivated and was not an expression of an Allied view that Lithuania was not a State. The British Under-Secretary of State for Foreign Affairs had previously accepted that the Polish occupation of Vilna (Wilno) was an occupation ‘of Lithuanian territory’, and as late as 1920 the Prime Minister agreed that the same considerations applied to the *de jure* recognition of Lithuania as to Latvia and Estonia. The merits of the Vilna dispute appear to have been decidedly in favour of Lithuania, and the Allied actions to have been based more on the desire for a strong Poland than an appreciation of those merits. It is clear that Lithuania and the other Baltic States were independent by mid-1919, despite then-existent or subsequent territorial claims. Arbitrator Reichmann in *Germany v Reparations Commission* stated that: ‘Le Gouvernement lithuanien a été reconnu *de facto* en septembre 1919, mais il existait comme Gouvernement indépendant déjà lors de la signature du Traité de Versailles…’. Lithuania was thus not included in the territory of ‘Russia’ within the meaning of Article 260 of the Treaty at the time of its signature (28 June, 1919). And a similar view seems to have been taken by the Permanent Court in two cases concerning Lithuania, though the issue was not directly in point in either of them.

Thus even a substantial boundary or territorial dispute with a new State is not enough, of itself, to bring statehood into question. The only requirement is that the State must consist of a certain coherent territory effectively governed—a formula that suggests that the requirement of territory is rather a constituent of government and independence than a distinct criterion of its own.

(2) Permanent population

If States are territorial entities, they are also aggregates of individuals. A permanent population is thus necessary for statehood, though, as in the case of territory, no minimum limit is apparently prescribed. The ten smallest States by population are set out in Table 2

Table 2. Populations of some small States

<table>
<thead>
<tr>
<th>Country</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vatican City</td>
<td>768</td>
</tr>
<tr>
<td>Tuvalu</td>
<td>9,743</td>
</tr>
</tbody>
</table>
Of States with very small populations only the Vatican City raises any question on this ground, and this more because of the ecclesiastical character of its population than its size. 68

The criterion under discussion requires States to have a permanent population: it is not a rule relating to the nationality of that population. It appears that the grant of nationality is a matter that only States by their municipal law (or by way of treaty) can perform. 69 Nationality is dependent upon statehood, not vice versa. Whether the creation of a new State on the territory of another results in statelessness of the nationals of the previous State there resident, 70 or (p.53) an automatic change in nationality, 71 or in retention of the previous nationality until provision is otherwise made by treaty or the law of the new State, 72 is a matter of some doubt. Persons could very well be regarded as nationals of a particular State for international purposes before the State concerned had established rules for granting or determining its nationality. On the other hand, in the absence of treaty stipulation a new State is not obliged to extend its nationality to all persons resident on its territory, and as between habitual residents and other categories of persons there is no a priori definition of those who should be considered prescriptively associated with a given territory.

Two views of the matter may be contrasted:
... in view of the rule that every State must have a determinate population (as an element of its statehood), and therefore nationality always has an international aspect, there is no very fundamental distinction between the issue of statehood and that of transfer of territory... [T]he evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality. 73
Although inhabitants of territory ceded by or seceding from the Crown lose their British nationality, it does not follow that they acquire either automatically or by submission that of the successor State. The latter may withhold the granting of its nationality to all or portions of the persons concerned... Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality...

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

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

The matter has been taken somewhat further by the ILC in its Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, which formulates the issues in terms of a ‘right to nationality’. Under Article 1, ‘Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned.’ Article 4 calls on States to ‘take all appropriate measures’ to prevent individuals from becoming stateless as a consequence of succession.
The matter was put to the test before the Eritrea–Ethiopia Claims Commission, where individual claims arose respecting arbitrary deprivation of nationality. Ethiopia argued that Ethiopian citizens who registered to vote in the 1992 referendum on Eritrean independence thereby became Eritrean nationals and lost their Ethiopian nationality. Eritrea argued that, whilst there existed at the time a provisional Eritrean government, the State of Eritrea came into being only after the referendum and thus there could have been no conferral of Eritrean nationality at the time Ethiopia alleged the loss of Ethiopian nationality occurred. Ethiopia argued in reply that Eritrea had ‘de facto’ emerged as a State prior to the Referendum, and was [thus] capable of conferring nationality. But Ethiopia had taken various steps tending to communicate an intention to allow persons both to register in the referendum and to remain Ethiopian nationals (e.g., issuance of Ethiopian passports, continued permission to own real property and to carry on business in Ethiopia). According to the Claims Commission: nationality is ultimately a legal status. Taking into account the unusual transitional circumstances associated with the creation of the new State of Eritrea and both Parties’ conduct before and after the 1993 Referendum, the Commission concludes that those who qualified to participate in the Referendum in fact acquired dual nationality. They became citizens of the new State of Eritrea pursuant to Eritrea’s Proclamation No. 21/1992, but at the same time, Ethiopia continued to regard them as its own nationals.

However, the Claims Commission went on to say, the outbreak of war between the two States in 1998 was a fundamental change of circumstances and, while not in itself suspending dual nationality, placed dual nationals ‘in an unusual and potentially difficult position’. It fell to the Claims Commission to determine in which cases suspension of Ethiopian nationality had been arbitrary and in violation of international law. The principle of nationality by estoppel appears to have been decisive here: for four classes of person, the Claims Commission held deprivation of Ethiopian nationality had been ‘arbitrary and unlawful’; the two main classes comprising persons who had benefited from land ownership or business licenses in Ethiopia and had held and travelled on Ethiopian passports. This qualifies Article 10(1) of the Draft Articles, which specifies that a ‘predecessor State may provide that persons concerned who, in relation to the succession of State, voluntarily acquire the nationality of a successor State shall lose its nationality.’ The problematic cases, in the Claims Commission’s view, were those where individuals lost Ethiopian nationality and ended up stateless...
because either they had acquired but later lost Eritrean nationality; or had never had Eritrean nationality (para 62). It held that: ‘[w]hile Eritrea cannot claim for the loss suffered by the persons who were the victims of those errors, Ethiopia is liable to Eritrea for any damages caused to it by those errors’ (para 62).

(3) Government

The requirement that a putative State have an effective government might be regarded as central to its claim to statehood. ‘Government’ or ‘effective government’ is evidently a basis for the other central criterion of independence. Moreover, international law defines ‘territory’ not by adopting private law analogies of real property but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some territory and population. Territorial sovereignty is not ownership of but governing power with respect to territory. There is thus a good case for regarding government as the most important single criterion of statehood, since all the others depend upon it. This is true equally for external as internal affairs. Governmental authority is the basis for normal inter-State relations; what is an act of a State is defined primarily by reference to its organs of government, legislative, executive or judicial.

The difficulty is, however, that the criteria for statehood are nominal and exclusionary. Their concern is not with the clear undoubted cases but with the borderline ones. Hence the application of the criterion of government in practice is much less simple than this analysis might suggest.

A striking modern illustration is that of the former Belgian Congo, granted a hurried independence in 1960 as the Republic of the Congo (later Zaire; since 1997, the Democratic Republic of Congo). The situation in the Congo after independence has been described elsewhere. It involved the following factors:

- The absence of any effective preparation for independence. The process of granting formal independence took hardly more than a year. For example no Congolese had by 1960 achieved more than adjutant rank in the armed forces.
- The existence of various secessionary movements, at least one of which (in Katanga) was inspired by foreign interests and led to civil war.
• The division of the central government, shortly after independence, into two fractions, both claiming to be the lawful government.  

• The reintroduction, in violation of the treaty of Friendship, Assistance and Co-operation between Belgium and the Congo, of Belgian troops shortly after independence, under claim of humanitarian intervention.

• The immediate and continuing need, because of the effective bankruptcy of the Congolese authorities, for international aid on a large scale.

• The introduction of United Nations forces shortly after independence to restore order and prevent civil war.

• ‘[T]he continued presence of Belgian and other foreign military and paramilitary personnel and political advisers, and mercenaries, in disregard of repeated resolutions of the United Nations’, referred to by General Assembly resolution 1599 (XV) as ‘the central factor in the present grave situation in the Congo.’

Anything less like effective government it would be hard to imagine. Yet despite this there can be little doubt that in 1960 the Congo was a State in the full sense of the term. It was widely recognized. Its application for United Nations membership was approved without dissent. United Nations action subsequent to admission was based on the ‘sovereign rights of the Republic of the Congo’. On no other basis could the attempted secession of the Katanga province have been condemned as ‘illegal’.

What then is to be made of the criterion of ‘effective government’? Three views can be taken of the Congo situation. It may be that international recognition of the Congo was simply premature because, not possessing an effective government, the Congo was not a State. It may be that the recognition of the Congo was a case where an entity not properly qualified as a State is treated as such by other States, for whatever reason—that is, a case of constitutive recognition. Or it may be that the requirement of ‘government’ is less stringent than has been thought, at least in particular contexts.

This third view is to be preferred. The point about ‘government’ is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority. Prior to 1960 Belgium had that right, which it resigned in favour of the new entity. Of course the Congo could thereafter...
have disintegrated. Moreover, the creation of States is in principle an original, not a derivative, act—each State must make its own title to recognition. Nevertheless, by withdrawing its own administration and conferring independence on local authorities, Belgium was precluded from denying the consequences of its own conduct. Thereafter there was no international person as against whom recognition of the Congo could be unlawful. It is to be presumed that a new State granted full formal independence by a former sovereign has the international right to govern its territory—hence United Nations action in support of that right. On the other hand, in the secessionary situation the position is different. A seceding entity seeks statehood by way of an adverse claim, and in general, statehood can only be obtained by effective and stable exercise of governmental powers. Acquisition of territory does not provide an exact analogy but the difference is similar to that between cession and prescription.

The position of Finland in 1917 to 1918 provides a good example of the latter situation. Finland was an autonomous part of the Russian Empire from 1807 until its declaration of independence after the November revolution. Its territory was thereafter subject to a series of military actions and interventions; it was not until after the defeat of Germany by the Entente and the removal of Russian troops from Finnish territory by Sweden that some degree of order was restored. In those circumstances it was not surprising that the Commission of Jurists appointed by the League to report on certain aspects of the Åland Islands dispute were of the opinion that...

for a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war between Red and White Finnish troops. It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted
sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May 1918, that the civil war was ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.98

The test applied rather strictly by the Jurists reflects the requirement of government in a secessionary situation. The Commission of Rapporteurs (p.59) disagreed with the Jurists, because of the importance they attached to Soviet recognition of Finland, and, more particularly, because of Finland’s continuity of personality before and after 1917. They therefore applied rules relating to the restoration of law and order in Finnish territory, and to the legality of foreign assistance for that purpose, rather than the stricter rules relating to the initial establishment of an independent government by secession.

The following conclusions suggest themselves. First, to be a State, an entity must possess a government or a system of government in general control of its territory, to the exclusion of other entities not claiming through or under it.

Second, international law lays down no specific requirements as to the nature and extent of this control, except that it include some degree of maintenance of law and order and the establishment of basic institutions.

Third, in applying the general principle to specific cases, the following must be considered:

(1) whether the statehood of the entity is opposed under title of international law: if so, the requirement of effectiveness is likely to be more strictly applied;

(2) whether the government claiming authority, if it does not effectively control the territory in question, has obtained authority by consent of the previous sovereign and exercises a certain degree of control;

(3) there is a distinction between the creation of a new State on the one hand and the subsistence or extinction of an established State on the other. In the former situation, the criterion of effective government may be applied more strictly.
These considerations are borne out in practice. The factors favouring the statehood of the Congo apply equally to Rwanda and Burundi, as well as to other cases of ‘premature independence’. On the other hand, where entities attempt to secede from within the State, the requirement of effectiveness is strictly applied: this was so with Biafra, for example, and in the very many cases of unsuccessful secession since (reviewed in Chapter 9).

The cases of the ‘divided States’ are also of interest. The statehood of Korea was certified by General Assembly resolution 195 (III): there the grant of independence by consent of the previous sovereign to ‘Korea’ as a whole, and the establishment in conformity with the various instruments of a freely elected government justified for a time the claim of the Republic of Korea to be ‘the government of Korea’ as a whole. But the continuance of an effective regime in the North led eventually to the acknowledgment of its separate statehood, leading to the eventual admission of both North and South Korea to the United Nations. The case of Vietnam was less clear, if only because of the contradictory grants of power to various regimes by France, as well as the doubtful independence of the ‘Republic of Vietnam’. And Taiwan, though possessing an effective government, has not been recognized as a separate State, principally because at the time its government moved offshore from mainland China, and for long afterwards, it did not claim to be separate but continued as ‘the Government of China’: in other words, its claim was not adverse to that of the People’s Republic of China.

The requirement of government thus has the following legal effects. Positively, the existence of a system of government in and of a specific territory indicates a certain legal status, and is in general a precondition for statehood. Continuity of government in a territory is an important factor determining continuity of the State concerned, as well as continuity between different forms of legal personality (see further Chapter 16). Although the law distinguishes States from their governments, normally only the government of a State can bind that State, for example by treaty. The existence of a government in a territory is thus a precondition for the normal conduct of international relations. Negatively, the lack of a coherent form of government in a given territory militates against that territory being a State, in the absence of other factors such as the grant of independence to that territory by a former sovereign. ‘Nomadic tribes... travers[ing] the desert on more or less regular routes’ may not have government in the sense required
and so may not be States, though they may have a more limited legal personality.\textsuperscript{111}

\textbf{(p.61)} To summarize, statehood is not simply a factual situation. It is a legally circumscribed claim of right, specifically to the competence to govern a certain territory. Whether that claim of right is justified as such depends both on the facts and on whether it is disputed. Like other territorial rights, government as a precondition for statehood is thus, beyond a certain point, relative. But it is not entirely so: each State is an original foundation predicated on a certain basic independence. This was represented in the Montevideo formula by ‘capacity to enter into relations with other States’.

\textbf{4) Capacity to enter into relations with other States}

Capacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative.\textsuperscript{112} True, States pre-eminently possess that capacity, but this is a consequence of statehood, not a criterion for it—and it is not constant but depends on the situation of particular States.\textsuperscript{113} It might still be said that \textit{capacity} to enter into the full range of international relations is a useful criterion, since such capacity is independent of its recognition by other States and of its exercise by the entity concerned.\textsuperscript{114} Something like this seems to have been the view when the UK voted against a proposed General Assembly resolution calling for national liberation movements to be accorded status under the Convention on the Representation of States in their Relations with International Organizations of Universal Character. The UK Representative stated:

\begin{quote}
[T]here is no justification for the resolution to call upon States to accord to certain national liberation movements, functional privileges and immunities. An entity other than a State cannot be regarded as the same as the government of a State. A national liberation movement does not have the same ability as a government to provide the guarantee of good conduct and behaviour which a host country is entitled to require.\textsuperscript{115}
\end{quote}

\textbf{(p.62)} But capacity, competence or ‘ability’ in this sense depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of international relations so that no other entity both carries out and accepts responsibility for them. In other words, capacity to enter into relations with other States, in the sense in which it

(9) Article 1(1)(a) of the Draft Articles on Succession of States with respect to Treaties provided that ‘“Succession of States” means the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory’ (ibid, 1968/II, 90–1; 1970/II, 301–2; 1972/I, 30–1). The words in italics were substituted, in the Drafting Committee, by the phrase ‘responsibility for the international relations of territory’: Ibid, 1972/I, 270–1. See now Vienna Convention on Succession of States in Respect of Treaties (1978), Art 2(1)(b), 23 August 1978, 1946 UNTS 3.

(10) GA res 3314 (XXIX) 14 December 1974 (adopted without vote).

(11) In 1973, during a discussion of the future ILC work programme, the consensus was that ‘[t]he question of recognition of States and governments should be set aside for the time being, for although it had legal consequences, it raised many political problems which did not lend themselves to regulation by law’: see ILC Ybk 1973/I, 175 (Bilge), 164 (Castañeda); but cf 165, 170 (Tsuruoka). The matter was raised again in 1996, but no action was taken. See ILC Planning Group, Working Group on the Long-Term Programme of Work: Annex 2: Outline of Issues on the Topic of Statehood, reprinted below (with permission) as Appendix 4, p 757.

(12) The deficiencies in the definition taken from the Montevideo Convention on the Rights and Duties of States are discussed below.


(16) Military and Paramilitary Activities in and against Nicaragua, ICJ Rep 1986 p 14, 133 (para 265):‘Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua... it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.’
(17) Ibid, 133 (para 263): ‘... adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.’


(19) See The Equality of States in Public International Law: the notion of equality of States is not historically a deduction from sovereignty, however: ibid, 56, 334–6.


(21) The Lotus, PCIJ ser A no 10 (1927) 18; in external affairs the presumption is less significant, since it must be weighed against the equal rights of other States.

(22) Polish War Vessels in the Port of Danzig PCIJ ser A/B no 43 (1931) 142.


(24) Interpretation of Peace Treaties (Second Phase), ICJ Rep 1950 p 221, 228–9.

(25) PCIJ ser A no 10 (1927) 18. The cogency of the Lotus presumption in modern law has been doubted: see, e.g., Brownlie, Principles (6th edn), 299–1. It was referred to with approval by the Permanent Court in the Free Zones Case, PCIJ ser A no 24, 11–12 (1930), but it was not applied by the Court in cases involving the constitution of international organizations when a rather extensive interpretation was adopted: see Competence of the ILO with respect to Agricultural Labour, PCIJ ser B nos 2–3 (1922) 23–6; Competence of the ILO to regulate, incidentally, the work of the Employer, PCIJ ser B no 13 (1926) 21–3; Jurisdiction of the European Commission of the Danube, PCIJ ser B no 14 (1927) 36, 63–4; contrast Judge Negulesco (diss), ibid, 104–5. In the Territorial Jurisdiction of the Oder Commission, PCIJ ser A no 23 (1929) 26, the Court refused to accept the contention ‘that, the text being doubtful, the solution should be adopted which imposes the least restriction
on the freedom of States. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation; in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States.’

Like most of the secondary rules of interpretation the *Lotus* presumption found no place in the Vienna Convention on the Law of Treaties 1969, Arts 31-3. It was not applied by the majority in the *Admissions Case*, ICJ Rep 1948 p 63; the dissentients (Judges Basdevant, Winiarski, McNair, Read) referred to it as ‘a rule of interpretation frequently applied by the Permanent Court’ (*ibid*, 86). It was applied in the *Asylum Case*, ICJ Rep 1950 p 266, 275. Apart from the separate opinion of Judge Guillaume in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 p 226, 291 (paras 9, 10) asserting that States remain free to act absent a prohibition, its reception in recent decisions has been ambiguous. Consider, e.g., *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) (Request for the Indication of Provisional Measures), ICJ Rep 2000 p 182, 233, Declaration of Judge Van Den Wyngaert, (para 10), and various statements in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 p 226, 239 (para 21). In that case President Bedjaoui indicated that the *Lotus* presumption has ‘very limited application in the particular context of the question which is the subject of this Advisory Opinion’: *ibid* p 226, 270–1 (paras 12, 15); cf Judge Shahabudeen, *ibid*, 376, 395. In his dissent, Judge Weeramantry discussed the presumption at length, suggesting ‘inter alia’ that the *Lotus* presumption might be inverted given that the use of nuclear weapons would drastically restrict the freedom of the States against which they were used. Cf Judge Dillard’s comment in *Fisheries Jurisdiction* (United Kingdom v Iceland), ICJ Rep 1974 p 3, 59: ‘[I]f the exercise of freedom trespasses on the interests of other States then the issue arises as to its justification. This the Court must determine in light of the applicable law and it does not advance the enquiry to attempt to indulge in a presumption or to lean on a burden of proof. It can be argued, for instance, that Iceland was the “actor” who sought to change the established law and the burden of proving legal justification rests on her. Conversely it can be argued that the Applicant was in the role of plaintiff and should therefore have the burden of establishing the illegality of Iceland’s actions. In either event the Court must determine the rights of the Parties. Freedom of State action and burdens of proof suggest analogies to the criminal and civil procedures of some States.'
Applied to the present case the analogy is misplaced.’ See also Lauterpacht (1949) 26 BY 48; Spiermann, *International Legal Argument in the Permanent Court of International Justice*, 247-63.

(26) Thus the Australian State of New South Wales, not a ‘State’ in the international law sense, was held to be a ‘foreign country’ for the purposes of a double taxation statute: *Burnet v Chicago Portrait Co*, 285 US 1 (1932), 6 ILR 19: the decision need have been no different if the statute had applied to ‘foreign States.’ See also *Gilmore Steel Corp v Dep’t of Revenue* 9 Or Tax 210, 222-3 (1982)(‘foreign country’ and political subdivision synonymous for purposes of Oregon tax law); *Smith v US* 953 F 2d 1116, 1117 (9th Cir 1991)(Antarctica, a ‘sovereignless region without civil tort law’, held a ‘foreign country’ for purposes of Federal Tort Claims Act); *Couvertier v Gil Bonar* 173 F 3d 450, 452 (1st Cir 1999)(US Virgin Islands a ‘foreign country’ for the purposes of a statute barring importation of lottery tickets from any foreign country). Conversely, a foreign State may, for purposes of a particular statute, sometimes be treated as something else: see, e.g., *O’Reilly v Fox Chapel Area School District*, 527 A 2d 581, 584 (Pa, 1987) (foreign country equated to part of the United States for purposes of income tax); *R v Governor of Belmarsh Prison* [2001] 1 AC 84, 92(Ireland not a ‘foreign state’ for purposes of s 3 of the Foreign Extradition Act 1989). See also *Randall v Randall*, 759 NYS 2d 537 (2003);*In re YMA*, 111 SW 3d 790 (Tex App, 2003) (both treating foreign countries as part of the United States for family law purposes).

(27) For Mandates see Chapter 12. For the nationality of Andorra before 1993 see Bélinguier, *La Condition juridique des vallées d’Andorra*, 206, 221;Ourliac in *Mélanges Maury*, 1, 403; Crawford (1977) 55 *RDISDP* 259.


(32) *Nanni v Pace and the Sovereign Order of Malta* (1935) 8 ILR 2, 5: ‘only States can contribute to the formation of international law as an objective body or rules—States as international entities which are territorially identifiable’ (Italy, Court of Cassation, 1935).


(34) ‘Sir Humphrey Waldock said that a distinction had to be made between the conduct of international relations and responsibility for international relations. He also said that the latter was the best short definition possible’ *ILC Ybk* 1972/I, 271; and for discussion of this formula, *ibid*, 1974/II(1), 26–8.

(35) The British Government still claimed responsibility for the international affairs of the Dominions at a time when they were effectively independent: see Chapter 8. In later, analogous cases, it has not claimed such responsibility (e.g., Southern Rhodesia before 1965).


(37) Thus the Holy See (1870–1929) and British India (1919–47) were treated as States for at least some purposes. The UN membership of Byelorussia and the Ukraine is a later example: see Chapter 4. But cf Higgins,
Development, 41 n 69; Marek, Identity and Continuity, 145, both of whom are too unqualified in their support of the declaratory theory.

(38) Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19. The Convention was ratified by the United States and certain States in Latin America: it is still in force. Despite its regional character and low participation, the Convention definition is referred to reflexively, irrespective of its actual language or of the context: Grant (1999) 37 Col JTL 403, 415 n 51. Its drafters no doubt had in mind standard definitions of the State: cf Crane, The State in Constitutional and International Law, 65 (‘government, independence, territory and people’); Kelsen (1929) 4 RDI 613, 614: ‘un État est formé lorsqu’un ordre de contrainte relativement souverain, c’est-à-dire dependant exclusivement du droit des gens, se créé et devient efficace sur un territoire donné et vis-à-vis d’une population donnée’. On the historical antecedents of the Montevideo criteria, see Grant, 414–18.


(40) The changing concept of statehood thus reflects historical and philosophical developments—the latter, perhaps, at a respectful distance. In the pre-Vattelian period the link between the law of nations and natural law was associated with a lack of a developed distinction between States and non-state entities (as noted in Chapter 1). The growth of positivism more or less coincided with the development of the doctrine of sovereignty and the decline of the principle of legitimacy—rejected in terms of its influence on statehood by the 1820s. The period after 1918 and (decisively) after 1945 saw the development of new principles of legitimacy, based on self-determination and human rights. See generally Franck, The Power of Legitimacy Among Nations; Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force; Roth, Governmental Illegitimacy; Buchanan, Justice, Legitimacy, and Self-Determination.


(45) Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands), ICJ Rep 1959 p 209, 212–13, 229; Case Concerning Right of Passage over Indian Territory (Portugal v India), ICJ Rep 1960 p 6, 27.


(47) Cf Jennings, Acquisition of Territory, 7–11.

(48) The point was assumed by the Permanent Court in two cases: Monastery at St Naoum (Albanian Frontier), PCIJ ser B no 9 (1924) 2 ILR 385; Polish-Czechoslovakian Frontier (Question of Jaworzina), PCIJ ser B no 8 (1923). But cf the stricter view proposed in the British Memorial: Interpretation of the Treaty of Lausanne, PCIJ ser C no 10, 202–3. There is no reference to the matter in the judgment: PCIJ ser B no 12 (1925).

(49) GA res 273 (III) (37–12:9), 11 May 1949; SC res 70, 4 March 1949 (9–1) (Egypt): 1 (UK)).

(50) SCOR 383rd mtg 2 December 1948, 11, and Jessup’s remarks generally, Ibid, 8–14.

(51) On Kuwait see Al Baharna, The Legal Status of the Arabian Gulf States, 250–8; Hassouna, The League of Arab States and Regional Disputes, 91–140. On Mauritania see Higgins, Development, 18–19, 307. For Bahrain see Chapter 7. Cf also Mendelson, 100–8. For Belize, see Maguire (1982) 22 Va JIL 849, 849–881. The position of Guatemala was that ‘the granting of independence to Belize by the United Kingdom is a unilateral act which is not recognised by Guatemala since this is not a case of a colony which is being granted independence but of a territory which is the subject of a dispute not yet resolved. The United Kingdom cannot disregard its territorial dispute with Guatemala, or its legal liability for the damage caused to Guatemala and for
its failure to fulfil various obligations it has had with respect to Guatemala in connection with Belize.’ Note of 27 January 1983, reprinted (1983) 54 BY 395. On Belize see also Chapter 14.


(55) ICJ Rep 1969 p 3, 32.

(56) *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Rep 1994 p 6, 22, 26 (paras 44, 52). See also Thirlway (1995) 66 BY 1, 18–19.

(57) But see statement of Minister of State, FCO, 12 December 1991, 200 HC Deb col 1166: ‘The traditional criteria that we adopt for the recognition of states probably apply to Slovenia. They do not apply in the case of Croatia in the same way, but I accept... that one of the reasons why the criteria do not apply to Croatia is that Croatian territory has been invaded by the [Jugoslav National Army] and Serbian irregulars.’ This, however, would not seem to state the general practice: ‘The United Kingdom recognises many states whose borders are not fully agreed with their neighbours. This is normally a bilateral matter for the states concerned.’ See also Minister of State, FCO, 5 February 1999, 185 HC Deb WA col 84.


(60) 139 HC Deb col 2207, 21 March 1921.

(61) 116 HC Deb col 1201, 28 May 1919.


(63) See LNOJ sp supp no 4 (1920). See further Lapradelle, le Fur and Mandelstam, The Vilna Question; Kavass and Sprudzs (eds), Baltic States: A Study of their Origin and National Development in International Military Law and History; Langer, Seizure of Territory, 22-5; Scelle (1928) 35 RGDIP 730; Brockelbank (1926) 20 AJ 483.

(64) Cf Judge Anzilotti, Railway Traffic Between Lithuania and Poland, PCIJ ser A/B no 42 (1931) 108.

(65) (1924) 1 RIAA 524, 525 (13th Question).

(66) In the Railway Traffic Between Lithuania and Poland, PCIJ ser A/B no 42 (1931) 112, the Court thought the establishment of Lithuania antedated the seizure of Vilna on 9 October 1920. See also Panavezys-Saldutiskis Railway Case, PCIJ ser A/B no 76 (1939) 10. To the same effect Répertoire Suisse 1, 439–41. For an overview of UK cases in which the status of Estonia was at issue see Hillgruber, Aufnahme neuer Staaten, 262-5.


(68) For the Vatican see Duursma, Microstates, 374, 411-12; and below Chapter 5.

(69) Nottebohm Case (Second Phase), ICJ Rep 1955 p 4, 23.

(70) Cf the Israeli cases in the period (1948–52) when there was no Israeli nationality law: 17 ILR 110-12. See also Naqara v Minister of the Interior (1953) 20 ILR 49.

(71) AB v MB (1951) 17 ILR 110, referring to the ‘absurd result of a State without nationals’; Draft Convention of Harvard Law Research, Art 18(2);
Wildermann v Stinnes (Romanian-German Mixed Arbitral Tribunal) (1924) 2 ILR 224; Poznanski v Lentz & Hirschfeld (1925) 4 Rec MAT 353.

(72) Date of Entry into Force of Versailles Treaty (Germany) Case (1961) 32 ILR 339. See also Weis, Nationality and Statelessness in International Law, 151 ff.; Beemelmans (1995) 41 Osteuropa-Recht 73, 97–8.

(73) Brownlie (1963) 39 BY 284, 320.

(74) O’Connell, State Succession, vol 1, 497–528, 503.

(75) PCIJ ser B no 7 (1923) 15. For comment see Berman (1993) 106 HLR 1792, 1834–42. Cf also Nationality (Secession of Austria) Case (1954) 21 ILR 175; Murray v Parkes [1942] 2 KB 123, 10 ILR 27; Graupner (1946) 32 GST 87.


(78) Ibid, para 44.

(79) Ibid, para 45.

(80) Ibid, paras 46–9.

(81) Ibid, para 51.

(82) Ibid, para 55.

(83) Ibid, paras 75–6.

(84) Article 9 of the Draft Articles addresses the situation the other way around: where a person is qualified to acquire the nationality of the successor State, that State is permitted to require the person to renounce another nationality. Consonant with Art 4 respecting prevention of statelessness, Art 9 further provides, ‘such requirements shall not be applied
in a manner which would result in rendering the person concerned stateless, even if only temporarily.’ There is no analogous clause in Art 10.

(85) It is clear that ‘government’ and ‘independence’ are closely related as criteria—in fact they may be regarded as different aspects of the requirement of effective separate control. For present purposes, government is treated as the exercise of authority with respect to persons and property within the territory of the State; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other States. Other writers draw a similar distinction but in different terms: e.g., Wheaton (‘internal’ and ‘external’ sovereignty); Kamanda Legal Status of Protectorates, 175–82 (‘sovereignty’ (internal) and ‘independence’ (external)).

(86) See ARSIWA 2001, Arts 4–7 for the normal situation of responsibility for acts of State organs or agencies and Arts 8–11 for other more-or-less exceptional cases.


(88) Kanza, Conflict in the Congo, 192.

(89) Kanza, Conflict in the Congo, 78, 109, 196 ff. The secession had been planned prior to 1960.


(91) 29 June 1960. 164 BFSP 645 Art 6.

(92) Belgian withdrawal was requested by the following: SC resns 4387, 13 July 1960 (8–0:3); 4405, 22 July 1960 (11–0); 4426, 1 August 1960 (9–0:2); GA res 1599 (XV), 15 April 1961 (61–5:33).

(93) See, e.g., the Agreement on Financial Assistance of 23 August 1960, UN–Congo: 373 UNTS 327, providing $5 million ‘to finance normal imports’ (Art 4) and ‘to meet... current budgetary needs, preference being given to the government pay-roll and emergency relief expenditure’ (Art 7).
(94) SC res 142, 7 July 1960; GA res 1480 (XV), 20 September 1960.


(96) SC res 169, 24 November 1961 (9–0:2).

(97) This was, it seems, the older view: Baty (1934) 28 AJ 444. Higgins describes the Congo’s UN admission as a derogation from ‘the fairly distinct pattern of consistent adherence to the requirement of a stable and effective government’: Development, 21-2.

(98) LNOJ spec supp no 4 (1920) 8–9.

(99) LN Council Doct B7: 21/68/106 (1921) 22.

(100) Ibid, 23: ‘[T]he legal government, appointed by the Diet before its dispersion by the insurrection, never ceased to exist throughout a part of the country, even in the midst of the civil war. It took refuge at Vasa, raised an army there, reconquered the provinces one by one and ended by crushing the revolution.’

(101) Ibid: ‘The sovereignty of the Finnish State was not diminished by the co-operation of Germany. A State does not lose its sovereign rights because it receives outside aid for the re-establishment of its authority.’

(102) Larnaude and Struycken, two of the Commission of Jurists, later reaffirmed their view before the Council: LNOJ September 1921, 697. Huber was absent and could not give an opinion.

(103) This meets the common case where some of the functions of government are exercised by other States or entities on a basis of agency. Cf ARSIWA, Art 6.

(104) Cf Higgins, Development, 24. See also below, Chapter 8.

(105) For the case of the so-called ‘failed States’ see Schachter (1998) 36 Col JTL 7, and see Chapter 17.

(106) See to this effect Warbrick in Evans (ed), Aspects of Statehood and Institutionalism in Contemporary Europe, 14–16. See also below, Chapter 16.

(108) Cf Rudzinski (1952) 480 *Int Conc* 173.


(110) Changes in the nature of Taiwanese claims may be in train: see Chapter 5. Generally on the ‘divided States’ see Chapter 10.

(111) ICJ Rep 1975 p 12, 41 (para 87). See further Chapter 6.


(113) Some writers nonetheless suggest this as a distinct criterion of statehood: e.g., Hillgruber (1998) 9 *EJIL* 491, 499–502. See also Hillgruber, *Aufnahme neuer Staaten*, 42: ‘Die Fähigkeit und die... Bereitschaft, die Staaten nach allgemeinen Völkerrecht obliegenden Pflichten zu erfüllen, wird zu so zum entscheidenden Kriterium für die Anerkennung eines Neustaates als Völkerrechtssubjekt.’ Vukas takes the better view, i.e., that capacity is more a consequence than a criterion of statehood. Vukas (1991/VI) 231 *HR* 263, 282.

(114) Montevideo Convention, Art 1(d); *Restatement 2nd, Foreign Relations Law of the US*, ss 4, 100(c); *Restatement 3rd, s 201, comment e*.

(115) Statement of Mr FD Berman, 7 December 1984 (1984) 55 *BY* 446. GA res 43/160/A, 9 December 1988, noting that SWAPO and the PLO already had been granted observer status (respectively, by GA resns 31/152, 20 December 1976 and 3237 (XXIX), 22 November 1974), extended the organizations a privilege of direct communication to the General Assembly; but GA res 43/160/B noted ‘that the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character... regulates only the representation of States in their relations with international organizations.’ See generally Morgenstern, *Legal Problems of International Organizations*, 68–74.

(116) For a discussion of nascent independence and the effect that a growing functional capacity to engage in international relations may have on status see Lloyd and James (1996) 67 *BY* 479. See further Chapter 8.