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University of Southampton

**International Law and State Failure -  
Somalia and Yugoslavia**

by

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LL.B. (Hons)(Exon) M.A. (Kent)

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ABSTRACT

FACULTY & DEPARTMENT OF LAW

Doctor of Philosophy

INTERNATIONAL LAW AND STATE FAILURE -

SOMALIA AND YUGOSLAVIA

by David John Carter

The present study considers the treatment of failed States in international law. State failure represents a relatively recent phenomenon, which presents novel problems for the international community to deal with. For international law, the principles and experience of dealing with the creation, continuity and extinction of States present the nearest analogies, and so will form the basis of its responses to failure.

Failure is defined as governmental and societal collapse in a State, so severe as to render it incapable of exercising internal and external sovereignty. It is likely to take the form of either conflictual implosion - such as in Somalia; or fragmentary explosion - as in Yugoslavia. Accordingly, an examination of the treatment of these two failed States, during the early 1990s, provides the substantive basis of the study.

The key aspects of Statehood under which the study proceeds are: loss of government as a criterion of Statehood; self-determination, including the emerging right of democratic governance; and recognition.

Consideration of the Somali and Yugoslav experiences of failure, and their treatment under the three areas identified, evidences a strong inertia in the international system against findings of State failure - the Somali experience. The only exception is if such a finding is coupled with a potential solution, such as the possible emergence of new States - the Yugoslav experience. The determinations constitute a meta-legal process, which can be seen as indicative of a new conception of 'political international law'.

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The PhD process is about so much more than the time spent at one's desk. For me, that has mainly meant being a tutor, and being a warden. Of the former: what a pleasure and a privilege. And a chance to realise teaching perhaps is the ultimate learning process. Hence, my thanks to all those students who have taught me so much in the last five years. Especially the four mooted teams I have thoroughly enjoyed working with - in particular Hannah who got lumbered with so much proof-reading.

Wardening is a different part of University life, but I think equally educational. Having spent four of my five Southampton years in the Halls system, it has been a major part of my experience here. My time as Warden brought me closest to giving up on this whole caboodle. That was down to me, but it was contributed to by the system, and by those within it, at all levels, who shouldn't be - I hope they don't last too long. Being a Subwarden, especially this last year, having returned to it, has been great, and another tremendous privilege. Thanks therefore to those who have been friends to me throughout my time in the system; students, SCR, and staff - especially this year, the Little People and the Puppy Patrol (including Tubbs aka Mr. Maps)!

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I think it is obvious from the foregoing that there are easily enough people to take the blame for the many shortcomings of this thesis. However, the one thing I will exonerate them all from is my sense of humour. For that, I am sorry.

Dave - July 2000

## Abbreviations and Acronyms

### Text

CGDK	-	Coalition Government of Democratic Kampuchea
CSCE	-	Conference on Security and Co-operation in Europe
EC	-	European Community <sup>1</sup>
ECOSOC	-	Economic and Social Council
EPC	-	European Political Co-operation
FRY	-	Federal Republic of Yugoslavia
GA	-	General Assembly, of the UN
ICCPR	-	International Covenant on Civil and Political Rights (1966)
ICESCR	-	International Covenant on Economic, Social and Cultural Rights (1966)
ICJ	-	International Court of Justice
IMF	-	International Monetary Fund
IOs	-	International Organisations
JNA	-	<i>Jugoslovenska Narodna Armija</i> (Yugoslav National Army)
LC	-	League of Communists, in Yugoslavia
MNCs	-	Multi-National Corporations
NFD	-	Northern Frontier District, of British Kenya
NGOs	-	Non-Governmental Organisations
P-5	-	The five Permanent Member States of the Security Council (China, France, Russia/USSR <sup>2</sup> , UK, US)
PCIJ	-	Permanent Court of International Justice

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<sup>1</sup> Whilst there exist three distinct Communities - what was the Economic Community, the Coal and Steel Community and the Atomic Energy Community - it is the EC that dominates, at least in matters of foreign policy, which are the concern in this work. The EEC was renamed the EC by the Treaty of European Union, 1992, known as the Maastricht Agreement, which came into force in November 1993. In addition, this Treaty created a new body, the European Union (EU), which incorporated the three communities, as well as wider policies of co-operation, including foreign and security policy - see, for example: Hartley, T.C. 'The Foundations of the European Community Law: An Introduction to the Constitutional Law of the European Community' 4 Edn. (Oxford: OUP, 1998), pp. 3-10. Since the events covered in this study span this period of significant change for the European States, the EC will be referred to throughout, for simplicity and consistency, except in direct quotations.

<sup>2</sup> This issue will be dealt with below, in Chapter 6, section 6.3.7

RSK	-	Republika Srbška Krajina
RSHB	-	Republika Srbška Herceg-Bosna
SC	-	Security Council, of the UN
SFRY	-	Socialist Federal Republic of Yugoslavia
SNA	-	Somali National Alliance
SNC	-	Supreme National Council, of Cambodia
SNM	-	Somali Nationalist Movement
SOC	-	State of Cambodia
SPM	-	Somali Patriotic Movement
SSDF	-	Somali Salvation Democratic Front
TNC	-	Transitional National Council, of Somalia
UN	-	United Nations
UNITAF	-	United Nations Task Force, in Somalia
UNOSOM	-	United Nations Operation in Somalia
UNPROFOR	-	United Nations Protection Force, in the former Yugoslavia
UNTAC	-	United Nations Transitional Authority for Cambodia
USC	-	United Somali Congress

## References

AJIL	-	American Journal of International Law
AUJIL&P	-	American University Journal of International Law and Policy
Austl. YBIL	-	Australian Yearbook of International Law
BYIL	-	British Yearbook of International Law
CJTL	-	Columbia Journal of Transnational Law
Cornell ILJ	-	Cornell International Law Journal
EJIL	-	European Journal of International Law
FFWA	-	Fletcher Forum of World Affairs
Fordham ILJ	-	Fordham International Law Journal
GST	-	Grotius Society Transactions
Harv. ILJ	-	Harvard International Law Journal
ICLQ	-	International and Comparative Law Quarterly
ILM	-	International Legal Materials

LQR	-	Law Quarterly Review
MLR	-	Modern Law Review
NYUJIL&P	-	New York University Journal of International Law and Politics
Proc. ASIL	-	Proceedings of the American Society of International Law
Proc. CCIL	-	Proceedings of the Canadian Council on International Law
TILJ	-	Texas International Law Journal
TLCP	-	Transnational Law and Contemporary Problems
Virg. JIL	-	Virginia Journal of International Law
Yale JIL	-	Yale Journal of International Law

## Textual Note

*Language... was a large part of the problem, because words say what they want to say, not what you want them to say...*

*Jason - A Hero*<sup>1</sup>

I intend to follow the advice of Crawford<sup>2</sup>, and Dowdall<sup>3</sup> before him, in capitalising the word 'State', and all of its derivatives, throughout the text, when used in the sense of a political unit, for the sake of clarity. However, when direct quotations are used in the text, the author's original usage will be retained.

The footnoting throughout the text is recommenced for each Chapter. As such, in addition to the numbering beginning again, references to works already cited will nevertheless be given in full on the first occasion of their usage in a Chapter.

Throughout the text, cross-referencing is primarily contained in footnotes. These refer either to appropriate Chapter(s) or Section(s), in which case the number designation is used, or to the appropriate footnote(s) at which the text can be found. The form used is "Above, text at nn. 1-2" for text within the same Chapter, and "Above, Chapter 1, text at nn. 1-2" for a different Chapter. When reference should be made only to the content of the footnote(s), the form used is "Above, n. 1".

**Declaration:** This thesis constitutes work completed whilst I have been registered in the Law Faculty of the University of Southampton. The authorship is solely mine, and no part of the thesis has been submitted for any other purpose.

---

<sup>1</sup> Holt, T. 'Ye Gods!' (London: Orbit, 1992), p. 289

<sup>2</sup> Crawford, J. 'The Creation of States in International Law' (Oxford: Clarendon, 1979), p. ix

<sup>3</sup> Dowdall, H.C. 'The Word 'State'' (1923) 39 LQR, pp. 98-125, at p. 98



The nail that sticks up gets hammered down.  
(Japanese proverb)

Chaos is untranslated order.  
James Blinn<sup>1</sup>

Our words make our worlds.  
Phillip Allott<sup>2</sup>

---

<sup>1</sup> 'The Aardvark is Ready for War' (London: Doubleday, 1997), p. 128

<sup>2</sup> 'Eunomia: New Order For A New World' (Oxford: OUP, 1990), p. 11

## Chapter 1: State Failure

*'How old-fashioned you are with your frontiers and your patriotism. The aeroplane doesn't know a frontier; even your financiers don't recognize frontiers.'*<sup>1</sup>

*Reality is infinitely various when compared to the deductions of abstract thought, even those that are most cunning, and it will not tolerate rigid, hard-and-fast distinctions. Reality strives for diversification.*<sup>2</sup>

### Abstract

States have been the fundamental units of international society, at least in their modern form, since the mid-seventeenth Century, but they have not held this position unchallenged. The recent questioning of States comes from Globalism, but this was preceded by those challenging the exclusivity of States as international persons.

One consequence of the challenges is a re-consideration of Statehood. Definitions of the concept in international law did not really emerge until other entities sought to exercise similar functions. These definitions have developed as the role and position of States has come under scrutiny. However, the State remains the fundamental unit of international law - of both its creation and application. As such, it is also its most difficult subject. The challenges to States have prompted challenges to, and reconsiderations of, the theory of international law, which have also reflected the wider theoretical trends. However, this study is not about these reconsiderations - they merely form its backdrop.

Challenges to States will mean failures of them, in some instances. Such failures will fall to be dealt with and accounted for by international law, whatever its own theoretical difficulties might be. That is what this study is about - how international law deals with State failure.

---

<sup>1</sup> "Dr Czinner called out to him angrily" - Greene, G. 'Stamboul Train' (London: Penguin, 1975), p. 165 (writing in 1932)

<sup>2</sup> Dostoyevsky, F. 'The House of the Dead' McDuff, D. (Trans.) (London: Penguin, 1985), p. 305

### 1.1 (Not) The End of the Nation-State...?

*In the 1990s, the nation-state, the most fundamental unit of international politics, has been under relentless pressure and questioning: the nation by new or revived cultural cleavages, the state by forces of economic and political liberalization and heightened popular expectations.<sup>3</sup>*

Human suffering seems to have been the main constant of world history; it is merely the form and classification of it that changes. For so much of the Twentieth Century, the focus was on war - inter-State violence on a scale never before seen. However, towards the end of that Century, and not unrelated to the end of an entirely different kind of war - the Cold War - a new form of destruction has occurred. Wars between States have partially given way to conflicts in and across States. These conflicts are one of the causes/characteristics of a (post)modern phenomenon, known as 'State failure'.

Failure takes many forms: the fragmentary, apparently nationalist, explosions that appeared to prevail in Central and Eastern Europe - Yugoslavia, the USSR; collapse of the basic functions of society, familiar in a number of African States - Chad, Equatorial Guinea, Sierra Leone, Zaïre; and sometimes that collapse is also characterised by intense internal 'faction' violence - Angola, Liberia, Rwanda, Somalia, Sudan, Togo; constitutional transitions give way to revolution, rebellion, and eventual loss of any coherent political legitimacy and authority - Cambodia, Haiti. Such categorisations are approximate, and disputable - overlaps and transitions between them will be evident. However, they represent a generality of State experience - of States that cease to function as States. For some this is a temporary condition - at least partial recovery occurred in Chad, Ghana, and Uganda; for others it is fatal - death ensued in Yugoslavia and the USSR; and some remain in seemingly interminable crisis - a coma, without the prospect of release through death or cure, might describe Somalia and Zaïre.<sup>4</sup>

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<sup>3</sup> Lyons, T. and Samatar, A.I. 'Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction' (Washington, DC: Brookings Institution, 1995), p. 2

<sup>4</sup> Broad overviews of many of these examples can be found in: Jackson, R.H. and James, A. (Eds.) 'States in A Changing World: A Contemporary Analysis' (Oxford: Clarendon, 1993); Zartman, W.I.

As intra-State conflict and collapse have emerged as dominant features of the contemporary world, they also arise as problems that must be faced by the international community, and by international law. Its origins were the laws of war and peace - now international law must deal with the difficulties of failing and failed States. And it is this new problem for international law that is to provide the subject matter of the present study.

Before this problem can be tackled directly, brief reference will need to be made to the context in which the theory and practice of international law take place. The general starting point is the recent trends in broad theory, which will be followed by brief reference to developments in international law theory prompted by it. It will then fall to clarify the meaning of the term 'State failure', before a general overview of the plan of study can be set forth.

### 1.1.1 Globalisation

*In the modern world the nation state is out of date. It is too small to exercise some of its present powers and too big properly to implement others. The future belongs to Europe and the regions.*<sup>5</sup>

This is the view of a politician, expressed towards the end of the 1990s, but it is a view that has become common in recent years. During the latter part of the Twentieth Century, there was a phenomenal growth in popular comment on the State and in questioning its place and status in the global order. Accompanying this spread, there was the inevitable backlash of traditionalists, and of counter-theorists. What, however, is truly remarkable, is the breadth of this debate. It is not merely a popular media phenomenon, nor is it a narrow doctrinal discussion confined (or consigned?) to certain departments in a handful of Universities. It cuts across so many disciplines -

---

(Ed.) 'Collapsed States: The Disintegration and Restoration of Legitimate Authority' (Boulder and London: Lynne Rienner, 1995)

The life-cycle terminology is an extension of that highlighted in Jackson, R.H. "Continuity and Change in the States System", in Jackson and James, pp. 346-367, at p. 348, but which is common throughout the literature on the subject.

<sup>5</sup> Hattersley, R. 'Why the Nation State is Now Out of Date' *The Guardian*, 4 September 1997, p. 20

Communications, Cultural Studies, International Relations, Law, Literature<sup>6</sup>, Media Studies, Politics, Sociology, Technology and as many other disciplines within the Arts-Humanities-Social Sciences bracket as there are labels for. Clearly, this is a non-exhaustive list, but equally clearly, it demonstrates the extent of the debate. It is itself a global phenomenon - and it represents the context of international law's treatment of State failure.

Whilst evidence of the underlying ideas extends back at least until the early 1960s<sup>7</sup>, the significant explosion of interest in the subject seems to be emphasised around the mid-1980s.<sup>8</sup> Such dating will always be imprecise, but the phenomenon and treatment of State failure can be said to be new to the UN era of international law<sup>9</sup>, and largely to the contemporary context of the end of the Twentieth Century, and the beginning of the Twenty-First.

The key concept is encapsulated in a single word: 'Globalisation'. A precise determination of that term would be extremely difficult, given the range of usage it has received. Indeed, the possible overuse of it might be argued to have rendered it as a cliché, of little value other than rhetorical.<sup>10</sup> However, a sense of the ideas can be gained from a general attempt to pin-down the concept:

*A social process in which the constraints of geography on social and cultural arrangements recede and in which people become increasingly aware that they are receding.*<sup>11</sup>

The social process involves many 'processes' - communications, economics, politics, technology, and so forth. Of course, these are themselves inter-related and inter-dependent - from one perspective, for example, the technology allows for the

---

<sup>6</sup> Indeed, it is arguable that the first conception of the technological globalisation of the 1980s originated in the dystopian dreams of the Cyberpunk generation of science-fiction authors. Without doubt, the seminal work in this context is: Gibson, W. 'Neuromancer' (London: Victor Gollancz, 1984)

<sup>7</sup> Held, D. *et al.* 'Global Transformations: Politics, Economics and Culture' (Cambridge: Polity, 1999), p. 1; Waters, M. 'Globalization' (London and New York: Routledge, 1995), p. 2

<sup>8</sup> Robertson, R. 'Globalization' (London: Sage, 1992), p. 8

<sup>9</sup> See below, Chapter 2, n. 7

<sup>10</sup> Held, *op cit.*, pp. 1-28

<sup>11</sup> Waters, *op cit.*, p. 3. Waters' is an extremely accessible, non-doctrinarian account of the general idea of globalisation.

communication, which serves the economy, which drives the political agenda(s). What is central to the idea(s) is the reconsideration of the international, or global, order, and all of its aspects and manifestations, all of which are interconnected, or at least related.

Perhaps the primary focus of the globalist agenda has been a reconsideration of the State - of its status, its role, and even of its future existence. A rash of literature in numerous contexts has emerged presaging 'The End of the Nation-State'.<sup>12</sup> Elsewhere, its place in the international order is reconsidered, or reconceptualised.<sup>13</sup> These considerations of the State find a linkage with, and are in part a continuation of, developments in political doctrine in the early 1970s within the sub-discipline of International Relations (IR). The name most easily identified with this trend is that of John Burton. Writing in 1972, he identified as the proper focus of study, not the traditional pure inter-State interactions, but the world society of layered interactions between and across States, at all levels.

*In practice there are so many direct communications or systems that a world map which represented them would look like a mass of cobwebs superimposed on one another, strands converging at some points more*

---

<sup>12</sup> Guéhenno, J.-M. 'The End of the Nation-State' Elliott, V. (Trans.) (Minneapolis and London: Minnesota UP, 1995)

The literature on this subject is vast, but for general starting points from within political science, see for example: Dunn, J. (Ed.) 'Contemporary Crisis of the Nation State?' (Oxford, UK and Cambridge, USA: Blackwell, 1995); Horsman, M. and Marshall, A. 'After the Nation-State: Citizens, Tribalism and the New World Disorder' (London: HarperCollins, 1994); Strange, S. 'The Defective State' (1995) 124 *Dædalus* 2, pp. 55-74; Sur, S. 'The State between Fragmentation and Globalization' (1997) 8 *EJIL* 3, pp. 421-434

Further, categorised references are given in subsequent notes.

<sup>13</sup> For example, from a technological perspective: Everard, J. 'Virtual States: The Internet and the Boundaries of the Nation-State' (London and New York: Routledge, 2000); Mowlana, H. 'Global Information and World Communication: New Frontiers in International Relations' 2 Edn. (London, Thousand Oaks, New Delhi: Sage, 1997)

From a primarily (international) political-economic stance: Cable, V. 'The Diminished Nation-State: A Study in the Loss of Economic Power' (1995) 124 *Dædalus* 2, pp. 23-53; Gill, S. (Ed.) 'Globalization, Democratization and Multilateralism' (Tokyo, New York, Paris: UNUP and MacMillan, 1997); Pierson, C. 'The Modern State' (London and New York: Routledge, 1996); Strange, S. 'The Retreat of the State: Diffusion of Power in the World Economy' (Cambridge: CUP, 1996)

From a welfare and social policy perspective: Hurrell, A. and Woods, N. (Eds.) 'Inequality, Globalization, and World Politics' (Oxford: OUP, 1999)

*than others, and being concentrated between some points more than between others. The boundaries of states would be hidden from view.*<sup>14</sup>

Again, such trends were not universally accepted, nor were they the only direction in which the study was taken<sup>15</sup> - such inter-paradigm debates have constituted the history of the discipline of IR.<sup>16</sup> Without delving too deeply into these ideas and paradigms, the key issue remains that the focus of study within IR had shifted from the basic assumption of the existence of the State system, to a questioning or justifying of it. The global order and its make-up became the (primary) subject of consideration, rather than the context of more focused considerations.

As has already been said, these debates and trends are not the focus of this study, but they do impact upon it. This study is one grounded in international law, and inevitably, the globalist agenda has influenced the development of that discipline, and the practice it is concerned with.<sup>17</sup> The impact has taken a number of forms: new

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<sup>14</sup> Burton, J.W. 'World Society' (Cambridge: CUP, 1972), at p. 43

For a general overview of World Society or Globalist approaches, see for example: Banks, M. (Ed.) 'Conflict in World Society' (Brighton: Wheatsheaf, 1984); Maghroori, R.M. and Ramberg, B. (Eds.) 'Globalism versus Realism: International Relations' Third Debate' (Colorado: Westview, 1982); Olson, W.C. and Groom, A.J.R. 'International Relations Then and Now: Origins and Trends in Interpretation' (London: HarperCollins, 1991), pp. 183-221

<sup>15</sup> The other major trend of the 1970s was the Structuralist Approach - Olson and Groom, *op cit.*, pp. 222-261. For an overview of the basic Neo-realist response to these trends, see: Olson and Groom, *ibid.*, pp. 262-284

<sup>16</sup> See for example: Banks, M.H. "The Inter-Paradigm Debate", in Light, M. and Groom, A.J.R. 'International Relations: A Handbook of Current Theory' (London: Pinter, 1985), pp. 7-26; Banks, M.H. 'Where Are We Now' (1985) 11 Review of International Studies 3, pp. 215-233; Maghroori, "Major Debates in International Relations" in Maghroori and Ramberg, *op cit.*, pp. 1-20; Nicholson, M. 'Imaginary Paradigms: A Sceptical View of the Inter-Paradigm Debate in International Relations' [Internet Document]; Viotti, P.R. and Kauppi, M.V. 'International Relations Theory: Realism, Pluralism, Globalism' (London: Collier MacMillan, 1987).

The classical inter-paradigm debate(s) have possibly now been eclipsed by alternative approaches - for an overview, see for example: Smith, S. "The Self-Images of a Discipline: A Genealogy of International Relations Theory", in Booth, K. and Smith, S. (Eds.) 'International Relations Theory Today' (Cambridge: Polity, 1995), pp. 1-37. Two different contemporary collections reflecting possible different directions: Groom, A.J.R. and Light, M. (Eds.) 'Contemporary International Relations: A Guide to Theory' (London and New York: Pinter, 1994) and Neumann, I.B. and Wæver, O. (Eds.) 'The Future of International Relations: Masters in the Making?' (London and New York: Routledge, 1997)

<sup>17</sup> Alston, P. 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 EJIL 3, pp. 435-448; but cf. Scott, S.V. 'International Lawyers: Handmaidens, Chefs, or Birth Attendants? A Response to Philip Alston' (1998) 9 EJIL 4, pp. 750-756

areas of study have developed, most noticeably the necessarily-global law dealing with the environment<sup>18</sup>; legal-theoretical interpretations of the demise of the State have arisen<sup>19</sup>; and, conventional aspects of the discipline have been reconsidered. In this latter context, the increasingly globalist world community can be said to have built upon, and contributed to, various aspects of international law that challenge, or at least demand a reassessment of, traditional conceptions of State sovereignty.<sup>20</sup> Key amongst these areas of international law have been: human rights<sup>21</sup>; self-determination and the treatment of nationalism<sup>22</sup>; and, humanitarian intervention, whether by States

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<sup>18</sup> Bragdon, S.H. 'National Sovereignty and Global Environmental Responsibility: Can the Tension Be Reconciled for the Conservation of Biological Diversity?' (1992) 33 Harv. ILJ 2, pp. 381-392; Chinkin, C. "International Environmental Law in Evolution" & Evans, T. "International Environmental Law and the Challenge of Globalization", in Jewell, T. and Steele, J. (Eds.) 'Law in Environmental Decision-making: National, European, and International Perspectives' (Oxford: Clarendon, 1998), at pp. 229-265 and 207-227 respectively; Nanda, V.P. "Environment", in Joyner, C.C. 'The United Nations and International Law' (Cambridge: CUP & ASIL, 1997), pp. 287-308. Schachter, O. 'The Emergence of International Environmental Law' (1991) 44 Journal of International Affairs 2, pp. 457-493

<sup>19</sup> Ali Kahn, L. 'The Extinction of Nation-States' (1992) 7 AUJIL&P 2, pp. 197-234; Ali Kahn, L. 'The Extinction of Nation-States: A World Without Borders' (The Hague: Kluwer, 1996); Picciotto, S. 'Fragmented States and International Rules of Law' (1997) 6 Social and Legal Studies 2, pp. 259-279. Schachter, O. 'The Decline of the Nation-State and its Implications for International Law' (1997) 36 CJTL 1, pp. 7-23; Schreuer, C. 'The Waning of the Sovereign State Towards a New Paradigm for International Law?' (1993) 4 EJIL 3, pp. 447-471, Trachtman, J.P. 'L'Etat, C'est Nous. Sovereignty, Economic Integration and Subsidiarity' (1992) 33 Harv. ILJ 2, pp. 459-473; and generally (1994) Proc. ASIL, pp. 1-87. 'State Sovereignty: The Challenge of A Changing World "New Approaches and Thinking on International Law"' (1992) Proc. CCIL, pp. 15-297

<sup>20</sup> Again, the literature is vast, and considerable variety exists between the extremes of out-and-out challenges to the existence of sovereignty and the re-entrenchment of it. For general starting points across this range, see for example Bartleson, J. 'A Genealogy of Sovereignty' (Cambridge: CUP, 1995); Bierstalker, T.J. and Weber, C. (Eds.) 'State Sovereignty as Social Construct' (Cambridge: CUP, 1996); Elstain, J.B. 'Sovereign God, Sovereign State, Sovereign Self' (1991) 66 Notre Dame Law Review, pp. 1355-1384; Jackson, R.H. 'Quasi-States: Sovereignty, International Relations, and the Third World' (Cambridge: CUP, 1986); James, A. 'Sovereign Statehood: The Basis of International Society' (London: Allen and Unwin, 1986); Kingsbury, B. 'Sovereignty and Inequality' (1998) 9 EJIL 4, pp. 599-625; Onuf, N.G. 'Sovereignty: Outline of a Conceptual History' (1991) 16 Alternatives 4, pp. 425-446; Warbrick, C. "The Principle of Sovereign Equality", in Lowe, V. and Warbrick, C. (Eds.) 'The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst' (London and New York: Routledge, 1994), pp. 204-229

<sup>21</sup> See below, text at nn. 33-35

<sup>22</sup> For example: Wani, I.J. 'Cultural Preservation and the Challenges of Diversity and Nationhood: The Dilemma of Indigenous Cultures in Africa' (1991) 59 UKMC Law Review 3, pp. 611-643; 'The Rise of Nationalism and the Breakup of States' (1994) Proc. ASIL, pp. 33-50  
Self-determination will form the subject of Chapter 5, below



individually or collectively, or by the UN<sup>23</sup>. Such developments have in themselves necessitated some re-examination of Statehood as a concept in international law. In addition, they have been fuelled by, and have in turn revitalised, an earlier species of challenge to States - the development of other 'persons' under international law.

### 1.1.2 *International Legal Personalities*

Globalisation represents the second major challenge to Statehood in international law. It builds upon, and contributes to an earlier phase of questioning that will also necessarily inform the subject of this study. Traditional conceptions of international law conceived it as the law as between sovereign States.<sup>24</sup> As such, States were the only legitimate subjects<sup>25</sup> of it - they were the only legal persons under international law; the only entities to possess the full range of rights and duties.<sup>26</sup> However, this sanctity of status has come to be challenged and reconsidered as international law has developed across the Twentieth Century.<sup>27</sup> At least five different categories of entity, other than States, have been accorded some form of personality under international

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<sup>23</sup> A broad overview of the various perspectives can be gained from three excellent works on the subject: Damrosch, L.F. (Ed.) 'Enforcing Restraint: Collective Intervention in Internal Conflicts' (New York: Council on Foreign Relations, 1993); Lyons, G.M. and Mastanduno, M.M. (Eds.) 'Beyond Westphalia: State Sovereignty and International Intervention' (Baltimore and London: John Hopkins U.P. 1995); Ramsbotham, O. and Woodhouse, T. 'Humanitarian Intervention in Contemporary Conflict: A Reconceptualization' (Cambridge: Polity, 1996)

The issue of humanitarian intervention, other than directly under the auspices of the UN, has most recently been in focus in the context of the NATO intervention in the FRY, during 1999. For an overview of the range of academic opinion, see: 'Editorial Comments: NATO's Kosovo Intervention' (1999) 93 AJIL 4, pp. 824-862; Kritisiotis, D. 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia' (2000) 49 ICLQ 2, pp. 330-359

<sup>24</sup> Jennings, Sir R. and, Watts, Sir A. (Eds.) 'Oppenheim's International Law' 9 Edn., Vol. 1 "Peace" (London: Longman, 1992), p. 16 § 7 n. 1.

"International law governs relations between independent States." - The Lotus Case (France v. Turkey) 1927 PCIJ Reports, Ser. A, No. 10, p. 18

<sup>25</sup> Although this concept has recently been criticised - see below, n. 33

<sup>26</sup> For example: "States and States alone enjoy *locus standi* in the law of nations; they are the only wearers of international personality..." - Birkenhead, The Right Hon., The Earl of 'International Law' 6 Edn., Moelwyn-Hughes, R. (Ed.) (London and Toronto: Dent, 1927)

On the subjects of international law generally, see for example: Aufrecht, H. 'Personality in International Law' (1943) XXXVII American Political Science Review 2, pp. 217-243; Jennings and Watts, *op cit.*, pp. 119-120, 330-331

<sup>27</sup> Lauterpacht, H. 'The Subjects of the Law of Nations' (1947) 63 LQR, pp. 438-460

law: non-State groups, individuals, international organisations (IOs), non-governmental organisations (NGOs), and multinational corporations (MNCs).

Within States, the earliest groups to be accorded “a degree of international personality” were rebel regimes - belligerents and insurgents.<sup>28</sup> More recently, certain rights, usually within the broad conception of human rights, have been argued to exist for certain groups - minority rights, the right of self-determination, and the rights of indigenous peoples.<sup>29</sup> Beyond these categories, there exists a considerable range of entities that might be described as “less than sovereign” States - whilst perhaps better not referred to as States, they are entities that possess partial independence or sovereignty. Included in this category are: protectorates, dependent territories, mandated areas, and trust territories.<sup>30</sup> In each of these contexts, the non-State group has a claim to certain rights, or might possibly be subject to certain duties, albeit short of those possessed or owed by States.

In a sense, the three other group categories - IOs, NGOs, MNCs - can find themselves in a similar situation: in possession of certain limited rights or capacities, and subject to certain duties. Thus, IOs established as between States can, and indeed will of necessity, take on a degree of objective legal personality insofar as is necessary to exercise their functions, the clearest statement of which was given by the International

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<sup>28</sup> Jennings and Watts, *op cit.*, pp. 161-169, quotation at p. 162

<sup>29</sup> Still the best overview is provided by: Crawford, J. (Ed.) ‘The Rights of Peoples’ (Oxford: Clarendon, 1988). See also: Anghie, A. ‘Human Rights and Cultural Identity: New Hope for Ethnic Peace?’ (1992) 33 Harv. ILJ 2, pp. 341-352; Brubaker, R. ‘National Minorities, Nationalizing States, and External National Homelands in the New Europe’ (1995) 124 Dædalus 2, pp. 107-132; Preece, J.J. ‘National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?’ (1997) 3 Nations and Nationalism 3, pp. 345-364; Preece, J.J. ‘National Minorities and the European Nation-States System’ (Oxford: Clarendon, 1998); Thornberry, P. ‘International Law and the Rights of Minorities’ (Oxford: Clarendon, 1991).

One of the key developments regarding the rights of indigenous people was the decision of the Australian High Court in Mabo and Others v. State of Queensland [1992] 107 ALR 1. See for example: Manwaring, M. ‘A Small Step or A Giant Leap? The Implications of Australia’s First Judicial Recognition of Indigenous Land Rights’ (1993) 34 Harv. ILJ 1, pp. 177-191; Patton, P. ‘Sovereignty, Law, and Difference in Australia: After the Mabo Case’ (1992) 21 Alternatives 2, pp. 149-170; Scott, S. ‘The Australian High Court’s Use of the *Western Sahara* Case in *Mabo*’ (1996) 45 ICLQ 4, pp. 923-927

<sup>30</sup> Jennings and Watts, *op cit.*, pp. 123-124, 266-318. The issue of neutralised States might also be relevant in this context - pp. 318-324

Court of Justice in The Reparations Case.<sup>31</sup> In similar manner, although to a more limited extent, NGOs and MNCs have been accepted as possessing some degree of personality on the international legal plane.<sup>32</sup>

Perhaps the most controversial, and without doubt the most radical, has been the status of the individual under international law.<sup>33</sup> The earliest conceptions were of individuals as the recipients of international rights, although their status as subjects of the law was arguably in question given their inability to enforce those rights in law.<sup>34</sup> However, the two most significant areas of development with regard to individuals under international law, both largely since WW II, have been the international protection of human rights and international criminal law.<sup>35</sup> And these developments have tied in with a number of other substantive areas of international law already

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<sup>31</sup> Reparations for Injuries Suffered in the Service of the United Nations Case (Advisory Opinion) 1949 ICJ Reports 174

See generally for example: Brownlie, I. 'Principles of Public International Law' 5 Edn. (Oxford: Clarendon, 1998), pp. 678-681; Bowett, D.W. 'The Law of International Institutions' 2 Edn. (London: Stevens, 1970), pp. 301-342; Esman, M. and Telhami, S. (Eds.) 'International Organizations and Ethnic Conflict' (Ithaca and London: Cornell UP, 1995); White, N.D. 'The Law of International Organisations' (Manchester and New York: MUP, 1996), pp. 27-56

<sup>32</sup> For a brief overview and collection of useful references on this general area, see: Grant, T.D. 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 CJTL 2, pp. 403-457, at pp. 404-407. See also, for example: Schmidt, V.A. 'The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State' (1995) 124 Dædalus 2, pp. 75-106

<sup>33</sup> On the difficulties preceding this question, based upon a criticism of the subject-object distinction, see: Higgins, R. 'Problems and Process: International Law and How We Use It' (Oxford: Clarendon, 1994), pp. 48-55

<sup>34</sup> See, for example: Aufrecht, *op cit.*, pp. 229-243. Early references to international law rights being conferred on individuals include: Acquisition of Polish Nationality (Advisory Opinion) 1923 PCIJ Reports, Ser. B, No. 7, at p. 7; Jurisdiction of the Danzig Courts (Advisory Opinion) 1928 PCIJ Reports, Ser. B, No. 15, at p. 17; and, Germany Minority Schools in Upper Silesia Case (Germany v. Poland) 1931 PCIJ Reports, Ser. A/B, No. 40, at p. 32 - "The treaty would fail in its purpose if it were not to be considered as an established fact that persons who belonged *de facto* to such a minority must enjoy the protection which had been stipulated."

<sup>35</sup> See generally: Beigbeder, Y. 'Judging War Criminals: The Politics of International Justice' (Basingstoke: MacMillan, 1999); Boven, T. van 'Human Rights and Rights of Peoples' (1995) 6 EJIL 3, pp. 461-476; Hannum, H. "Human Rights", in Joyner, *op cit.*, pp. 131-154; Jennings and Watts, *op cit.*, pp. 846-849, 983-1030; McCormick, T.L.H. and Simposn, G.J. (Eds.) 'The Law of War Crimes: National and International Approaches' (The Hague, Boston, London: Kluwer, 1997); Murphy, J.F. "International Crimes", in Joyner, *op cit.*, pp. 362-381; Vincent, R.J. 'Human Rights and International Relations' (Cambridge: CUP, 1986).

On the possible impact this has had on general international law: Gunning, I.R. 'Modernizing Customary International Law: The Challenge of Human Rights' (1991) 31 Virg. JIL 2, pp. 211-247

mentioned, including self-determination, minority rights, and humanitarian intervention. As such, and notwithstanding the difficulties associated with 'subjects', a considerable amount of recent international law concerns the rights and duties of individuals.

Whatever the details of the respective areas, the acceptance of alternative international legal persons will inevitably impact upon Statehood. First, the possibility of different forms of personality means that determinations of whether an entity is a State will require a greater precision of definition. As such, the scarcity of legal-academic and judicial treatment of what constituted a State that prevailed for the early years of the discipline had to give way to consideration of the matter in the light of these wider issues of personality. The detail of these developments will be returned to in Chapter Two. The second consequence of the existence of alternative forms of international legal personality is direct challenges to States. These entities possessed of international legal rights must necessarily hold those rights as against international duty-holders - most usually States. And the existence of challenges to individual States, across the various contexts already discussed, have directly fed into the newer developments of challenges to Statehood and the State-centricity of the international order.

### 1.1.3 *The State of International Law*

*[I]t should always be borne in mind that the State of jurisprudence and the State of sociology are conceptions, only existing in the domain of thought.<sup>36</sup>*

The purpose of the foregoing survey has not been to provide anything approaching a comprehensive account of either the idea(s) of globalisation, or of the issues surrounding persons other than States under international law. Nor was the intention to deal comprehensively with the substantive issues of international law that have arisen in these contexts. Instead, the purpose has been to sketch an overview of the contemporary context of the State in international law. In so doing, two key issues

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<sup>36</sup> Kunz, J.L. 'On the Theoretical Basis of the Law of Nations' (1924) 10 GST, pp. 115-142

have been sought to be identified: that the State as an international institution has come under increasing scrutiny academically and under considerable pressure, both internally and externally (if such a distinction is valid), in practice; and, that the identification of States requires something considerably more than mere acceptance or evidence of international personality.

Inevitably these developments in the context and practice of international law have led to reconsiderations of the underlying theory of the discipline. The range of reconsiderations of theory that have impacted upon, and have themselves been impacted upon by, globalisation is vast.<sup>37</sup> The diversity of approaches includes the disillusioned<sup>38</sup> Phillip Allott's, arguably idealistic<sup>39</sup>, "reconceiving of the human world"<sup>40</sup>, based on post-Vattel conceptions of sovereignty and State giving way to:

*[A]n international society which is at last a society, a society whose purpose is the survival and prospering of the whole human race, that is to say, its self-selected evolution as a species.*<sup>41</sup>

From a different approach. Martti Koskenniemi's "deconstruction"<sup>42</sup> of "the dynamics of international legal argument"<sup>43</sup> has alleged its ultimate indeterminacy and

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<sup>37</sup> A useful starting point is: Kennedy, D. and Tennant, C. 'New Approaches to International Law: A Bibliography' (1994) 35 Harv. ILJ 2, pp. 417-460. At p. 418:

*In general, there has been a dramatic increase during the past two decades in the volume of scholarly work that aims to rethink the foundations of international law and to respond to recent trends in political, social, and legal theory.*

<sup>38</sup> Warbrick, C. "Introduction", in Allott, P. *et al.* 'Theory in International Law: An Introduction' (London: BIICL, 1991), pp. xi-xvi, at pp. xv-xvi

<sup>39</sup> Carty, A. 'Social Theory and the "Vanishing" of International Law: Review Article' (1992) 41 ICLQ 4, pp. 939-945, at pp. 944-945

<sup>40</sup> Allott, P. 'International Law and International Revolution: Reconceiving the World (Josephine Onoh Memorial Lecture)' (Hull: HUP, 1989), p. 7

<sup>41</sup> Allott, P. 'Eunomia: New Order for a New World' (Oxford and New York: OUP, 1990), pp. 239-53 (13.96-13.112), and pp. 405-411 (19.1-19.27), quotation at p. 420 (20.32). See also: Allott, P. "New International Law: The First Lecture of the Academic Year 20-", in Allott *et al.*, *op cit.*, pp. 105-116; and Allott, P. 'The Concept of International Law' (1998) 10 EJIL 1, pp. 31-50

<sup>42</sup> Koskenniemi, M. 'From Apology to Utopia: The Structure of International Legal Argument' (Helsinki: Lakimiesliiton Kustannus, 1989), pp. XVII-XIX. See generally: Balkin, J.M. 'Deconstructive Practice and Legal Theory' (1987) 96 Yale LJ, pp. 743-786; Georgiev, D. 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 EJIL 1, pp. 1-14

<sup>43</sup> *ibid.*, pp. 40-42, at p. 42

consequent inability to resolve 'hard cases'<sup>44</sup>, resulting in lawyers re-emerging as social actors able to re-think the international context.

*Rethinking of contexts will involve imagining social institutions which will no longer permanently privilege some voices under a category of statehood which has no particular value by itself.*<sup>45</sup>

Feminist voices serve to provide alternative emphases, based upon reconceptions of the participation requirements of States within a conceived liberal society; of the role of non-State groups; and, ultimately, of the acceptance of distinct and 'different voices' - of fragmented, layered, overlapping, multiple sovereignties.<sup>46</sup> Still other trends are grounded in 'pure postmodernity'<sup>47</sup>, or in Functionalist/Marxist conceptions<sup>48</sup>. And of course, for all of the voices of change and reconception, there remain those who regard the current world order, and therefore the context of international law theory, as remaining firmly entrenched in the State-centric paradigm.

*Seeking signs of the 'rebirth of statehood' is more than a little premature: there is no evidence that the State has died. It is an intellectual fashion to preach the end of the State and to attack sovereignty. But such iconoclasm has had no impact on the real world. The fact remains that since 1945 the existence of States has provided the basis of the legal order.*<sup>49</sup>

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<sup>44</sup> *ibid.*, pp. 130-191, conclusion at pp. 187-191; Koskeniemi, M. 'The Politics of International Law' (1990) 1 EJIL 1.2, pp. 4-32, at pp. 4-9

<sup>45</sup> 'Apology' *ibid.*, pp. 458-501, quotation at p. 499; 'Politics' *ibid.*, pp. 7-9. See further: Koskeniemi, M. 'The Future of Statehood' (1991) 32 Harv. ILJ 2, pp. 397-410; Koskeniemi, M. "Theory: Implications for the Practitioner", in Allott *et al.*, *op cit.*, pp. 1-45; Koskeniemi, M. 'The Wonderful Artificiality of States' (1994) Proc. ASIL, pp. 22-29; Koskeniemi, M. 'International Law in a Post-Realist Era' (1995) 16 Aust. YBIL, pp. 1-19

<sup>46</sup> Charlesworth, H. *et al.* 'Feminist Approaches to International Law' (1991) 85 AJIL 4, pp. 613-645 and Knop, K. 'Re Statements: Feminism and State Sovereignty in International Law' (1993) 3 TLCP, pp. 293-344.

<sup>47</sup> For example: Carty, A. 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 EJIL 1, pp. 66-96; Purvis, N. 'Critical Legal Studies in Public International Law' (1991) 32 Harv. ILJ 1, pp. 81-127. But *cf.*, Trimble, P.R. 'International Law, World Order, and Critical Legal Studies' (1990) 42 Stanford Law Review, pp. 811-845

<sup>48</sup> For example: Chimni, B.S. 'International Law and World Order: A Critique of Contemporary Approaches' (New Delhi and London: Sage, 1993), pp. 211-296

<sup>49</sup> Brownlie, I. "Rebirth of Statehood", in Evans, M. (Ed) 'Aspects of Statehood and Institutionalism in Contemporary Europe' (Aldershot: Dartmouth, 1996), pp. 5-7, at p. 5. The extract continues:

*Even attacks on sovereignty are often fuelled by powerful States who see the thesis of the demise of sovereignty as a vehicle for the projection of their sovereignty at the expense of others. Reality is often complex and paradoxical. Thus the European Union is based upon the existence of individual States.*

Again, without delving too deeply into these complex discourses, what remains in focus for the present study is that contemporary international legal thought faces the reality of challenges to and questioning of States.<sup>50</sup> They have become the subject of legal enquiry as never before. And the fact that their position and status have become challengeable opens paths for new considerations. It is within this context that the problem of State failure must be faced.

## 1.2 State Failure

Globalisation offers challenges, both theoretical and practical, to Statehood. A consequence of these challenges has been reassessments of international law, which, as has been seen, have occurred in the realms of doctrine, theory and practice. These aspects most clearly meet in the practical context of the reconstitution, redefinition, and realignment of States. During the UN era, there have been two distinct phases in which these issues have been to the fore. The first was the period of decolonisation, in which the largely European Empires, primarily in Africa, but formerly in South America, were subject to the doctrine of self-determination, with the consequence of a considerable increase in the number of States. The second period has been the end of the Cold War, and the collapse of communism across Central and Eastern Europe, but arguably with effects in all areas of the globe previously impacted upon by the Superpower stand-offs. Both of these phases of international development have contributed to the realities of fragmentary and fractured, failing and failed States.<sup>51</sup>

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<sup>50</sup> The themes running throughout this section will not be dealt with directly in the substance of the present study, but the context they provide will necessarily form a backdrop to Chapter 7, in which a brief consideration of the outcome of the current work will be set out.

<sup>51</sup> Helman, G.B. and Ratner, S.R. 'Saving Failed States' (1992) 89 Foreign Policy, pp. 3-20, at pp. 3-5 - also identifying a third potential phase of failures, being the newly emergent States arising from some of these prior failures, in particular of Yugoslavia and the USSR.

Also, Lyons and Samatar, *op cit.*, p. 1:

*Artificial states without a strong social base of support, resources, or popular legitimacy often survived during the cold war thanks to superpower patronage and international norms that favoured stability and sovereignty. Several of those states, however, collapsed in the 1990s, as external support was withdrawn and societal demands for economic advancement and better governance increased.*

### 1.2.1 *Meanings of Failure*

‘State failure’ is an imprecise concept. It is closely related to, and overlaps and can be confused with, numerous other terms - State collapse; governmental failure or collapse; anarchy, disorder and civil war. And this imprecision is contributed to both by the complexity of the subject matter, and the scarcity of academic treatment of the subject. Accordingly, it will be necessary to establish a basic understanding of the meaning of the term in the context of the present study.

The word ‘failure’ itself contains an inherent ambiguity - it can imply a temporary or permanent situation. This distinction has been used as a key to distinguishing two types of situation. In dealing with the difficulties of certain African States, Widner established this difference as between failure and collapse.<sup>52</sup> Failure was in terms of “institutional performance” - infrastructure, standards of living, welfare provision, and so forth<sup>53</sup>; collapse denoted a stage beyond this, although not necessarily preceded by it, of total social disintegration - governments giving way completely to internal conflict, and total disorder.<sup>54</sup> Although the distinction is not expressly drawn between these two categories in terms of permanence, it is arguably implicit in the analysis.

Gordon draws a different distinction, although in reference to “disintegrating, collapsed, or failed nation-states”. The distinction is between “the breakup of nation-states into smaller nation-states and the implosion of states”<sup>55</sup>, although this distinction is not developed further within the study. Instead, the focus becomes that of the latter category, again in the African context. It is taken to mean:

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<sup>52</sup> Widner, J.A. ‘States and Statelessness in Late Twentieth-Century Africa’ (1995) 124 *Dædalus* 3, pp 129-153

<sup>53</sup> *ibid.*, pp. 131-147, quotation at p. 131

<sup>54</sup> *ibid.*, pp. 136-137, 147-150, quotation at p. 147

<sup>55</sup> Gordon, R. ‘Saving Failed States. Sometimes A Neocolonialist Notion’ (1997) 12 *AUJIL&P* 6, pp. 903-974, at p. 904.

See also: Türk, D. ‘The Dangers of Failed States and A Failed Peace in the Post Cold War Era’ (1995) 27 *NYUJIL&P* 4, pp 625-630 - Although tantalisingly used in the title, the term ‘Failed States’ is not then repeated at all within the text. However, implicit within the discussion of the Yugoslav break-up, and the reference to that of the USSR, is an acceptance of the Gordon’s first meaning - in Türk’s words “dissolution of states [and the] emergence of new states” at p. 625



*[D]ifficulties in performing basic governmental functions and delivering essential services... resulting in severe societal dislocations and inordinate human misery.*<sup>56</sup>

As such, it is very similar in its content to Widner's meaning of State failure. Setting aside Widner's distinction between failure and collapse for the moment, the commonalities between these two descriptions can be seen to be: "Civil strife, government breakdown, and economic privation".<sup>57</sup> State collapse "refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart".<sup>58</sup> The resultant conception of the failed State is of an entity "utterly incapable of sustaining itself as a member of the international community."<sup>59</sup> In these terms, State failure represents internal collapse to a degree which prevents the internal or external exercise of sovereign authority - such that "they can no longer perform the functions required for them to pass as states."<sup>60</sup> The nature of this determination of the meaning of State failure serves to conflate Widner's two categories of failure and collapse. Likewise, it can be said to cover both the implosion and break-up referred to by Gordon. Indeed, it is hoped that this study will demonstrate that Gordon's distinction is in fact one as to the consequences of failure, not as to its definition.

This characterisation of State failure is not without difficulty - not least in the determination of what constitutes the extent of the internal collapse sufficient to

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<sup>56</sup> *ibid.*, p. 905

<sup>57</sup> Helman and Ratner, *op cit.*, p. 3

<sup>58</sup> Zartman, I.W. "Introduction: Posing the Problem of State Collapse", in Zartman (Ed.), *op cit.*, pp. 1-11, at p. 1

<sup>59</sup> Helman and Ratner, *op cit.*, p. 3

<sup>60</sup> Zartman, *op cit.*, p. 1. The functions are:

*[T]he state as the sovereign authority - the accepted source of identity and the arena of politics; the state as an institution - and therefore tangible organization of decisionmaking and an intangible symbol of identity; and the state as the security guarantor for a populated territory.*

- p. 5

Or:

*[A] state in which sovereignty has been radically fragmented by revolutionary chaos such that not even the most skeletal civil administration remains.*

- Simpson, G.J. 'The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age' (1996) 32 Stanford Journal of International Law 2, pp. 255-286, at p. 256

render the external consequence.<sup>61</sup> At least a part of the assessment must be as to both duration and extent - "State collapse is not a short term phenomenon but a cumulative, incremental process similar to a degenerative disease."<sup>62</sup> However, it is again part of the aim of this study to demonstrate that the determination as to the existence of 'failure' is an integral part of the international treatment of the situation, rather than being a matter for determination as a precursor to that treatment. As such, these matters will be returned to throughout the substance of the study.

### 1.2.2 *Failing and Failed States*

The difficulties in establishing a firm definition of State failure will always mitigate against effective analysis of it. However, it is submitted that a sufficiently detailed picture of the concept can be painted to allow the determination of clear cases that fit within it, even if more borderline cases will remain uncertain. As such, the key requirement for a failing State is 'collapse' - as opposed to mere suspension or non-exercise of governmental function - so as to prevent the effective exercise of internal or external sovereignty of the entire State. Difficulty in establishing when this stage has been reached will in part be offset by an outcome illustrative of the loss of the coherence of the State. Usually this will take the form of Gordon's two categories<sup>63</sup>: disintegrative internal conflict; or fracture into individual component parts. Although the line between these two need not itself be clear.

Once the extent of governmental and societal collapse has shifted, either to conflict or break-up, the process of 'failing' will become one of 'failed'. It is at this point that the final key determination arises. If failure means 'death' of the State, then there is no longer a subject under discussion - post-mortems deal with events in the past. Indeed, as will be seen, the likelihood is that such a determination will only occur when a new State or States emerge. The detail of the present study is not directly concerned with such after-effects. The focus of the study is the period of illness - States during the

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<sup>61</sup> Widner, *op cit.*, p. 132 *et seq.* - "Evaluating state capacity is not an easy task"; Zartman, *op cit.*, pp. 5 *et seq.* - "It... becomes difficult to establish an absolute threshold of collapse."

<sup>62</sup> Lyons and Samatar, *op cit.*, p. 1

<sup>63</sup> Above, text at n. 55

process of failure itself. This distinction will be more clearly drawn in Chapter Two within the detailed treatment of the international law of State extinction.

For the present, clear cases of State failure are those in which collapse preventing the exercise of (internal and external) sovereignty leads to internal fragmentation or external break-up. The period of failure is that prior to the final demise of the State.

### 1.3 The End of the Beginning

*In keeping with my general outlook as a lawyer, I shall, however, also try to go beyond the realm of law. Indeed, a modern doctrinal account should not closet itself in the lawyer's hermetically sealed chamber. This study is therefore committed to a contextual approach to law in which history, politics, and jurisprudence are all employed in the service of legal elucidation.*<sup>64</sup>

The purpose of these introductory remarks has been to provide a broad context and justification for the present study, and to establish the basic starting point of the concept under consideration. The prevalence of the Globalist debate has been referred to, without any attempt to accept or reject its premises or conclusions, other than to acknowledge its relevance. Likewise, the consequent strands of development in international political and legal theory have been referred to. In so doing, the questioning of States has been accepted, without any attempt to offer answers to those questions having been made. Finally, a meaning of the concept of State failure has been sketched out. In dealing with international law's treatment of this phenomenon, there will be no attempt made to seek to propose solutions to it<sup>65</sup>, nor to deal with the means of prevention or cure for failing States.

The manner in which the study of international law's treatment of State failure will proceed is through a detailed consideration of the actual experience of two States, although with reference to other similar experiences. In line both with the distinction

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<sup>64</sup> Cassese, A. 'Self-determination of Peoples: A Legal Reappraisal' (Cambridge: CUP, 1995), pp. 2-3

<sup>65</sup> But see, for example the ideas of "Neocolonialism" - Gordon, *op cit.*; and UN "Conservatorship" - Helman and Ratner, *op cit.*, pp. 12-20. And see generally: Zartman, I.W. "Putting Things Back Together", in Zartman (Ed.), *op cit.*, pp. 267-273

as to the nature, or outcome, of failure drawn by Gordon, and with the general tendencies in the literature, the two examples selected represent respectively: collapse and internal conflict in Africa, and collapse and break-up in Europe.<sup>66</sup>

*[T]he new territorial African States - like the former Yugoslavia - can in almost every case be defined as posing a fundamental problem of ethnic division, tension, and not infrequently conflict which sometimes registers as civil war or secession movements.*<sup>67</sup>

The two examples selected are Somalia and Yugoslavia. The former offers perhaps one of the clearest examples of the brutality of internal conflict and the complete collapse of Statal structures. However, it also offers comparisons in terms of fragmentation and attempted secession, and offers a relatively similar pattern of internal cultural make-up. Yugoslavia can be seen to have been the definitive example of failure, involving war and collapse, and eventual break-up, within the widest European context. It also warranted the most international involvement in the process of dissolution, unlike the relatively peaceful experiences elsewhere in the region. As such, these two examples offer useful points of comparison, as well as providing clear examples of the full extent of what State failure means, and the challenges it poses.

*In global security terms, the Somali troubles and the Yugoslav war have already initiated consideration of what needs to be done to assure greater stability. Order is increasingly being sought in untraditional ways, some of them breaching the long-standing principle of non-interference in states' internal affairs.*<sup>68</sup>

The study will offer a broad background and factual account of each of the two States up to the point of failure, after the other background context - of States in political theory and international law - has been addressed. From this discussion of the treatment of States in international law it will be possible to identify the key concepts involved in that process, which will serve as the main foci of the subsequent study. These concepts will be dealt with in turn, in each case followed by a consideration of their respective use in the two States under consideration, with a general comparison offered. As each element is considered, some general conclusions will be drawn, and broader themes as to international law's treatment of State failure will be developed.

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<sup>66</sup> Above, text at nn. 4 & 55

<sup>67</sup> Jackson, R.H. "Sub-Saharan Africa", in Jackson and James, *op cit.*, pp. 136-156, at p. 141

<sup>68</sup> Horsham and Marshall, *op cit.*, p. 236. See further below, section 3.1

These themes will be drawn together in the final chapter, when an overview of the treatment of State failure in international law will be offered. From this, some more general conclusions will be offered in terms of theories of IR and international law, although these will necessarily be limited given the extent and nature of the study. This then is the structure to be followed for the remainder of the study.

## Chapter 2: State(hood) and Failure in International Law

*The state is an ascertainable fact which cannot be ignored.*<sup>1</sup>

*States are, in a manner of speaking, legal fictions; so too are governments, one fiction acting on behalf of another. In the end (and the beginning and the middle) there are only people and things.*<sup>2</sup>

### Abstract

Having introduced this study with a general overview of globalisation, of its impacts in international law theory, and of the practical problem of State failure, it now falls to consider the treatment of failed States in international law. This will begin with an account of the place of States in the development of international law, and thereby an exposition of the situation of States within international law. The specific aspect of State failure will then be considered.

The vagary and newness of the phenomenon mean that there is no specific aspect of the discipline dealing with it. As such, it will fall to consider the two nearest aspects: the extinction of States, and the criteria for their creation. From this consideration the basic principles will emerge that are utilised by the international legal community in their treatment of failed States: government as a criterion, self-determination, and recognition. As such, the application of these three concepts in the treatment of the two failed States under consideration will form the basis of the main study, from which more general conclusions can then be drawn.

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<sup>1</sup> Brown, P.M. 'The Theory of the Independence and Equality of States' (1915) 9 AJIL 2, pp. 305-335, at p. 314

<sup>2</sup> Crawford, J. 'Who is A Government? The Executive and the Courts' (1993) 52 Cambridge Law Journal, pp. 4-6, p. 4

## 2.1 Introduction

As has been said, the focus of the present study is the treatment of failed States by international law. Having established a basic understanding of what State failure means, in the previous Chapter, the broader context of Statehood needs to be considered. Accordingly, the beginning of this piece will focus upon the development of the concept of 'State' within international law. Whilst there must clearly be reference to that idea in politics, it will remain purely referential. The next stage in the process will be to consider the relationship between Statehood and international law - specifically the extent to which the legal process can deal with the nature of States, given their role and status as regards the legal system.

This basic background survey will then be followed by a more detailed account of the development of current international law as regards the criteria of Statehood. It will be indicated that this area of law is only really concerned with the creation, or emergence, of new States, and less with the existence and continuity of existing States. This latter topic then will be addressed separately, and with specific reference to the failure of States. The outcome of the general account of Statehood, and of the extinction of States will allow the identification of the key aspects of the subject. These will serve to signpost the main subjects to be addressed within the detailed treatments of Somalia and Yugoslavia, and will accordingly conclude this Chapter.

## 2.2 The State in International Law

*The growth of the law of nations is part of the history of civilization itself, and only a historian could with any approximation trace its course. But some attempt must be made here to sketch, however briefly and incompletely, some of the elements that have made the law of nations what it is.*<sup>3</sup>

### 2.2.1 Beginnings

The origin of the *Rajya* - of the State - is explained in the *Shanti Parva* of the *Mahabharata*. In the earliest periods of civilisation, people had existed in an ideal,

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<sup>3</sup> Fawcett, J.E.S. 'The Law of Nations' 2 Edn. (Harmondsworth: Penguin, 1971), p. 19

Stateless society. Every individual acted scrupulously according to the rules of right conduct through good habit and force of culture, without requiring any form of supervisory order, but gradually human desires overcame this order and society became dominated by *Matsyanyaya*<sup>4</sup> - tyranny. This was the characteristic, or force, that was behind the epic war of *Kurukshetra*, at the end of which *Bhishma* promulgated the *Rajadharma* - the law of the State.<sup>5</sup> The *Rajadharma* sets forth the ideals of the State, which are entirely in harmony with those in the heart of the individual - the *Trivarga* (three goals) of *Dharma*, *Artha* (wealth) and *Kama* (desire). Thus, the *Rajadharma* should serve to curb *Matsyanyaya*, and best serve the achievement of the *Trivarga* of all individuals and societies.<sup>6</sup>

This account has played no part in the foundation of modern international law. Its purpose here is to illustrate the possibilities - to emphasise that the current conceptions of international law are merely the product of a particular tradition. As such, there is no special inherency about them. They simply form the currently most accepted form of order. A typical modern account of Statehood in international law would usually refer to the works of classical international law<sup>7</sup>, which would most typically refer to the works of Cicero and Plato. For example, Samuel Pufendorf relied on Cicero<sup>8</sup> in asserting that:

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<sup>4</sup> 'Big fish devouring the small fish'

<sup>5</sup> *Rajya* = State; *Dharma* = law, hence the composite word *Rajadharma*. Perhaps the nearest translation is constitutional law.

*Dharma* is conveniently rendered as law, but it means so much more than that - its meanings are many, including ideas of morality, of culture, of religious piety, of good order (of society), and of the foundation of the entire world.

Some similarity can be found in the discussion of *lex* (law, in the sense of rules) and *jus* (taken wider to embody ideas of justice and equity) in Suárez, F. '*De Legibus, ac Deo Legislatore*' (A Treatise on Laws and God the Lawgiver, 1612) Williams, G.L. *et al* (Trans.) (Oxford: Clarendon, 1944), pp. 21-36

<sup>6</sup> Rama Jois, M. 'Legal and Constitutional History of India' Vol. 1 "Ancient Legal, Judicial and Constitutional System" (Bombay: Tripathi, 1990), pp. 575-578.

<sup>7</sup> By the classical period of international law is meant the period roughly denoted by the emergence of the discipline in the late Sixteenth and early Seventeenth Centuries, until roughly the end of the Nineteenth Century. The period is to be distinguished from the modern era, which comprises respectively the League of Nations era and the UN era; and from contemporary international law, which is taken as roughly the 1990s onwards

<sup>8</sup> '*De Officiis*' (On Duties, c. 44 BCE) - Book II, v - "...there is no curse so terrible but it is brought down by man upon man" - Miller, W. (Trans.) (London: Heinman, 1928), p. 183



*[T]he real and principal reason why the fathers of families left their natural liberty and undertook to establish states, was in order that they could surround themselves with defences against the evils which threaten man from his fellow man.<sup>9</sup>*

Before reaching his conclusions, Pufendorf had referred, albeit negatively, to Plato's assertion that the State was a means of furthering the needs of individuals.<sup>10</sup> Whilst the Indian conception of the origin is perhaps externally focused on the society or societies, the classical western idea is firmly rooted in the benefits for the individual or the individual society.

*The state is a complete association of free men, joined together for the enjoyment of rights and for their common interest.<sup>11</sup>*

Consequently, the conceptions of international law differ in similar fashion between the Indian and Western traditions. In India, the emergence of individual States (*Rajyas*), each with its own *Dharma* and *Rajadharma*, occurred as part of the emergence of a general *Dharma* and *Rajadharma* across the entirety of India, covering all of these States. India embodied a society of societies, or a Commonwealth of States - its *Rajadharma* was in a sense a form of international law.<sup>12</sup>

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<sup>9</sup> Pufendorf, S. *'De Jure Naturae et Gentium Libri Octo'* (Eight Books on the Law of Nature and of Nations, 1688) Oldfather, C.H. (Trans.) (Oxford: Clarendon, 1934), p. 959, and generally at pp. 956-966

<sup>10</sup> *ibid.*, pp. 958-959

Plato 'The Republic' (c. 390-370 BCE) Bk II, 369B "A city, I take it, comes into being because each of us is not self-sufficient but needs many things... So we each take in different persons for different needs, and needing many things we gather many persons into one dwelling place as partners and helpers, and to this common settlement we give the name of city." - Rouse, W.H.D (Trans.) (New York: Mentor, 1961).

However, the passage Pufendorf relies on from Cicero goes on to list the three properties of virtue, third of which is: "the skill to treat with consideration and wisdom those with whom we are associated, in order that we may through their co-operation have our natural wants supplied in full and overflowing measure, that we may ward off any impending trouble..." - *op cit*, p. 185, which seems to be a similar point to that Pufendorf had attributed to Plato and then refuted.

Pufendorf also rejected the (biblical) idea, attributed to, for example, Johannes Hornius, that the State was an inevitable consequence of the original family - pp. 956-957.

<sup>11</sup> Grotius, H. *'De Jure Belli ac Pacis Libri Tres'* (Three Books on the Law of War and Peace, 1625) Kelsey, F.W. (Trans.) (Oxford: Clarendon, 1925), p. 44

This reasoning was used as the basis of the early writings on international law, however questionable it might be in terms of modern political theory. See, for example: Hall, J.A. and Ikenberry, G.J. 'The State' (Milton Keynes: Open UP, 1989), pp. 16-21

<sup>12</sup> Rama Jois, *op cit.*, pp. 580-582

In the West, the equivalent developmental process happened somewhat differently. The roots of the modern discipline of international law emerged in Western Europe, in the Sixteenth, and primarily the Seventeenth Centuries. The emergent ideas grew out of wider philosophies of religion and nature (natural reason), which were extended to cover the increasingly powerful political entities. As such, the earliest conceptions of international law relied upon natural law ideas, but gradually the divine gave way to the human, and the abstract to the positive.<sup>13</sup> These developments happened over a long period, and occurred through a gradual process, based in part on the reason for State formation - the benefit of the individual.<sup>14</sup> The characterisation of the human world within this Western tradition was one based upon (absolute) sovereignty of each State, which could not be subjected to any external (earthly) authority, whereas for the *Rajadharma* the central idea was the good of all society and societies. Whatever the merits or demerits of either conception; whatever the extent of their overlap or divergence, it is the ideas of the Western classical international lawyers that came to dominate the theory and practice of the subject. So, it is the individualist, inward focused State that came to be the model, and the focus.<sup>15</sup>

*Nations [Nation] or States [État] are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.*<sup>16</sup>

This extract also evidences another aspect typical in the Western classical period - a blurring of the terms State [*Civitas* or *Respublica*] and nation [*Populus*]. For many classical writers, no distinction was even expressed.

*Now the Law of Nations is founded on the agreement of Nations. For one State has no authority over another, nor one free people over another...*<sup>17</sup>

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<sup>13</sup> "These works [of the Sixteenth and Seventeenth Century jurists] are distinguished by the blending of moral principles as discovered by reason and revelation with positive law and custom as found in the jurisprudence of nations and their practices. The first constituted what was called the law of nature (*jus naturae*); the second, the law of nations (*jus gentium*)."- Moore, J.B. 'A Digest of International Law' (Washington. Government Printing Office, 1906), Vol. 1, §1

<sup>14</sup> See below, text at n. 16 & generally

<sup>15</sup> "The modern state, whose government asserts sovereignty over a particular portion of the earth's surface and a particular segment of the human population, is an occidental phenomenon." - Knutsen, T.L. 'A History of International Relations Theory' (Manchester and New York: MUP, 1992), p. 1

<sup>16</sup> Vattel, E.de '*Le Droit des Gens ou Principes de la Loi Naturelle*' (The Law of Nations or the Principles of Natural Law, 1758) Fenwick, C.G. (Trans.) (Washington: Carnegie Institution, 1916), p. 3

Whilst in others, the distinction is implicit, but is not dwelt upon.

*Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a sovereign State.*<sup>18</sup>

Perhaps the fairest conclusion for the classical period was that drawn by Moore in his Digest of 1906:

*International Law is concerned with the relations of states which constitute the society of nations. In this sense the words "state" and "nation" are used synonymously, without regard to the distinctions which political science draws between them.*<sup>19</sup>

These vagaries of terminology were not to be resolved, and their importance not to emerge, in international law theory until the concept itself - of States, or nations - came under scrutiny.<sup>20</sup> This was largely reserved until the Twentieth Century, both as a consequence of the increased dominance of positivism, but most significantly as the institution of States came to be challenged by alternative claims to international legal personality.<sup>21</sup> However, before these matters are developed, it is necessary to sketch briefly the development of the discipline of international law, and the key concepts within it that were later to be of such importance - the ambit and meaning of international law. States and sovereignty.

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<sup>17</sup> Rachel, S. *De Jure Naturae et Gentium Dissertationes* (Dissertations on the Law of Nature and Nations, 1676) Bate, J P. (Trans.) (Washington: Carnegie Institution, 1916), p. 157

<sup>18</sup> Vattel, *op cit.*, p. 11

<sup>19</sup> Moore, *op cit.*, Vol. 1 §3; see also: Lansing, R. 'Notes on Sovereignty In a State' (1907) 1 AJIL 1, pp. 105-128, at pp. 105-110

One notable exception to this stance is Wheaton:

"A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to the same supreme authority... So, also, the same nation or people may be subject to several States..." - Wheaton, H. *Elements of International Law* 8 Edn., Dana, R.H.Jnr (Ed.) (1866) Wilson, G.G. (Ed.) (Oxford: Clarendon, 1936), §17.4

However, the usage made of this distinction elsewhere in the text is far from clear, for example:

§ 16 "The peculiar subjects of international law are Nations, and those political societies of men called States."; and,

§33 "A sovereign State is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers."

<sup>20</sup> See below, text at nn. 73-78

<sup>21</sup> Above, section 1.1 2, and below, text at n. 72

### 2.2.2 Classical International Law

*But there has been perhaps no more potent influence on the law of nations, for both good and ill, than the emergence of the nation-state. The idea of the state as a legal person had all the force and economy of primitive atomism. Just as the Greek philosopher Democritus had made the world appear so simple by declaring that in reality there were only atoms and the void, so the concept of states as a group of distinct legal units was a fantastic simplification of political forces and social relations, which had both its uses and its abuses.*<sup>22</sup>

It is said that Jeremy Bentham coined the term ‘international law’ in 1789,<sup>23</sup> but the concept and the discipline tended to retain the previously used nomenclature well into the Twentieth Century. In English it is ‘Law of Nations’; in French ‘*Droit des Gens*’; German ‘*Völkerrecht*’ - all of which have as their root the Roman law phrase ‘*Jus Gentium*’, which is itself a complex concept. It embodied a number of different ideas: the law common to all people by their nature - natural law (*jus naturae*); the law common to all people through exercise of their reason - the elements of domestic legal systems common to all (*jus civile*)<sup>24</sup>; the law used by all peoples in their interactions - inter-societal law (*jus gentium*)<sup>25</sup>. As such, the *jus gentium* was distinguished from the

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<sup>22</sup> Fawcett, *op cit.*, p. 21

<sup>23</sup> For example: Schwarzenberger, G. and Brown, E D. ‘A Manual of International Law’ 6 Edn. (Abingdon: Professional, 1976), p. 3.

In making the same attribution

*Perhaps something like “interstatal” would have been more exact - if one assumes with Kant that the law of Nations (Völkerrecht) ought to be called the “law among states”*

- Nussbaum, A. ‘A Concise History of the Law of Nations’ Revised Edn. (New York: MacMillan, 1954), p. 136

<sup>24</sup> The term *jus commune* is sometimes used, meaning specifically the law of nations as the common foundation of all (European) legal systems. See for example: Merryman, J.H. ‘The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America’ 2 Edn. (Stanford, CA: SUP, 1985), p. 9. This conception is arguably the basis of the “the general principles of law recognized by civilised nations”, which the International Court of Justice is to apply under Art 38(1)(c) of its Statute. Strictly, the *jus civile* was only applicable to citizens of Rome. Hence, another meaning of *jus gentium* was that part of Roman law that was applicable to citizens and foreigners (*perigrini*) alike - applicable to all people by their nature (also, another echo of natural law) - for example: Borkowski, A. ‘Textbook on Roman Law’ (London: Blackstone, 1994), p. 79; Nicholas, B ‘An Introduction to Roman Law’ (Oxford: Clarendon, 1962), pp. 57-59

<sup>25</sup> It has been argued that this (modern) use of the term *jus gentium* is simply incorrect - for example: Kunkel, W. ‘An Introduction to Roman Legal and Constitutional History’ 2 Edn., Kelly, J.M. (Trans.) (Oxford: Clarendon, 1973), pp 75-77. However, the majority of classical jurists seemed to go the other

*jus naturae*, in that both were common to all mankind, but the *jus gentium* was based upon the exercise of will and reason. It was distinguished from those shared elements of the various *jus civilae* in that they were part of the domestic law applicable as between a State's subjects *inter se* and as between the State and its subjects, whereas the *jus gentium* was shared between States and regulated their inter-relations.<sup>26</sup>

The generally accepted meaning of *jus gentium* in its modern revival settled to being that of the law of States *inter se*, but the reaching of this conclusion was often based upon an extensive survey of the other possible meanings of the term. Perhaps unsurprisingly then, the other (older) meanings of it still exerted some influence over its more modern usage. Not least amongst these were the aspects of meaning derived from, or associated with, the nature of people.<sup>27</sup>

The Roman *jus naturale* of Cicero or Gaius assimilated the Greek ideas of law controlling people as rational, social beings, which was therefore taken to be of universal application, and hence part of the *jus gentium*.<sup>28</sup> Whilst this particular meaning of the idea was not adopted in the classical revival, the historical linkage between the two ideas, coupled with the prevailing philosophical attitudes of the Sixteenth and Seventeenth Centuries, made it inevitable that the religious understanding of natural law, such as that of Aquinas, would be seen as a part of the law of nations. This was also a consequence of the international influence, and dominance, of the Holy Roman Empire during the period that saw the emergence of the law of nations. It took time and

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way - even so far as criticising the Roman jurists, e.g. Gaius, for incorrectly referring to the laws common to all legal systems as the *jus gentium* - for example, Rachel, *op cit.*, pp. 157-163

Another version of the account is that the modern usage of the term is attributable to a mis-transcription of Justinian's '*Institutes*' by Francisco de Vitoria, when he used the term *inter gentes* (amongst peoples) as opposed to *inter homines* (amongst men) - Nussbaum, *op cit.*, pp. 80-81

<sup>26</sup> Suárez, *op cit.*, pp. 325-349

<sup>27</sup> Willoughby, W.W. '*An Examination of the Nature of the State - A Study in Political Philosophy*' (New York and London: MacMillan, 1896), pp. 102-103

<sup>28</sup> Briery, J.L. '*The Law of Nations: An Introduction to the International Law of Peace*' 6 Edn., Waldock, Sir H. (Ed.) (Oxford: Clarendon, 1963), pp. 16-20; Nicholas, *op cit.*, pp. 54-55; Ruddy, F.S. '*International Law in the Enlightenment: The Background to Emmerich de Vattel's *Le Droit des Gens**' (Dobbs Ferry, NY: Oceana, 1975), pp. 1-4

intellectual courage to break from the initial composite interpretation - from the *jus naturae et gentium*.<sup>29</sup>

The early period of the emergence of the law of nations, in the first half of the Seventeenth Century, saw much of Europe dominated by the Thirty Years war. With hindsight, this conflict can be seen to have been the last northern European religious war. At its resolution in 1648, the Peace of Westphalia marked a distinct shift from the religious to the secular world. Thus, the two treaties - of Osnabrück and Münster, between the Empire, and Sweden and France respectively - were based upon religious tolerance and secular values. Their subject matter, including dispute settlement and issues of reconstruction, was handled, for the first time, in neutral, secular terms. It is for this reason that 1648 is often taken as one of the starting dates for modern international law, and of the modern nation-State.<sup>30</sup> This move from the religious to the secular was mirrored across the Century by philosophers and jurists treating upon the law of nations. Many early accounts of *jus gentium*, such as that of Francisco de Vitoria, relied upon both (religious) nature, and actual practice, but in so doing, implied that the practice would inevitably follow natural reason, such that they amounted to the same idea.<sup>31</sup> For others, such as Johann Wolfgang Textor, the findings of reason were 'filtered' through actual practice in the *jus gentium*, which was therefore distinct from natural law, deriving as it did directly from natural reason.<sup>32</sup> Richard Zouche embodied ideas of positivism within his conception of the *jus gentium*, but still these found their starting point in natural law:

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<sup>29</sup> Nussbaum, *op cit*, pp. 135-36; Ruddy, *op cit*, pp. 4-12. This construction was common in the titles of works dealing with the law of nations - see, for example, the already cited works of Pufendorf (n. 9), Rachel (n.17) and even Vattel (n. 16), although this latter is a slight variation with the insertion of 'or'.

<sup>30</sup> Of course, such dating processes are necessarily very vague. As regards the State, see for example: Hall, S "The State in Question", in McLennan, G. *et al* 'The Idea of the Modern State' (Milton Keynes and Philadelphia: Open UP, 1993), pp. 1-28, at pp. 9-17

On the impact of the Peace on international law generally, see for example. Bewes, W A. 'Gathered Notes on the Peace of Westphalia of 1648' (1932) 19 GST, pp. 61-73; or. Gross, L. 'The Peace of Westphalia, 1648-1948' (1948) 42 AJIL 1, pp. 20-41

For a useful characterisation of the shifting conceptions of the international environment throughout the Sixteenth and Seventeenth Centuries, see: Knutsen, *op cit.*, pp. 43-98

<sup>31</sup> Scott, J.B. 'The Spanish Origin of International Law - Part 1: Francisco de Vitoria and His Law of Nations' (Oxford: Clarendon, 1934), pp. 163-172

<sup>32</sup> Textor, J.W. 'Synopsis Juris Gentium' (Synopsis of the Law of Nations, 1680) Bate, J.P. (Trans.) (Washington: Carnegie Institution, 1916). pp. 1-4

*That which natural reason has established among all men is respected by all alike, and is called the Law of Nations, as being a law which all nations recognise .. [I]t is the law which is observed in common between princes or peoples of different nations...*<sup>33</sup>

For Hugo Grotius, the root of the authority of the *jus gentium* was the law of nature, which was “a dictate of right reason”, but the content of it was to be founded upon the will of nations, as proved through “unbroken custom”. As such, it is a volitional (human) law, distinct from divine law, albeit that God is the “author of nature”.<sup>34</sup> Writing even earlier than Grotius, Francisco Suárez argued that the *jus gentium* was human law, based upon will, and only differing from the *jus civile* in the subjects to which it was addressed. It was the law of the community of all humankind, in the same way that the *jus civile* was the law of the community of a State.<sup>35</sup>

*Therefore, the conclusion would seem to be, in fine, that the jus gentium is in an absolute sense human and positive.*<sup>36</sup>

The gradual shift in the main works dealing with the law of nations across the Seventeenth Century accordingly saw the influence of natural law becoming increasingly subordinated to the evidences of State practice - of treaties and of custom. This process continued into the Eighteenth Century, with its ‘cult of reason’.<sup>37</sup> For example, Cornelis van Bynkershoek saw law, including the law of nations, as based upon reason, but reason as common sense, not as specifically of divine origin, and with reference to custom as a means of clarification.<sup>38</sup> Emmerich Vattel, following Christian de Wolff, characterised States as being bound by the natural (necessary and

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<sup>33</sup> Zouche, R. ‘*Juris et Judicii Feccialis, sive, Juris Inter Gentes et Quaestionum de Eodem Explicatio*’ (An Exposition of Feccial Law and Procedure, or of Law between Nations, and Questions Concerning the Same, 1650) Brierly, J.L. (Trans.), Holland, T.E. (Ed.) (Washington: Carnegie Institution, 1911), I.I.1

<sup>34</sup> Grotius, *op cit.*, pp. 38-50; quotations at p. 38, p. 44 and p. 39 respectively.

<sup>35</sup> *op cit.*, pp. 348-349. This should be seen alongside his distinctions as to the various meanings of *jus gentium* - above, text at n. 26

<sup>36</sup> *ibid.*, p. 343

<sup>37</sup> Knutsen, *op cit.*, pp. 99-127

<sup>38</sup> For example:

*To be sure, reason remains immutable, but when reason argues in behalf of both sides so that it is doubtful where the prepondering weight lies, we must appeal to custom for a decision*

Bynkershoek, C. van ‘*Quaestionum Juris Publici Libri Duo*’ (Two Books on Questions of Public Law, 1737) Frank, T. (Trans.) (Oxford: Clarendon, 1930), Preface - p. 7

unchangeable) and the positive (based upon consent) law - the former being viewed through, and modified by, the latter.<sup>39</sup> This process of increased reference to State practice, and away from divine or natural sources of authority, was also fuelled by events - the period following the Napoleonic wars, was one of reconstruction and technological advance, which saw a great increase in the number and range of international treaties.

As the positive was emphasised over the natural, so the source of authority of the law needed greater attention. The seeds were sown in the Seventeenth Century works of Thomas Hobbes. Although he characterised the order, both international and domestic, as of God, it was nevertheless an order seen through natural reason.<sup>40</sup> As such, it was a system requiring some earthly consent to subordination - domestically, a pact to form a Commonwealth or State. But for the society of States, no such pact was possible, such that they were subject to no superior laws, and were thereby in a perpetual state of nature.<sup>41</sup> By the early Nineteenth Century, such foundations famously led to John Austin's conclusion that the lack of a sovereign over States rendered international law as 'not law properly so called'.<sup>42</sup> Whatever the impact of these opinions, the reality of international law in the classical Western tradition was that it represented an order without a single sovereign source of authority, other than that they themselves set forth.<sup>43</sup>

*[T]here cannot be judicial processes between supreme sovereigns [Principes] or free peoples unless they themselves consent, since they acknowledge no judge or superior... The sovereign has no earthly judge, for one over whom another holds a superior position is not a sovereign.*<sup>44</sup>

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<sup>39</sup> Vattel, *op cit.*, pp. 3-9. See also: Nussbaum, *op cit.*, pp. 144-172; Ruddy, *op cit.*, pp. 25-95

<sup>40</sup> Hobbes, T. 'Leviathan' (1651) Macpherson, C.B. (Ed.; Trans.) (London: Penguin, 1985), p. 409 *et seq.*

<sup>41</sup> Part 1, Chap. 3:

*...yet in all times, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators;*

- *ibid.*, p. 187

<sup>42</sup> Austin, J. 'The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence' (1832) (London: Weidenfeld & Nicolson, 1954), p. 142 *et seq.*

<sup>43</sup> Nussbaum, *op cit.*, pp. 175-185. 196-236

<sup>44</sup> Gentili, A. 'De Jure Belli Libri Tres' (Three Books on the Law of War, 1612) Rolfe, J.C. (Trans.) (Oxford: Clarendon, 1933), p. 15



It was within this context of individualism and autonomy, and within the consequent conceptions of the law of nations, that contemporary understandings of State and sovereignty were forged, and so it is to these concepts that we must now turn our attention.

### 2.2.3 *States and Sovereignty in Classical International Law*

It will be recalled that the *Rajadharma* of the *Mahabharata* saw the main focus of its international order as the good ordering of the society of societies. The Western classical tradition came from an almost opposite perspective - that of the good of the individual society. As such, “the right of independence” of States became one of the fundamental premises of the science of international law.<sup>45</sup>

Given that the earliest developments of the law of nations were as a wider part of natural or divine conceptions of the world, such independence of human societies was most usually rendered as freedom “from any external earthly authority”<sup>46</sup> - it was equality of subordination to a higher order. But, as the foundation of that order lost favour - as natural law gave way to other sources of authority - it was the freedom, not the subordination, that was retained in the theory. This was an inevitable consequence of the original individualist Western conceptions of Statehood, and it produced an idea of internationalism based upon the freedom of each society from any external authority.

Despite its basis in the independence of each society, the Western conception of international law is not totally isolated from ‘the society of societies’ idea of the *Rajadharma*. The first, obvious, consideration is that the independence of all States means that the independence of any one of them cannot be absolute.<sup>47</sup> As such, the post-

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<sup>45</sup> Brown, *op cit.*, p. 305. It has been observed how easily the Western tradition could have arisen with a greatly different focus, such as subordination to a centralised authority - Hall, W.E. ‘A Treatise on International Law’ 8 Edn., Higgins, P (Ed.) (Oxford: Clarendon, 1924), pp. 17-18

<sup>46</sup> Gross, *op cit* , p. 29

<sup>47</sup> Kelsen, H. ‘Sovereignty and International Law’ (1960) 48 Georgetown Law Journal 4, pp. 627-640. See also more generally: Bluntschli, J.K. ‘The Theory of the State’ 3 Edn. (Oxford: Clarendon, 1921). pp. 493-496

Westphalian world was one “characterised by the coexistence of a multiplicity of states”.<sup>48</sup>

As the ideas of jurists such as Suárez and Grotius were giving form to the emergent concepts of the law of nations, they were inevitably influenced by the dominant philosophies of their time. As such, the ‘independence’ they attributed to States was a concept already formed elsewhere. It had its basis in feudal territoriality and in monarchical ownership of the land (and the people) as property, building on Roman law ideas of the *pater familias*. The monarch was a supreme ruler, a single unitary authority superior to all others. They held *summa potestas* or *majestas*; they held sovereignty.

The classical Western international law idea of sovereignty built upon development of that concept by Jean Bodin. His was an entity whose power was that of lawgiver, who was not therefore subject to those same laws, or to any other (human) laws.

*That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will.*<sup>49</sup>

However, the concept retained coherence because even this lawgiver was subject to the *meta*-authority of fundamental laws - divine law, the law of nature, laws common to all mankind, and the laws of government (*leges imperii*). This idea of sovereignty satisfied the dominant ideas of all authority requiring some higher binding force, and also accorded with the practical realities of the time - that kings, and queens, and princes were not all-powerful, but were in fact subject to many limiting forces, whatever their legitimacy.<sup>50</sup>

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<sup>48</sup> Gross, *op cit.*, pp. 28-29

<sup>49</sup> Grotius. *op cit.*, p. 102

<sup>50</sup> For example:

*For if we say that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign, since every earthly prince is subject to the law of God and of nature and to various human laws that are common to all peoples.*

- Bodin, J. ‘*Six Livres de la République*’ (The Six Books of the Commonwealth, 1576), ‘On Sovereignty’ Franklin, J.H. (Ed.) (Cambridge: CUP, 1992), p. 10. See also: Brierly, *op cit.*, pp. 7-11; Ruddy. *op cit.*, pp. 13-16; Willoughby, *op cit.*, pp. 184-192

As just one example of the inception of these ideas, Grotius, *op cit.*, p. 121:

*I am not speaking of the observance of the law of nature and divine law, or of the law of nations; observance of these is binding upon all kings, even though they have made no promise.*

As well as providing coherence through limitation, the various external *meta*-authorities also provided a logical source of the sovereignty of the State. But as the intellectual field developed, as we have seen, away from such divine and natural law ideas, so this source and the limitation on the sovereign faded. The source came generally to be assumed to be from within, in a manner akin to the Seventeenth and Eighteenth Century social contract theories of Locke or Rousseau.<sup>51</sup> This shift was itself a gradual one in the Seventeenth Century, which had originally seen the early Grotian rejection of any aspect of sovereignty residing in the people.<sup>52</sup> However, the source was again inevitable given the foundation of the reasoning for the formation of States - that of the benefit of the individual. So, for Pufendorf, the formation of States was by a pact from which sovereignty arose, albeit that this process was seen as fulfilling the will of God, and natural law, by exercise of reason.<sup>53</sup> Ultimately, Vattel's conception of sovereignty was one originating solely from the entire body of the people of the State.<sup>54</sup>

The consequences of an internally authorised sovereignty, existing in a positivist world devoid of any higher, or *meta*-, authority, was that there existed no obvious source to bind States externally - a Hobbesian state of nature as between States, or a Hegalian<sup>55</sup> pre-eminence of Statism.<sup>56</sup> The justification mattered little, the fact mattered considerably, and these ideas became dominant in the Eighteenth and Nineteenth Centuries, which also saw the true emergence of the modern State. The twin political revolutions, in America in 1776 and in France in 1789, entrenched the ideas of popular sovereignty in practice and into the minds of the world's population, although for many their enjoyment of it was to be decades, if not centuries, away. The State power of these two revolutions was serviced by the provisions of the Industrial Revolution, providing

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<sup>51</sup> Ruddy, *op cit.*, pp. 4-12; Willoughby, *op cit.*, pp. 53-88

<sup>52</sup> Grotius, *op cit.*, pp. 102-111

<sup>53</sup> Pufendorf, *op cit.*, pp. 958, 1000-1003. These ideas are an expanded form of those set out in: Pufendorf, S. 'De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo' (Two Books on the Duty of Man and Citizen According to Natural Law, 1682) Moore, F.G. (Trans.) (New York: OUP, 1927), pp. 103-105

<sup>54</sup> Vattel, *op cit.*, for example, p. 11, p. 20, etc.

<sup>55</sup> On a consideration of Hegalian ideas as they relate to international law in this context, see: Lansing, *op cit.*, pp. 106-122, & 'Notes on Sovereignty In a State' (1907) 1 AJIL 2 (1907), pp. 297-320 at pp. 297-300

<sup>56</sup> See above, text at nn. 40-42

for mass automated armies, as well as mass production and mass consumption, and the emergence of the world economy. Whether it was Marx and Engels' world of economic interdependence and class struggle, or Clausewitz' world of nations (*Völker*) engaged in pursuit of their self-interest through war and politics, the post-Enlightenment world was one dominated by the nation-States of the developed world.<sup>57</sup> Whatever the basis of their sovereignty; whatever the attempted justification of limitations on them, the fact was the State, and it was the dominant entity in the world.

Under this weight, and this pressure, the fundamental problem for international law has always been to justify its own authority over States, and to deal with issues surrounding Statehood. Yet it is trying to address the subject of entities whose *de facto* control has become prohibitive, despite the loss of much of the philosophical justification that originally established and underwrote their position. Traditional international lawyers were always caught in the trap of either asserting that the only international law that is valid is that consented to by States, since theirs is the only sovereign authority,<sup>58</sup> or that external sovereignty is somehow limited by international law<sup>59</sup>. In the former case, sovereignty is beyond the scope of international law, such that it cannot be a subject of

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<sup>57</sup> Brierly, *op cit*, pp. 11-16. Knutsen, *op cit*, pp. 99-160, Ruddy, *op cit*, pp. 25-28

<sup>58</sup> For example: Moore, *op cit*, pp. 18-20, or Fenwick, C.G. 'International Law' (New York: Century, 1924), p. 45.

*Sovereignty thus implies not the denial of rules of law already in existence, as has at times been its practical significance, but the rejection of rules imposed by a higher authority against the will of the state*

Such that "international law has reconciled the fiction of 'sovereignty' with the actual interdependence of nations", *ibid.*, p. 86.

Thus, membership of international organisations is simply an exercise of sovereignty in the delegation of certain administrative functions of governments - Reinsch, S. 'International Administrative Law and National Sovereignty' (1909) 3 AJIL 1, pp. 1-45, at pp. 10-12; but cf. Geitem, H. 'Some Problems of Sovereignty' (1927) 13 GST, pp. 79-93, at pp. 81-88, wherein the exact opposite reasoning is made in the observation that membership of international organisations is akin to that of entities such as the British Empire in that they must limit sovereignty for all members.

<sup>59</sup> For example: Schwarzenberger and Brown, *op cit*, pp. 51-54; Verzijl, J.H.W. 'International Law in Historical Perspective' Part I "General Subjects" (Leyden: Sythoff, 1968), pp. 256-262, 272-283

The Draft Declaration on the Rights and Duties of States, reprinted in (1949) Yearbook ILC, p. 286.

which was "commended" by the General Assembly on 6 December 1949, stated at Art 14:

*Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law*

its consideration; and in the latter case, the source of international law's authority remains obscure.

The apogee of these fundamental theoretical difficulties for international law appear in terms of its ability to address matters directly associated with Statehood and sovereignty<sup>60</sup>. For international law, the "fundamental fact with which it deals is the existence of states."<sup>61</sup> They are the originating source of, and the main persons subject to, the laws created. In addition, in large part, they are the arbitrators of that law. As such, their nature must be at least difficult to deal with within the realm of international law.<sup>62</sup> The ultimate source of the normative weight of international law is the State, which cannot therefore be addressed by that normative order - an idea that echoes Kelsen's *Grundnorm*, as being beyond the realm of legal science.<sup>63</sup> In the alternative, it is a conception that requires the legal theorist to look beyond law into the realms of social theory and political philosophy.<sup>64</sup> Or, it involves statements of language that cannot in themselves be anything other than nonsensical.<sup>65</sup> Nevertheless, international law remains a legal science and, despite these apparent difficulties, there persists in practice the continuing adherence to Statehood as being a legal concept, definable in terms of specific criteria.<sup>66</sup> However, underlying these practices are the

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<sup>60</sup> See further below, text at nn 128-134

<sup>61</sup> Brown, *op cit.*, p. 310

<sup>62</sup> "The State, as a powerful monster, is quite out of reach of jurisprudence." - Kunz, J.L. 'On the Theoretical Basis of the Law of Nations' 10 GST (1924), pp. 115-42, at p. 121

<sup>63</sup> Kelsen, H. 'General Theory of Law and State' (Harvard: HUP, 1946), pp. 116-117. However, it is clear from Kelsen's own writing that he would take the *Grundnorm* of international law to be something much different, in that he already presupposes the existence of States prior to their presupposition of the basic norm - pp. 369-370

<sup>64</sup> Koskenniemi, M. 'From Apology to Utopia: The Structure of International Legal Argument' (Helsinki: Lakimiesliiton Kustannus, 1989), pp. xiii-xvi. Koskenniemi charges that this duty to step beyond the legal is a requirement for all law. He argues for the need to examine the "deep-structure" of all rules as the only means to avoid constant oppositions and ascertain a description of the acceptable content of legal language - pp. xiii-xxiv

<sup>65</sup> Although these need not thereby be regarded as without use:

*My propositions serve as elucidations in the following way: anyone who understands me eventually recognizes them as nonessential, when he has used them - as steps - to climb beyond them (He must, so to speak, throw away the ladder after he has climbed up it)*

*He must transcend these propositions, & then he will see the world aright*

- Wittgenstein, L. 'Tractatus Logico-Philosophicus' Pears, D.F. and McGuinness, B.F (Trans.) (London: Routledge and Kegan Paul, 1974) ¶ 6.54.

<sup>66</sup> See below, text at n. 107

fundamental conceptual differences highlighted. As will be seen, they are most likely to emerge when international law is forced to confront its own 'hardest cases' - issues of States and Statehood, and most especially, atypical situations, such as extinction and failure.<sup>67</sup>

#### 2.2.4 *Twentieth Century International Law*

These problems of theory as to State and sovereignty tended to remain outside of the normal study of the law of nations - esoteric discussions concerning sovereignty were for political scientists, not for (international) lawyers. Instead, international lawyers operated in a more pragmatic context. The difficulties of theoretical justification gave way to practical acceptance.

*It must always be borne in mind that 'absolute' sovereignty of the single State and International Law are quite impossible at the same time.*<sup>68</sup>

This practice was most distinct in the context of defining and dealing with issues of the existence and demise of States. Despite the long a varied history of the concepts of Statehood in political and philosophical doctrine<sup>69</sup>, academic treatment of the concept, so typical in political thought, was largely absent from the early periods of international law study. As late as the end of the Nineteenth Century, the definition of Statehood was regarded with the same level of pragmatism over theory as was sovereignty.

*According to predominant nineteenth-century doctrine, there were no rules determining what were 'States' for the purposes of other international law rules; the matter was within the discretion of existing recognized States.*<sup>70</sup>

Indeed, many Nineteenth Century international law texts simply did not consider the question of the criteria of Statehood at all, or if they did, it was only in the form of a discussion of State practice with regard to accepting entities as members of the

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<sup>67</sup> See below, text at nn. 137 & 155-163

<sup>68</sup> Kunz, *op cit.*, p. 130

<sup>69</sup> For a brief overview see, for example: Crawford, J. 'The Creation of States in International Law' (Oxford: Clarendon, 1979), pp. 5-9; or Twiss, Sir T. 'The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Time of Peace' 2 Edn. (Oxford: Clarendon, 1884), pp. 4-7

<sup>70</sup> Crawford (1979), *ibid.*, p. 5

international community of nations without a consideration of the governing principles.<sup>71</sup> Instead, there was simply implicit acceptance of a reality of what constituted Statehood, in terms of a politically organised people. It was not until the period around the start of the Twentieth Century that such matters had to be addressed, with the emergence of the challenges to States of entities newly seeking to act directly under international law - whether non-State groups, IOs, NGOs, MNCs, or individuals.<sup>72</sup> This process was also fostered and facilitated by the developments in the organisation of the community of States, most clearly seen in with the establishment of the League of Nations.

One aspect of this process, of the greater treatment of the subject of States, has been an increased rigour in the use of terminology. As was noted above, the terms ‘nation’ and ‘State’ were often used interchangeably into the early years of the Twentieth Century.<sup>73</sup> Thus, even in 1924, Fenwick wrote:

*No distinction is made in international law between the two terms [nation and state], whatever variations of meaning are assigned by political science.*<sup>74</sup>

However, as the subject began to be addressed, the differences in meaning of the two terms came to be seen - in particular the vagaries of the term nation:

*[T]he indefiniteness and instability of all the characteristics on which nationalities are based are a conclusive objection to founding international rights on nationality... Nationalities, though often important in politics, must be kept outside international law.*<sup>75</sup>

The distinction is one based on etymology - nation derives from *nasci*, meaning to be ‘born’. It most accurately should refer to groups linked by race, whether in linguistic or customary terms. Whereas State refers to “...a people... bound together... into a body politic...”<sup>76</sup> Hence:

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<sup>71</sup> See for example: Twiss, *op cit.*, pp. 8-10; or, Holland, T.E. ‘Studies in International Law’ (Oxford: Clarendon, 1898), pp. 152-167

<sup>72</sup> Above, section 1.1.2

<sup>73</sup> See above, text at nn. 16-19

<sup>74</sup> Fenwick, *op cit.*, p. 83 n. 1

<sup>75</sup> Westlake, J. ‘International Law: Part 1 - Peace’ 2 Edn. (Cambridge: CUP, 1910), p. 5

<sup>76</sup> Hackworth, G.H. ‘Digest of International Law’ Vol. I (Washington: Govt. Printing Office, 1940), p. 47

*Nor should a state be confused with a nation, although in modern times many states are organized on a national basis... a single state... may include many nations, or a single nation may be dispersed among many states...<sup>77</sup>*

Much of the historic confusion of the terms remains in practice, largely for reasons of tradition, or for emotive effect - thus the name “international law” for the law as between States; the “United Nations”, membership of which is only available to “States”<sup>78</sup>. And the extra seal of this confusion has been the preponderance of the usage of the term ‘nation-State’. However, it is submitted that this nomenclature represents a conflation of distinct concepts. As such, the accepted international legal distinctions will be maintained in the remainder of this study. ‘State’ denotes the primary legal persons in international law - each is a distinct political identity, based upon a delimited territory and population. ‘Nation’ denotes sociological entities, based upon such ties as religion, ethnicity, faith, history, culture, and language, which lack (full) personality in international law in themselves.

The partial clarification of the terminology in international law only represented the very fringe of a much wider consideration of issues connected with Statehood. The first of these was that of the definition of States, and an enunciation of the criteria required for them to come into existence. Accordingly, it will be necessary to consider these aspects in some detail as a precursor to dealing with the issues of their extinction, and so ultimately with State failure.

### 2.3 The Criteria of Statehood

*A paradox... confronts the writer who looks to the state to help clarify the identity of legal persons in the international system. In fact, international legal sources provide no satisfactory definition of ‘state’.<sup>79</sup>*

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<sup>77</sup> Brierly, *op cit.*, pp. 126-127

<sup>78</sup> UN Charter (1945) Arts 3 & 4. Recalling the Covenant of the League of Nations (1919) Arts 1(1) & (2)

<sup>79</sup> Grant, T.D. ‘Defining Statehood: The Montevideo Convention and its Discontents’ (1999) 37 CJTL 2, pp. 403-457, at pp. 407-408. Grant provides the most recent account of the requirements of Statehood, based upon a comprehensive overview of its historical development, with particular attention paid to the Montevideo criteria.



### 2.3.1 Background

The challenges to Statehood across the Twentieth Century have meant that the concept has become the subject of considerable scrutiny, both within the generality of modern developments in international law, and through the specific experience of State failure. As the challenges have been made, so the concept of 'State' has itself suffered the indignity of detailed examination. Inevitably, especially in a legal context, the starting point for any such examination is a determination of what constitutes a State.

The difficulties for international law in dealing with issues concerned with States<sup>80</sup> have meant that this process has not been a straightforward one.

*The international community is composed of already constituted and commonly recognized states, however there is virtually no universally accepted definition of statehood in international law.*<sup>81</sup>

However, the lack of precision has not meant a lack of broad consensus:

*Of the term 'state' no exact definition is possible, but so far as modern conditions go, the essential characteristics of a state are well settled.*<sup>82</sup>

And these characteristics are traced back to Article 1 of the Convention on the Rights and Duties of States 1933 - more commonly referred to as the Montevideo Convention.<sup>83</sup> This is the typical starting point of most modern accounts, and has been said to set out "the most widely accepted formulation of the criteria of statehood in international law."<sup>84</sup> The text of Article 1 reads:

*The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter relations with other states.*

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<sup>80</sup> Above, text at nn. 58-66

<sup>81</sup> Batish, M. 'The Right of Self-Determination and International Law' (1995) 7 Auckland University Law Review 4, pp. 1013-1037, at p. 1014

<sup>82</sup> Shearer, I.A. 'Starke's International Law' 11 Edn. (London: Butterworths, 1994), p. 85

<sup>83</sup> (1934) 28 AJIL Supp., pp. 75-78. See also: Bowman, M.J. and Harris, D.J. 'Multilateral Treaties: Index and Current Status' (London: Butterworths, 1984), p. 95 - Treaty 148; or Rohn, P.H. 'World Treaty Index' Vol. 1 'Introduction, Main Entry Section - League of Nations Treaty Series' (Santa Barbara and Oxford: A.B.C.-Clio, 1974), p. 258 - No. 303802

<sup>84</sup> Shaw, M.N. 'International Law' 4 Edn. (Cambridge: Grotius, 1997), p. 140

The Montevideo Convention certainly represents the first, and probably only, legal definition of Statehood in international law. It emerged in the first period of institutional international law, during the lifetime of the League of Nations. Whilst the preceding centuries of international legal discourse had dealt with State identity largely pragmatically, the then more recent discourse had begun to consider the issues.

Although no precise and generally agreed criteria, let alone a single text, existed during this period, a brief survey of the literature does reveal some broad consensus on a few basic requirements. The two most commonly accepted requirements appear to have been: a need for a fixed, reasonably fixed, or determinable territory; and, some form of sovereign independence from any external influence.<sup>85</sup> Another almost universal requirement was that of durability, or even permanence.<sup>86</sup> The means for determining this was unclear, but the reasoning was the need for certainty concerning the carrying out of obligations arising from the agreement of international treaties.

Whilst an express reference to organised government was common<sup>87</sup>, it was by no means universal, and any more precise formulation differed between almost every text. The necessity of membership of the international community of nations remained of prominence, although it was not always listed amongst the general criteria of Statehood.<sup>88</sup> One final point that does appear in a small number of works, although with nothing even approaching general acceptance, is the need for a 'determinable people'<sup>89</sup>, although this omission was a reflection of the assumption that the

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<sup>85</sup> Birkenhead, *The Right Hon. The Earl of 'International Law'* 6 Edn., Moelwyn-Hughes, R. (Ed.) (London and Toronto: Dent, 1927), pp. 31-32; Fenwick, *op cit.*, p. 84, Hall, *op cit.*, pp. 17-19; Lawrence, T.J. *'The Principles of International Law'* 7 Edn., Revised, Winfield, P.H. (London: MacMillan, 1925), pp. 48-56; Smith, F.E. *'International Law'* 4 Edn., Revised, Wylie, J. (London: Dent, 1911), pp. 25-26. Walker, T.A. *'A Manual of Public International Law'* (Cambridge: CUP, 1895), p. 1; Westlake, *op cit.*, p. 44.

<sup>86</sup> All of n. 85, with the exceptions of Lawrence and Walker.

<sup>87</sup> Birkenhead, Lawrence, Smith and Walker.

<sup>88</sup> Although it is in Birkenhead, Fenwick, and Smith. A different aspect of this same consideration was the sometimes-positing idea of 'a certain degree of civilisation' - for example, Lawrence, *op cit.*, pp. 48-56. This can be regarded as an anomaly of its period, and requires no further consideration - Brownlie, I. *'Principles of Public International Law'* 5 Edn. (Oxford: Clarendon, 1998), p. 76, but *cf.* Hyde, C.C. *'International Law: Chiefly as Interpreted and Applied by the United States'* 2 Edn., Vol. 1 (Boston: Little Brown, 1945), pp. 22-23.

<sup>89</sup> For example, Walker, *op cit.*, p. 1.

requirement was too obvious even to mention, rather than any belief in it being non-essential.

Thus it can be seen that, as commentators began to delve into the subject of the criteria of Statehood, a broad consensus was evident, but with divergence as to the details. The agreement seemed to cover the need for a defined territory, sovereign independence and some degree of durability. Additionally, a likely further consideration was the question of membership of the international community of nations. The divergence as to detail remained largely hidden at the time of the adoption of the Montevideo Convention, to an extent explaining the lack of justification of the elements included within it. However, as the concept of Statehood has come to be considered more closely in recent years, so the divergences have become more evident.

### 2.3.2 *The Montevideo Convention*

The Montevideo Convention was one of the products of the Seventh International Conference of American States<sup>90</sup>, part of the then relatively recently emerging 'Pan-American' movement.<sup>91</sup> The agenda for the Seventh Conference primarily focused on three main issues: the nationality of women; naturalisation; and, non-intervention. The last of these was tacitly an expression of concern by the other Republics regarding the dominant role of the US in the region. It was this topic, carried over from the Sixth Conference (Havana, 1928), which gave rise to the Convention on the Rights and Duties of States.

The Convention has eleven enacting articles, which deal with the definition of States and federal States, and the effect of recognition, as well as enunciating the principles of equality of States, non-intervention, exclusivity of jurisdiction, pacific settlement of

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<sup>90</sup> For a commentary, see: Scott, J.B. 'The Seventh International Conference of American States' (1934) 28 AJIL 1, pp. 219-30; or, 14 Report on Foreign Affairs (1933), pp. 626 and 634 (Which, incorrectly, refers to the Sixth Conference)

<sup>91</sup> See generally: Connell-Smith, G. 'The Inter-American System' (London, New York and Toronto: OUP, 1966), pp. 39-74; On the Fifth Conference, 4 Report on Foreign Affairs (1923), pp. 75-77, 158-60, 257-59; On the Sixth Conference, 9 Report on Foreign Affairs (1928), pp. 90-93

disputes and the non-use of force in international relations. All nineteen States<sup>92</sup> present signed the Convention, and it was subsequently ratified by sixteen<sup>93</sup> of them. As set out in Article 14, the Convention entered into force as between the parties on their individual ratification's, the last of which was Haiti in 1941.<sup>94</sup>

As a specific piece of treaty law, the Convention is only of relevance in the American region. Thus, at the time of its agreement, the rest of the international community, even the international legal community, paid little regard to it.<sup>95</sup> However, over time, the Convention has gained prominence and global importance due to the content of its first article regarding the definition of States, which remains the only major example of such a statement.

The criteria enunciated in Article 1 of the Convention represented a slight departure for the then prevailing orthodoxy. However, the four criteria listed have become the dominant basis for any exposition of the requirements of Statehood. This adoption of the Montevideo criteria has occurred gradually. They were first adopted in American academic writing. Arguably, they also soon developed into customary law, at least for the US and other American States. Thus, in 1945, Hyde simply quoted the Convention as illustrating 'existing practice'.<sup>96</sup> Some 35 years later, in one of the standard US textbooks, the Convention is taken, alongside the Second Restatement of Foreign

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<sup>92</sup> Argentina, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the US, Uruguay, and Venezuela. The US reserved on the eleven enacting articles, stating that '...during the brief period of this Conference there is apparently not time to prepare interpretations and definitions of these fundamental terms that are embraced in the reports.' Brazil and Peru registered a private vote with regard to Article 11 - concerning the non-use of force - to the effect that they accepted the doctrine in principle, but did not consider it suitable for codification as positive international law at that stage.

<sup>93</sup> Those not ratifying it were: Argentina, Paraguay and Peru.

<sup>94</sup> Bowman and Harris, *op cit.*, and Rohn, *op cit.* The US, despite its reservation, did ratify the treaty in full on 13 July 1934

<sup>95</sup> Keesings, Vol. 1, only mentioned the conference in respect of the need for mediation between the Bolivian and Paraguayan delegates due to the continuing Gran Chaco dispute (1060, I) and the US attitude to the Convention on the Nationality of Women (1073, B).

The only mention in the British Yearbook of International Law is in a review of the current edition of the American Journal of International Law - (1935) XVI BYIL, p 228

<sup>96</sup> Hyde, *op cit.*, p. 22. See also Hackworth, *op cit.*, pp 47-48

Relations Law of the US, as definitive.<sup>97</sup> In this same period, a much wider academic audience has taken these criteria as a statement of customary law, usually without any particular analysis as to why.<sup>98</sup> Or have referred to the provision expressly, but only as descriptive rather than definitional,<sup>99</sup> or as examples of possible criteria.<sup>100</sup>

These direct citations must be read alongside the vast majority of post-WW II academic writing, which has seen the widespread adoption of the criteria with or without any attribution as to source. However, when the source is not cited, the terminology, and sometimes the precise meanings, are not always completely in line with Article 1. Such variations will be considered shortly within an overview of the meaning of the criteria. As well as variations in the terminology, some writers in the early post-WW II period continued to include the older criterion of durability or permanence.<sup>101</sup>

In the most recent publications - whether teaching or reference texts - there has developed a fairly clear consensus regarding the acceptance of the Montevideo criteria.<sup>102</sup> Whilst in some texts they are expressly described as being customary law<sup>103</sup>, or are implicitly taken as such<sup>104</sup>, they are more generally described as, for example:

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<sup>97</sup> Henkin, L. Pugh, R.C. Schachter, O. and Smith, H. 'International Law Cases and Materials' (St Paul, Minn.: West, 1980), p. 169

<sup>98</sup> For example: O'Connell, D.P. 'International Law' 2 Edn., Vol. 1 (London: Stevens, 1970), pp. 284-285; Orfield, L.B. and Re, E.D. 'Cases and Materials on International Law' (London: Stevens, 1956), p. 80; Mugerwa, N. 'Subjects of International Law', in Sørensen, M. (Ed.) 'Manual of Public International Law' (London, Melbourne and Toronto: MacMillan, 1968), pp. 247-310, at p. 250

<sup>99</sup> Starke, J.G. 'An Introduction to International Law' 7 Edn. (London: Butterworths, 1972), p. 101; and, Greig, D.W. 'International Law' 2 Edn. (London: Butterworths, 1976), p. 92-99. Greig qualifies this with the possible requirement of recognition - see further below, section 2.3.4

<sup>100</sup> For example: Kaplan, M.A. and Katzenbach, N.deB. 'The Political Foundations of International Law' (New York and London: John Wiley, 1961), p. 89. They do not however cite any other examples, but simply posit a few suggested examples of the international community recognising as legal entities those that do not appear to satisfy all of the criteria

<sup>101</sup> For example: "reasonable probability of permanence" - Brierly, *op cit.*, p. 137; or "enjoying a reasonable degree of stability" - Lauterpacht, E., (Ed.) 'International Law: Being Collected Papers of Hersch Lauterpacht' Vol. 1 "General Works" (Cambridge: CUP, 1970), p. 316; or "stabilized" - Ross, A. 'A Textbook of International Law: General Part' (London, New York, Toronto: Longman, 1947), p. 97

<sup>102</sup> Although some explicitly or implicitly rely on Jellinek's earlier '*Drei-Elementen-Lehre*' (three element formulation) in Jellinek, G. '*Allgemeine Staatslehre Zweite, durchgesehene und vermehrte Auflage*' (Berlin: O. Häzing, 1905) - for example, Malanczuk, P. 'Akehurst's Modern Introduction to International Law' 7 Revd. Edn. (London and New York: Routledge, 1997), p. 75 See: Marek, K. 'Identity and Continuity of States in Public International Law' 2 Edn. (Geneva: Librairie Droz, 1968), p. 161-162.

*...no more than a basis for further investigation... not all the conditions are peremptory, and in any case further criteria must be employed to produce a working legal definition of statehood.*<sup>105</sup>

And in some cases the criteria are still enunciated without specific reference to the Convention.<sup>106</sup> This is also true of some international adjudication:

*[T]he State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty;*<sup>107</sup>

Whatever the nomenclature used, the four criteria set forth in the Montevideo convention have now become generally accepted as the starting-point for an assessment of the emergence of a State, even if they will not always be fully determinative of the issue. This (slight) uncertainty as to their status is reflected and compounded by the issues of their precise meaning, and the extent to which they need to be satisfied. As each of the four is considered in turn, it will become evident that the inconsistency of reliance on the Convention itself, and the general sourcing of the criteria, have contributed to lack of consensus as to their various meanings.<sup>108</sup>

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This formulation does not include the 'capacity' requirement - "...the so-called doctrine of the three elements", for example: Doehring, K. "State", in Max Planck Institute for Comparative Public Law and International Law, Dir. Bernhardt, R. 'Encyclopedia of Public International Law' Vol. 10 "States: Responsibility of States: International Law & Municipal Law" (Amsterdam, New York, Oxford, Tokyo, North-Holland, 1987), pp. 423-26

<sup>103</sup> Dixon, M. and McCorquodale, R. 'Cases and Materials on International Law' 2 Edn. (London: Blackstone, 1995), pp. 143-144; Harris, D.J. 'Cases and Materials on International Law' 5 Edn. (London: Sweet & Maxwell, 1998), pp. 102-104; Murphy, S.D. 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 ICLQ 3, pp. 545-581, at p. 546; Roth, B.R. 'Governmental Illegitimacy in International Law' (Oxford: Clarendon, 1999), p. 130; Wallace, R.M.M. 'International Law' 3 Edn. (London: Sweet & Maxwell, 1992), p. 61

<sup>104</sup> Jennings, Sir R. and Watts, Sir A. (Eds.) 'Oppenheim's International Law' 9 Edn., Vol. 1 "Peace" (London: Longman, 1992), pp. 120-123; Shearer, *op cit.*, pp. 85-88

<sup>105</sup> Brownlie, *op cit.*, p. 70; "The starting point for a discussion of the criteria of statehood is Art 1..." - Dixon, M. 'Textbook on International Law' 3 Edn. (London: Blackstone, 1996), p. 100 *et seq*; Crawford (1979), *op cit.*, pp. 36-76; Shaw, *op cit.*, pp. 139-44

<sup>106</sup> For example: Cassese, A. 'International Law in a Divided World' (Oxford: Clarendon, 1986), pp. 77-78

<sup>107</sup> EC Arbitration Commission. Opinion No. 1 (29 November 1991) *reprinted in* 31 ILM 1494-1497. The Commission provided no sources of authority for this assertion within its judgement. On this decision, see further below, section 4.5.2

<sup>108</sup> See generally: Crawford (1979), *op cit.*, pp. 36-48; Crawford, J. 'The Criteria for Statehood in International Law' (1976-77) XLVIII BYIL, pp. 93-182; Grant, *op cit.*, pp. 434-436; Vyer, J.D. van der 'Statehood in International Law' (1991) 5 Emory International Law Review 1, pp. 9-102

### 2.3.3 *The Montevideo Criteria*

The requirement of a “permanent population” has been described as “aggregates of individuals”<sup>109</sup>, “a stable community”<sup>110</sup>, or “a community whose members do not owe allegiance to other outside authorities”<sup>111</sup>. A “defined territory” has been rendered as “a certain coherent territory effectively governed”<sup>112</sup>, “a particular territorial base upon which to operate”<sup>113</sup>, or “some definite physical existence that marks it out clearly from its neighbours”<sup>114</sup>. It appears that the extent of their delimitation need not be complete.

In the words of the ICJ:

*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.*<sup>115</sup>

Traditional accounts of both elements focused on the possible need for a minimum requirement to be satisfied, and often centred on so-called micro-States<sup>116</sup>, which therefore serve as useful examples of the parameters for wider international law. Examples include: Monaco<sup>117</sup> - approximately 5,000 nationals and 1.95 square kilometres; Nauru - approximately 5,000-6,000 people, and 21 square kilometres; Andorra<sup>118</sup> with approximately 11,000 nationals; Liechtenstein<sup>119</sup> and San Marino<sup>120</sup> with approximately 20,000 nationals each; and, the Vatican City<sup>121</sup> which extends to

<sup>109</sup> Crawford (1979), *op cit.*, p. 40; and, Wallace, *op cit.*, p.61

<sup>110</sup> Brownlie, *op cit.*, p.71

<sup>111</sup> Cassese (1986), *op cit.*, p. 78

<sup>112</sup> Crawford (1979), *op cit.*, p. 40

<sup>113</sup> Shaw, *op cit.*, p. 140

<sup>114</sup> Dixon, *op cit.*, p. 101

<sup>115</sup> North Sea Continental Shelf Cases (FRG v. Denmark; FRG v. The Netherlands) 1969 ICJ Reports 3, at p. 32

<sup>116</sup> For a scholarly treatment of the specific subject of micro-states in international law, including case-studies of the five main European examples, see: Duursma, J. C. ‘Fragmentation and the International Relations of Micro-States: Self-determination and Statehood’ (Cambridge: CUP, 1996). In particular, on the criteria of Statehood, pp. 110-132

<sup>117</sup> On the status of the Principality of Monaco, see: Duursma, *op cit.*, pp. 261-315

<sup>118</sup> On the status of the Principality of Andorra, see: Duursma, *op cit.*, pp. 316-373

<sup>119</sup> On the status of the Principality of Liechtenstein, see: Duursma, *op cit.*, pp. 147-206

<sup>120</sup> On the status of the Republic of San Marino, see: Duursma, *op cit.*, pp. 207-260

<sup>121</sup> On the question of the statehood of the Vatican, see: Crawford (1979), *op cit.*, pp. 152-60; Duursma, *op cit.*, pp. 374-419; Graham, R.A. ‘Vatican Diplomacy: A Study of Church and State on the International Plane’ (Princeton, N.J.: PUP, 1959), especially pp. 184-214; Jennings and Watts, *op cit.*, 325-329; Kunz,

only 0.44 square kilometres.<sup>122</sup> From these examples it would appear that the only parameters on the requirements of territory and population are that they need be sufficient to support the other elements of Statehood.<sup>123</sup>

Government has been taken to require “an indication of some sort of coherent political structure and society”<sup>124</sup>, “a stable political community, supporting a legal order, in a certain area”<sup>125</sup>, or “a central structure capable of exercising effective control over a given territory”<sup>126</sup>. The requirement of government is central to that of Statehood - it is the element which links the other two. Hence, Statehood is evidenced by:

*[T]he presence of a supreme authority, ruling over a defined territory, who is recognized as having power to make decisions of government [and] is able to enforce such decisions and generally maintain order...*<sup>127</sup>

The central requirement of government is also intimately bound-up with the fourth criterion - that of capacity to enter relations with other States - which is itself the most obscure of the criteria. It is both a requirement for Statehood, and a consequence of it. At the most basic level, there is the need for the simple legal capacity to form binding agreements with other States, which is therefore closely linked to, but distinct from, external recognition. The distinction is as between having the legal capacity to conclude such agreements, as opposed to the practical ability.<sup>128</sup> Hence, we may arrive at a formulation such as: “...governed by a central authority which maintains official relations with other similar entities”.<sup>129</sup> Alternatively, the concept may be taken to

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J.L. ‘The Status of the Holy See in International Law’ (1952) 46 AJIL 2, pp. 308-314; Ireland, G. ‘The State of the City of the Vatican’ (1933) 27 AJIL 2, pp. 271-289.

<sup>122</sup> Duursma, *op cit.*, pp. 116-115

<sup>123</sup> For example: O’Connell, *op cit.*, pp. 284-285; *cf.* Grant, *op cit.*, pp. 435-436, outlining a limited number of challenges to the necessity of territory, or territorial control, for Statehood.

<sup>124</sup> Shaw, *op cit.*, p. 139

<sup>125</sup> Brownlie, *op cit.*, p. 71

<sup>126</sup> Cassese (1986), *op cit.*, p. --

<sup>127</sup> Roberts, K. ‘Order and Dispute’ (Harmondsworth: Pelican, 1979), p. 32

<sup>128</sup> Shaw, *op cit.*, pp. 142-143; Wallace, *op cit.*, pp. 63-64. *cf.* Crawford (1979), *op cit.*, pp. 47-48 - “[It] is not a criterion, but rather a consequence, of statehood”. See further, Grant, *op cit.*, pp. 434-435

<sup>129</sup> Lissitzyn, O.J. ‘International Law Today and Tomorrow’ (Dobbs Ferry, NY.: Oceana, 1965), pp. 8-9 (emphasis in the original)



mean something arguably different<sup>130</sup> for example; “the right to conduct its own affairs without direction, interference or control by any like authority”<sup>131</sup>, “sovereignty”<sup>132</sup>, or “independence”.<sup>133</sup> The aspect of independence is arguably more than mere lack of external control. It is the external manifestation of sovereignty.<sup>134</sup> One element of this is an actual assertion of that independence by the entity concerned.<sup>135</sup> Without a claim

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<sup>130</sup> But, “ in the Montevideo Convention, the concept of independence is represented by the requirement of capacity to enter relations with other states ” - Brownlie, *op cit* , p 71, and, “If a state is sovereign it is independent, and vice versa ” - Maryan Green, N A ‘International Law Law of Peace’ (London MacDonald and Evans. 1973). pp 31-32, at p 31

<sup>131</sup> Fawcett, *op cit* , p 41 - this account of independence is in the external aspect of sovereignty Alternatively “not recognise any outside superior authority” - Schwarzenberger and Brown. *op cit* , p 44, or “self-governing legal community” - Ross, *op cit* , p 97

In this connexion, there has arisen some discussion as to the relevance of subordination either to international law or to international organisations: Grant, *op cit* . p 428, O’Connell, *op cit* . pp. 283-284

<sup>132</sup> Jennings and Watts, *op cit* . p 122

*Sovereignty is supreme authority which on the international plane means not legal authority over all other states, but rather legal authority which is not in law dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round within and without the borders of the country.*

See generally above, text at nn 49-59 These ideas will also be developed further Chapter 7

<sup>133</sup> Briery, *op cit* . p 137, Brownlie, *op cit* . pp 71-72, Dixon, *op cit* . p 102, Higgins, R ‘The Development of International Law Through the Political Organs of the United Nations’ (London OUP. 1963). pp. 25-42, Kelsen, H ‘Recognition in International Law Theoretical Observations’ (1941) 35 AJIL 4, pp 605-617 at pp 607-08. Shaw, *op cit* , pp 142-144, Von Glahn, G ‘Law Among Nations An Introduction to Public International Law’ 3 Edn (New York MacMillan. 1976), pp 65-66 Lauterpacht speaks of independence of government, which is arguably an equivalent assertion, albeit within the context of a treatment of recognition - (1970), *op cit.*, p. 316

“[T]he bodies endowed with supreme authority must in principle be quite distinct from, and independent of, any other State” - Cassese (1986), *op cit.*, pp 77-78, “[C]apacity to enter into relations with other States, in the sense in which it might be a useful criterion, is a conflation of the requirements of government and independence ” - Crawford (1979). *op cit* , pp 47-48, and see further, pp 48-71. at p 71 - “The term ‘sovereignty’ is sometimes used in place of ‘independence’ as a basic criterion for statehood. However . [s]ince the two meanings are distinct, it seems preferable to restrict ‘independence’ to the prerequisite for statehood, and ‘sovereignty’ to the legal incident ”

<sup>134</sup> Recalling Judge Anzilotti’s famous opinion in the Austro-German Customs Union Case (Advisory Opinion) 1931 PCIJ Reports, Ser A/B, No. 41, at p 57.

*Independence is really no more than the normal condition of States according to international law, it may also be described as sovereignty (suprema potestas), or external sovereignty by which is meant that the State has over it no other authority than that of international law*

On the difficulties of sovereignty, see above, text at nn 49-60

<sup>135</sup> Crawford (1979), *op cit* , p 119

*Statehood can be described as a claim of right based on a certain factual and legal situation [A]n entity which does not claim to be a State, even though it might otherwise qualify for statehood in accordance with the basic criteria, will not be regarded as a State*

to exercise the capacity to enter relations with foreign States - without a claim to be a State - no question of Statehood can arise.<sup>136</sup>

What remains clear from this brief account is that, despite the relative clarity of the Montevideo criteria, the general inconclusivity as to their acceptance is exaggerated by the ambiguity of their precise meaning. This is most evident as regards the government and capacity requirements - the very essence of the legal meaning of Statehood. This then is a reflection of the difficulties already mentioned in international law's treatment of questions of States and Statehood.<sup>137</sup> These ambiguities have been further compounded in two specific ways: their attempted application to the extinction of States, and the emergence of further claimed requirements for Statehood. Both of these aspects fall now for consideration.

## 2.4 Extinction and Failure of States in International Law

The foregoing discussion on the criteria required for Statehood should more accurately have been described as the requirements for a new State to come into existence. Whilst it would seem obvious that the same criteria must exist for an extant State, as for a new entity to be described as a State, the reality is more equivocal. The basic position is a simple one:

*Once established, a State is presumed to continue in existence.*<sup>138</sup>

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One of the clearest examples of this is the situation of Taiwan. See generally, for example: D'Amato, A. 'Purposeful Ambiguity as International Strategy: The Two China Problem', in Makarczyk, J. (Ed.) 'Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski' (The Hague, London, Boston: Kluwer, 1996), at pp. 109-121. On the US Taiwan Relations Act, 1998, see for example: Hines, J.H. 'Why do Unrecognized Governments Enjoy Sovereign Immunity? A Reassessment of the *Wulfsohn Case*' (1991) 31 Virg. JIL 4, pp. 717-759, at pp. 737-744.

<sup>136</sup> Wallace-Bruce, N.L. 'Taiwan and Somalia: International Legal Curiosities' (1997) 22 Queen's Law Journal 2, pp. 453-485, at pp. 458-468.

<sup>137</sup> Above, text at nn. 60-67.

<sup>138</sup> Brownlie, I. 'The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations' (The Hague, London, Boston: Martinus Nijhoff, 1998), p. 38 - In his discussion of Statehood, Brownlie does not deal with collapse or failure. The nearest two categories are forcible secession and dissolution of a union by agreement (which might cover the USSR, but would appear not to fit with contemporary analyses of the SFRY).

This we might describe as the inertia of the international (legal) system - the inertia of Statehood. In greater detail, it is to be supposed that a State will persist despite the loss of one or more of the criteria of Statehood. For example, in a pre-existing State, periods without government have not traditionally been perceived as problematic, whether through civil war, or military occupation.

*Once a state has been established, extensive civil strife or the breakdown of order through foreign invasion or natural disasters is not considered to affect personality.*<sup>139</sup>

Yet this position is rarely presumed to be absolute:

*Of these four elements needed before a community may be regarded as a state, some may at times exist only to a diminished extent, or may even be temporarily absent, without the community necessarily ceasing to be a state. Thus the existence of a civil war may affect the continued effective existence of a government, or relations with other states may affect the degree to which sovereignty is retained, while the state nevertheless continues to exist.*<sup>140</sup>

However, the meanings of “diminished extent” and “temporarily absent” remain unclear. This then is the difficulty: When, and in what manner, will absence of criteria lead to the loss of Statehood? Treatment of this question within the academic discipline of international law has been even more ambiguous than that of the emergence of States. In the leading work of the time on Statehood, when writing originally in 1954, Krystyna Marek phrased it thus:

*Customary international law does not supply any definite criterion for determining when a State ceases to exist. Obviously enough, no conventional solution of the problem has ever been undertaken. Nor are any pronouncements on the subject to be found in international judicial decisions.*<sup>141</sup>

The implication is clearly that the criteria that did exist for the creation or emergence of States, however ambiguous they might have been, could not simply be applied negatively to determine the extinction of States. More recent writings have sought to

<sup>139</sup> Brownlie ‘Principles’, *op cit.*, p. 71. See further below, section 4.1 *et seq.*

<sup>140</sup> Jennings and Watts, *op cit.*, p. 123

<sup>141</sup> Marek, *op cit.*, p. 7 *et seq.* - “It may thus be taken for granted that there exist no fixed criteria of State extinction.” - p. 9. Unfortunately, the author did not continue to explain why this was so ‘obvious’.

show that the case is more one of the ambiguity and uncertainty of the criteria of State extinction, rather than of their non-existence.<sup>142</sup> Examples of grounds for extinction exist in the literature, deriving from basic classical categories. Thus, a State is extinguished when the population perishes, either in substance, or as the population of the State - that is, they become the population of another State or States.<sup>143</sup> The same would apply if the territory of the State physically disappeared.<sup>144</sup> Otherwise, extinction occurs through loss of sovereignty: through forcible seizure of it by another State; by surrender; or, by the ruler's consent to its termination - either to form new States, or to come under an existing State or States.<sup>145</sup>

The problem with this area is that this very limited comment constitutes virtually the full extent of the treatment of the subject. International legal discussion seems only to extend to cover the extinction of States when they are replaced by another State or States, with the exception of material disappearance. The concept of State failure is not specifically addressed under traditional discourse. As has already been observed, failure represents a period between the existence of a State and its extinction, if that occurs. It may lead to that extinction, but that is the conclusion of the process, not its actual substance.<sup>146</sup> Hence, it is something prior to the legal discourse of distinction. However, the criteria of Statehood, and their general application to extinction are the only aspects of the discipline that seem to impinge on the subject of failure. As such, the treatment of State failure by international law will need to be addressed by reference to these existing criteria. Accordingly, before this actual analysis can occur, it will be necessary to reprise the account of the basic criteria of Statehood, and

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<sup>142</sup> Craven, M.C.R. 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 EJIL 1, pp. 142-162, at pp. 158-161. See also: Crawford (1979), *op cit.*, pp. 417-420 - Whilst not expressly making such comment, the implication is much the same as that expressed by Craven.

<sup>143</sup> Pufendorf 'De Jure', *op cit.*, pp. 1366-1367 in *Capit XII 'De Mutatione et Interitu Civitatum'* (On Changes Within States and the Dissolution of States)

<sup>144</sup> Marek, *op cit.*, p. 7

<sup>145</sup> Textor, *op cit.*, pp. 315-319 in *Capit XXX 'De Modis Quibus Imperium Extinguitur aut Vacat'* (Of the Ways in Which Sovereignty is Extinguished or Becomes Vacant...). Although the more recent consideration of the legality of such actions must be considered - Crawford (1979), *op cit.*, pp. 417-418

<sup>146</sup> See above, section 1.2.2

specifically to deal with the modern developments in the practice which are likely to impact most heavily upon the modern experience of State failure.

## 2.5 Beyond the Montevideo Criteria

### 2.5.1 Further Criteria of Statehood

The difficulties and ambiguities surrounding the meanings and scope of the generally accepted Montevideo Criteria of Statehood extend further to include more recent debates regarding other possible criteria - either additional to, or instead of, the more traditional ones.<sup>147</sup> Some are perhaps really just of evidential value regarding the Montevideo criteria, as opposed to being requirements in themselves - for example the (historic requirement of) likelihood of permanence.<sup>148</sup> Others are possibly only extensions to, or re-classifications of, underlying elements within the Montevideo criteria - such as Crawford's development of the idea of independence<sup>149</sup> - which nevertheless continue to reinforce the aspect of ambiguity inherent in this entire area. Still others are likely only to feature in terms of decisions made by other States regarding (political) recognition - such as a willingness to observe international law.<sup>150</sup>

However, at least three of the posited (additional or alternate) criteria are of greater significance in the context of the present study. These are: recognition, self-determination and democratic governance. Recognition is a formal acknowledgement by a State of a particular legal situation. It is of primary relevance in the present context in terms of recognition of Statehood, although recognition of governments is

<sup>147</sup> See generally Crawford (1979), *op cit.*, pp. 48-76, Grant, *op cit.*, pp. 437-451, with a summary of eight suggested possible extra criteria at pp. 450-451.

<sup>148</sup> For example, Brownlie 'Principles', *op cit.*, p. 75.

<sup>149</sup> See above, n. 133. Grant extends the discussion, to entail further elements of doubt, including subordination to International Organisations, and the significance of consent, both external and internal, to the claimed Statehood - *op cit.*, pp. 437-441.

<sup>150</sup> Brownlie 'Principles', *op cit.*, pp. 75-76. Art 4(1) of the UN Charter provides that:  
*Membership in the United Nations is open to all 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*

On UN Membership issues in the context of State Failure, see below, section 6.3.6. However the issue of such stipulations will also be discussed in the context of the EC reaction to the situations in Eastern Europe in 1990-91 - see below, section 6.3.1.

also of importance. It has been put forward as a necessary pre-requisite of Statehood, either in its own right, or as a means of establishing the fourth Montevideo criteria of ‘capacity to enter relations’.<sup>151</sup> Self-determination has emerged as a legal principle only since WW II, and concerns the rights of all peoples to “freely determine their political status and freely pursue their economic, social and cultural development”.<sup>152</sup> Democratic governance refers to an asserted emergent right of peoples to control their form of government, and a duty on States to represent their populations within their government. As such, it is closely related to self-determination, and in particular addresses the Montevideo criteria of government.<sup>153</sup>

Whilst none of these three proposed criteria can be said to be universally accepted as necessary for Statehood, equally none can be dismissed from the consideration either. In a sense, the debates surrounding their necessity for Statehood goes to the heart of the conceptual difficulties of treatment of States within international law. In addition, they have all been prominent in the international community’s treatment of the two recent phases of the emergence of new States - in the period of decolonisation, and at the end of the Cold War.<sup>154</sup> As such, a detailed consideration of them will serve to clarify the contemporary treatment of State failure in international law.

### 2.5.2 *Conclusions*

The concept of Statehood itself has only become the subject of international legal discourse as has been necessary in the context challenges to it - challenges to its exclusivity of international legal personality, and to its dominance in international affairs from theories of globalisation.<sup>155</sup> These challenges have in themselves

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<sup>151</sup> Brownlie ‘Principles’, *op cit* . pp. 85-104, Crawford (1979), *op cit* . pp. 10-25; Grant, *op cit.*, pp. 446-447; Jennings and Watts, *op cit* . pp. 126-203. Recognition will form the subject matter of Chapter 6

<sup>152</sup> Art 1(1) - International Covenant on Civil and Political Rights (1966), & International Covenant on Economic, Social and Cultural Rights (1966). For example: Crawford (1979), *op cit* , pp. 84-106 Self-determination will form the subject matter of Chapter 5

<sup>153</sup> The two seminal works on this topic are: Fox, G H ‘The Right to Political Participation in International Law’ (1992) 17 Yale JIL 2, pp. 539-607, and, Franck, T ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 1, pp. 46-91. Democratic governance will be dealt with within the discussion of self-determination in Chapter 5 - see below, section 5.2.5 and generally.

<sup>154</sup> Above, Chapter 1, text at n 51

<sup>155</sup> See above, section 1.1

emphasised the key definitional issues concerning Statehood, and have also emphasised the conceptual difficulties in dealing with States under international law.

From the survey undertaken, what has become apparent is that there exists considerable uncertainty as to the precise requirements for a State to come into existence, and more so as to their disappearance. This position also reflects the current conception of State sovereignty as being built upon the satisfaction of (largely objective) criteria. Prior to this conception, in the late Nineteenth Century, sovereignty sufficient to found Statehood was generally accepted to have been built upon effectiveness of political control. Earlier alternate grounds upon which title could be founded included legitimacy doctrine - the Prince derived title from an historic dynastic claim; and contiguity doctrine - effective control by a sovereign gave them title over adjacent lands not already subject to another sovereign.<sup>156</sup> However, all such doctrines have now been effectively dismissed as bases of title, in favour of a criteria-based conception of Statehood.

Despite the emergence of a positivist criteria-based definition of Statehood, no fully accepted list of the requisite criteria has been possible. The Montevideo Convention represents the nearest attempt at this, but debate and disagreement prevail as to the extent and meaning of the criteria included, and as to the range of alternate posited criteria. Meanwhile, the Twentieth Century positivist international legal order has been unable to definitively reconsider the matter. A redrafting of the Montevideo criteria has proved to be beyond the powers of any international organisation, despite various attempts.<sup>157</sup>

This political failure to redraft the criteria has not, however, been reflected in stagnation of the meaning of Statehood.

*[I]t should not be thought that, because the formal definition of statehood has remained unchanged, the concept of statehood is rigid and immutable. Its component elements have always been interpreted*

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<sup>156</sup> For a general discussion of the two doctrines in this context, see: Grant, *op cit.*, pp. 418-433. On the rejection of contiguity doctrine, and other geographical doctrines, see: Waldock, H.M. 'Disputed Sovereignty in the Falkland Islands Dependencies' (1948) XXV BYIL, pp. 311-353, at pp. 341-342

<sup>157</sup> For an account of the various attempts, see: Duursma, *op cit.*, pp. 113-114

*and applied flexibly, depending on the circumstances and the context in which the claim of statehood is made.*<sup>158</sup>

Yet this flexibility has contributed to the lack of consensus and ambiguity in the meanings ascribed to the agreed criteria, as well as in the emergence of other suggested criteria. In addition, the lack of clarity as to a determination process has contributed to the further element of confusion as between the criteria of Statehood and the requirements for recognition.<sup>159</sup>

*This problem - the blurring of distinctions between what it takes to be a state and what it takes to get other states to recognize a state as such - has recurred in recent practice, and it is common to all proposed criteria that assess the legality of a putative state under international rules.*<sup>160</sup>

The result of this blurring means that the criteria for recognition have come to exert an influence over the accepted requirements for Statehood, notwithstanding the political dimension to recognition decisions.<sup>161</sup> This is all the more so given the linkage between recognition and the fourth Montevideo criteria of ‘capacity to enter relations with other States’.<sup>162</sup> As such, recognition is fundamental to issues of Statehood, in addition to it also being one of the suggested newer criteria for emergent States.

All of this ambiguity, and flexibility, again serves to emphasise the difficulties for international law in dealing with matters of Statehood.<sup>163</sup> As such, in order, to consider the treatment of failed States in international law, it will be necessary to confront these key aspects of ambiguity. Of the basic Montevideo criteria, the aspect of government is the most significant, and is both in itself a source of ambiguity, as well as being closely tied to the fourth requirement of ‘capacity’, which is the most obscure. In

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<sup>158</sup> Higgins. R. ‘Problems and Process: International Law and How We Use It’ (Oxford: Clarendon, 1995), p. 39

<sup>159</sup> Crawford (1979), *op cit.*, pp. 72-73; Warbrick, C. ‘Current Developments: Public International Law - Recognition of States’ (1992) 41 ICLQ 2, pp. 473-482; Warbrick, C. ‘Current Developments: Public International Law - Recognition of States Part 2’ (1993) 42 ICLQ 2, pp. 433-442. See below, text at n. 161

<sup>160</sup> Grant, *op cit.*, p. 445 *et seq.*

<sup>161</sup> Grant, *op cit.*, pp. 452-453; Warbrick, C. “Recognition of States: Recent European Practice”, in Evans, *op cit.*, pp. 9-43, at pp. 16-17. These matters will be returned to in Chapter 5.

<sup>162</sup> Above, text at n. 128

<sup>163</sup> Above, text at n. 67



addition, failure of governmental functions represents a key aspect of the reality of State failure.<sup>164</sup> As such, the criterion of government will serve as the first major issue for consideration. Self-determination represents probably the most significant international legal principle relating to Statehood in the UN era, specifically in the context of being one of the posited newer criteria of Statehood. It also has close links with the suggested right of democratic governance, which is also posited as a possible criteria. Finally, it is a phenomenon that is associated both with the rights of non-State groups, and with the fragmentation of States - the former relating to issues of international legal personality; the latter being one of the likely aspects of State failure. Accordingly, it will be the second major issue for consideration. Recognition, as just noted, is of fundamental significance for issues of Statehood. Since it is largely concerned with the emergence of new States, it is likely to relate to the end of the process of State failure, such that it will be the final major issue for consideration. These three elements will serve as the primary foci of the specific study of State failure, which will, as noted at the end of Chapter One, be viewed in the context of the international legal community's treatment of two examples of State failure - Somalia and Yugoslavia.

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<sup>164</sup> Above, section 1.2

## Chapter 3: Two Cases

*A young nation has shallow roots and the slightest disturbance can throw out the equilibrium, patriotically speaking. Nationalism is nothing less than clutching at straws.<sup>1</sup>*

*And does history repeat itself, the first time as tragedy, the second time as farce? No, that's too grand, too considered a process. History just burps, and we taste again the raw-onion sandwich it swallowed centuries ago.<sup>2</sup>*

### Abstract

Having introduced the general subject of the thesis - the treatment of failed States in international law, it falls now to engage in the groundwork for that study. The basic process is to be an analysis of the three key elements of Government, Self-Determination, and Recognition, through the experiences of two States - Somalia and Yugoslavia. These two examples have been chosen because of the similarities in events and time-scale, and the stark difference in international legal treatment of them.

Since these two situations are being utilised to facilitate a primarily theoretical assessment, the basic histories and contemporary accounts will serve largely to provide a common background for the discussion, as opposed to providing a rigorous historical analysis of the respective failures. The time-scales for each will be approximately to the point of commencement of failure, with the relevant details of the process of failure being reserved until the assessment of the individual topics in the succeeding chapters.

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<sup>1</sup> Bail, M. 'Eucalyptus' (London: Harvill, 1999), p. 36

<sup>2</sup> Barnes, J. 'A History of the World in 10½ Chapters' (London: Picador, 1990), p. 241

### 3.1 Introduction

*In the aftermath of the Cold War, the State system has become increasingly fluid, with the centrifugal forces of nationalism perpetually eroding the glue that binds federal states. Across the globe, the recent spate of secessions and dissolutions shows no sign of abating.*<sup>3</sup>

Secession, self-determination, national liberation, insurgency, civil war, break-up, collapse, failure - words that have been greatly used during the post-Cold War decade; a decade in which the maps of the world have been significantly redrawn. Sometimes this redrawing has been (relatively) amicable - such as the so-called 'velvet divorce' of the Czech Republic and Slovakia, on 31 December 1992-1 January 1993<sup>4</sup>; and the unification of the Federal Republic of Germany and the German Democratic Republic, on 3 October 1990.<sup>5</sup> At other times, the road to the redrawing has been the result of a long and violent process - as was the case with Eritrea's secession from Ethiopia, eventually declared on 24 May 1993.<sup>6</sup> There were also times when the entire international community has seemed to hold its collective breath as tensions ran high, and the greatest of risks presented themselves - most obviously the USSR leading up to its dissolution in December 1991.<sup>7</sup> However, in so many of these cases, the reality has been epitomised by words and ideas like misery, brutality, destruction, anarchy, despair, ethnic cleansing<sup>8</sup>, and incompetence or inability on the part of international organisations<sup>9</sup>. The early part of the 1990s witnessed two stark examples of the worst

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<sup>3</sup> Scharf, M.P. 'Musical Chairs' The Dissolution of States and Membership in the United Nations' (1995) 28 Cornell ILJ 1, pp. 29-69, p. 67

<sup>4</sup> Keesings, Vol. 39, 39280-81

<sup>5</sup> Keesings, Vol. 36, 37761-63

<sup>6</sup> The provisional administration was first declared on 29 May 1991, following the fall of the Mengistu government, but it was emphasised that this did not imply independence - Keesings, Vol. 37, 38174. The eventual secession occurred only after a referendum held 23-25 April 1993 - Keesings, Vol. 39, 39450-51

<sup>7</sup> Keesings, Vol. 37, 38654-57 See below, sections 5.3.5 and 6.3.7

<sup>8</sup> This first use of this neologism in English was in the 9 July 1991 edition of the 'The Times' - Bryson, B. 'Made in America' (London: Black Swan, 1994), p. 358

<sup>9</sup> Ramlogan, R. 'Towards A New Vision of World Security. The United Nations Security Council and the Lessons of Somalia' (1993) 16 Houston Journal of International Law 2, pp. 213-260, at p. 258:

*Somalia serves as a vivid example of what the United Nations should not be - a bumbling, inept organization struggling to assist international peace and security*

of these elements - one in the Horn of Northeast Africa, and one in the Balkan region of south-east Europe<sup>10</sup>.

The experiences of these two States exhibit similarities between them that are not perhaps immediately apparent. Superficially, of course, the failure of both States can be said roughly to have occurred in 1991. Both failures were characterised by suffering and inward focused brutality on a truly devastating scale. From another perspective, both were at the centre of the new international order, and the various attempts by global and regional agencies to settle such “local wars”.<sup>11</sup> Both States had experienced turbulent times during the 1970s & 1980s; both had sat astride the cusp of the Cold War fissures, and both were States comprising a number of clan/national communities that were approximately territorially divided, but with significant overlap and intermingling. And these diverse communities had, in both States, been held together largely in the grip of a single man. Mohamad Siyad Barre<sup>12</sup> may have come to be the leader of Somalia some twenty-six years after Josip Broz Tito<sup>13</sup> had emerged as the leader of Yugoslavia towards the end of WW II, but his role was not unlike that of his south-east European counterpart. Both tried to suppress their individual clan/nationality roots to bring together diverse populations in which those roots were of great importance. And both largely succeeded - for a time. Whilst the demise of Somalia occurred during Siyad Barre’s lifetime, Yugoslavia’s spiral into

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<sup>10</sup> On the difficulty of defining European regions, see: Hyde-Price, A. ‘The International Politics of East Central Europe’ (Manchester and New York: Manchester UP, 1996), pp. 6-8

<sup>11</sup> This term, or the alternative “civil cum international wars”, has been used to describe the earlier phases of the Balkan conflict (1991-1993), when there was still a single State in existence. that had failed, but had not then broken-up - Jackson, R.H. and James, A. “The Character of Independent Statehood”, in Jackson, R.H. and James, A. (Eds.) ‘States in a Changing World: A Contemporary Analysis’ (Oxford: Clarendon, 1993), pp. 3-25, at p. 8

<sup>12</sup> *Alt*: Siad Barre; Siyaad Barre.

Although there exists a single Somali language (*af-somali*), it was historically almost exclusively oral. Accordingly, spellings of most words and names have a number of alternatives - Bradbury, M. ‘Somaliland Country Report’ (London: Catholic Institute for International Relations, 1997), p. 2; Lewis, I M. ‘Understanding Somalia: Guide to Culture, History and Social Institutions’ (London: Haan, 1993), pp. 19-20.

On the significance of the Somali language more generally, see: Adams, H.M. “Language, National Consciousness and Identity”, in Lewis, I M. (Ed.) ‘Nationalism and Self Determination in the Horn of Africa’ (London. Ithaca, 1983), pp. 31-42; and, Tubina, J. “The Linguistic Approach to Self Determination”, in Lewis, *ibid.*, pp. 23-30

<sup>13</sup> See below, nn. 90 & 98

decline only began, or only became apparent, after Tito's death, but arguably he was nonetheless its 'living architect', in that the demise was inevitably written into the terms of 'his' 1974 Constitution. Just as Siyad Barre's ouster had been preceded by a gradual loss of control, and a rise in militarism, so the decline of Tito's design for Yugoslavia after his death gradually fractured, and arms came to the fore.

Of course, the differences between the Somali and Yugoslav experiences are probably more numerous than their similarities. Also, some of the similarities that do exist are nothing more than whimsical coincidences - the fact of there being six main Somali clans and six Yugoslav Republics, might be noteworthy, but it is not overly instructive.<sup>14</sup> However, what is of the utmost importance regarding these two States is that they both failed.<sup>15</sup> Whatever the reasons for this, and whether there can be any connection drawn between the two failures, both States first saw their respective governments cease to function, and then the States themselves followed suit. Both societies descended into violence; in both cases, this was followed by international involvement - military and diplomatic; and in both cases the experiences of various areas within each States differed greatly - in some, the past resurfaced violently, whilst in others the possibility of building a future seemed to become apparent, sometimes involving (attempted) secession. Neither region has yet regained stability and peace in its entirety, although some parts of each of the two areas have achieved considerable order, and even stability.

This then is the focus of the present work: the treatment of two States that failed during the same period. It is a consideration of the differences of application of the same international law, and so will inevitably also become a consideration of that international law. But all of this is some way ahead - first we must return to each of the States under consideration. And return to them at a time before failure was known to be their fate.

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<sup>14</sup> Below, n. 98 and Lewis (1993), *op cit.*, p. 12 - "The Somali nation as a whole consists of six main divisions which are to some extent geographically distinct." But see below, n. 20

<sup>15</sup> Above, section 1.2

### 3.2 Somalia

*"Me and Somalia against the world, Me and my clan against Somalia, Me and my family against clan, and Me against my family."*<sup>16</sup>

*Although Somalis are united through common descent, the Somali 'nation' did not constitute a unitary polity or state before colonialism. Political affiliation and identity was based on kinship. ...although the war in Somalia has been fought along the fault lines of clan identity, it has not been a traditional clan war, contrary to popular media depiction. Rather it has been a war where 'clanism' has been manipulated by powerful elites and backed by parties interested in more than grazing resources, and with modern weaponry.*<sup>17</sup>

#### 3.2.1 Somali Peoples

The linguistically defined Cushitic (Hamitic) peoples of East Africa are native to the regions today known by the labels Ethiopia, Uganda, Kenya, Tanzania, and Mozambique. Within this wide family exist a number of sub-groups, originally defined by region - including the Afars (or Danakil or Oodali) of Djibouti, Eritrea and the Awash Valley; the Oromo of Ethiopia and northern Kenya; the Berbers of the northern coastal region of the Republic of Somalia, having been recorded in the area at least 2000 years ago; and, the Omo-Tana, native to the region between the southern lake area of Ethiopia and the Lamu coast. It was of this last group that the Samaale peoples formed a part, and it was from this region that they drifted northwards to the Horn around the Fifth Century BCE. Whilst the evidence is sparse, it seems likely that by the second millennium of the modern era, the forbears of the modern Somalis - the

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<sup>16</sup> Chopra, J. 'Achilles' Heel in Somalia: Learning from a Conceptual Failure' (1996) 31 TILJ 3, pp. 495-525, p. 504. The sentiment is very similar to that expressed in the Bedoin Arab maxim - "Myself against my brother; my brother and I against my cousins; my cousins and I against the world", which the authors use to express the ideology behind, and the importance of, the Somali genealogical clan structure - Lewis, I. and Mayall, J. "Somalia", in Mayall, J. (Ed.) 'The New Interventionism, 1991-1994: United Nations Experience in Cambodia, Former Yugoslavia and Somalia' (Cambridge: CUP, 1996), pp. 94-124, p. 101

<sup>17</sup> Bradbury, *op cit.*, pp. 3 & 4 See also: Tulumello, A. 'Rethinking Somalia's "Clanism"' (1993) 6 Harvard Human Rights Journal, pp. 230-234, at p. 230:

*The current conflict in Somalia is not so much attributable to deeply entrenched clan-based rivalries as it is to the personal ambitions of a few well-financed, well-armed militia leaders, or "warlords" In misunderstanding this, the United States and its international supporters have grounded their relief effort in a distorted version of history.*

Below, n. 58

Berbers and Samaale - between them occupied the entire Horn area. However, Somali peoples can still be found across a broad swathe of Cushitic Northeast Africa, from Djibouti and the Awash Valley, through the Ethiopian heartland and the Ogaden, down to the Tan River in northern Kenya.<sup>18</sup>

The modern Somali peoples now recognise this single shared lineage, a single language (*af-somali*)<sup>19</sup> and a single religion (*sunni* Islam). Theirs is a clearly defined clan culture, based around six main clan groupings<sup>20</sup> - *Darod*<sup>21</sup>; the *Irir* clans of *Dur*<sup>22</sup>, *Hawiye*<sup>23</sup> and *Isaq*<sup>24</sup>; and the *Saab* clans of *Digil*<sup>25</sup> and *Rahanweyn*<sup>26</sup>. The two *Saab* clans are largely agro-pastoralists, mainly concentrated in the relatively fertile region of

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<sup>18</sup> Bradbury, *op cit*, pp 2-3, Laitin, D D. and Samatar, S S. 'Somalia: Nation in Search of A State' (Boulder, CO. Westview, 1987). pp 1-20, Lewis (1993), *op cit*, pp 9-10; Samatar, S.S. 'Somalia A Nation in Turmoil' (London Minority Rights Group 1991; update 1995), p. 10. On the desire to unite all of these Somali peoples, see below, text at n. 37

<sup>19</sup> Although the two *Saab* clans - *Digil* and *Rahanweyn* (*infra*) - have a distinct dialect (*af-maymay*), that is sometimes also termed a language - Bradbury, *op cit.*, p 3, Lewis, *op cit.*, p. 12

<sup>20</sup> Despite the overwhelming majority of scholars agreeing on the basic division of the Somali peoples into the six main clan groupings, this acceptance is not universal, for example: listing five, omitting the *Digil* - Hirsch, J.L. and Oakley, R.B. 'Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping' (Washington, DC: US Institute of Peace Press, 1995). pp. 3-11, listing five, omitting the *Rahanweyn* - Adam, H.M. "Somalia A Terrible Beauty Being Born?", in Zartman, I.W. (Ed) 'Collapsed States: The Disintegration and Restoration of Legitimate Authority' (Boulder, CO and London: Lynne Rienner, 1995). pp. 69-89. at p 69. It seems likely that these two accounts are erroneously conflating the *Digil* and *Rahanweyn* as a single clan, as opposed to being two clans collectively distinguished as *Saab*

Perhaps the simplest presentation of the clan structure, and the associated political factions during the conflict, is: Ramsbotham, O. and Woodhouse, T. 'Humanitarian Intervention in Contemporary Conflict. A Reconceptualization' (Cambridge: Polity Press, 1996), at p. 194

<sup>21</sup> Including: *Dolbahante* [*Alt* *Dulbahante*, *Dhulbahante*, *Dolbahunte*]; *Majeerteen* [*Alt* *Majeerteen*, *Mijerteen*, *Mijerteyn*], *Warsangali* [*Alt* *Warsangeli*]; *Ogadeni* [*Alt* *Ogaadeeni*]; *Marehan* [*Alt* *Marrehan*, *Mareehaan*]

Useful examples of diagrammatic representations of the clan structures can be found in: Bradbury, *op cit.*, p. 3; Lewis (1993), *op cit.*, p. 11. For greater depth, including diagrams of the sub-clans of each clan group, see: Gilkes, P S. 'Two Wasted Years: The Republic of Somaliland 1991-1993' (London: Save the Children Fund, 1993). pp. 64-72

<sup>22</sup> Including: *Bimaal*; *Gadabursi*; *Issa* [*Alt* *Ise*]; *Samaroon*

<sup>23</sup> [*Alt* *Hawieh*] Including: *Abgal*, *Ajoran*; *Gaalje'el*; *Gurreh*; *Habar Gedir* [*Alt* *Habar Gidir*, *Habar Gaddir*, *Habir Gedir*, *Habr Gadr*]; *Mobilan*; *Sheikkel*

<sup>24</sup> [*Alt* *Issaq*; *Issak*] Including: *Habar Awal*, *Habar Jaalo*, *Habar Yunis* [*Alt* *Habar Yoonis*]; *Idagale* [*Alt* *Eidegalla*] (*Garhajis* [*alt. Garxajis*] = *Habar Yunis* and *Idagale* collectively)

<sup>25</sup> Including: *Garre*; *Tuni*

<sup>26</sup> [*Alt* *Rahanweyne*; *Rahanwein*] Including: *Sagaal*; *Siyyeed*

southern Somalia, between the Juba and Shebeelle<sup>27</sup> rivers. The remaining four clans are predominantly nomadic pastoralists - *Dir* are spread throughout the northern regions in north-western Somalia, the northern Ogaden, the Haud region, and southern Djibouti; *Isaq* are spread across north and north-eastern Somalia, and the Haud region; *Darod* are the largest and most widely spread clan grouping, covering north-eastern Somalia, north-eastern Kenya, and the heart of the Ogaden; and, *Hawiye* dominate central and southern Somalia.<sup>28</sup> However, these areas are approximate, and significant overlaps occur. More especially, for the nomadic peoples, which comprise the heart of the economy, they utilise vast areas of land migratorily. As such, their conception of land is not territorial in the European sense - ownership is meaningless, grazing rights and access to wells are critical<sup>29</sup>, although this is less so for the agro-pastoralists, and for the growing city populations, which are nonetheless relatively small, and largely confined to the coastal ports.<sup>30</sup>

The clan structure is central to the social and political organisation of the Somali peoples. Each of the six main clans allows identification and association distinct from the others, but within each clan, similar sub-clans exist which likewise serve to associate and divide. The clan structures serve many purposes, including traditional means of dispute settlement and leadership through meetings of elders (*Isaq* - *Guurti*; *Darod* - *Isimada*). Clan division has always been tempered by the co-operation necessary for people to coexist in such a delicately balanced environment. The clans, sub-clans, and the families within them also form the core of individual identity - children are taught to memorise their entire genealogy back to their founding father.

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<sup>27</sup> *Alt Shabelle, Shabeelle*

<sup>28</sup> Lewis (1993), *op cit.*, pp. 10-13, Lyons, T. and Samatar, A.I. 'Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction' (Washington, DC: Brookings Institution, 1995), p. 9

<sup>29</sup> As illustrated by the traditional Somali definition of the Ogaden province: 'Western Somalia stops where the camel stops' - FitzGibbon, L. 'The Evaded Duty' (London: Rex Collins, 1985), p. 20

<sup>30</sup> Lewis (1993), *op cit.*, pp. 49-59, at p. 53:

*It cannot be emphasised too strongly that the pastoral nomadism constitutes the economic base of the vast bulk of the Somali population, and manifestations of the nomadic life-style and traditions pervade almost all aspects of Somali life*

See also, for example: Bradbury, *op cit.*, pp. 7-9; Drysdale, J. 'Somaliland: The Anatomy of Secession' (Brighton: Global Stats, 1992), pp. 1-4; Samatar, *op cit.*, pp. 6-9; Tulumello, *op cit.*, pp. 230-231



which for most Somalis is the mythical *Samaale*, or will be their clan father, such as *Darod* or *Digil*. Put simply - the clan is central to Somali life.

*[The Clan system] is at the root of questions concerning political stability, national security, social cohesion, and day-to-day commercial transactions.*

*[It] is a substitute for a private address almost anywhere in the world; it accepts liability, without a premium, for those in distressed circumstances; it acts as a friend and advocate, with collective resources far beyond a single family's modest means.<sup>31</sup>*

Perhaps most graphically from a European perspective, the clan system does not recognise individual culpability - a crime committed by an individual means harm committed by his or her clan against one or more other clans. Alongside this aspect is the idea of familial or clan 'law', or perhaps more accurately, 'morality and kinship' - the system of *Heer*<sup>32</sup>. Its central belief was in personal authority, not to control others, but to ensure others were not controlled. The only form of political organisation recognised were the informal collectives of elders within clans and sub-clans. The result was a horizontal, egalitarian society, regulated by mutual self-interest and respectful distance.<sup>33</sup> In European terms, this society did not fit the traditional models:

*Before European colonisation, despite a strong sense of linguistic and cultural identity, they did not constitute a state, but were divided into an elaborate series of clans and sub-clans without strongly developed dynastic rule.<sup>34</sup>*

### 3.2.2 Colonialism

*Colonialism grafted a system of centralised governance onto a decentralised and egalitarian political system of a pastoral people.<sup>35</sup>*

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<sup>31</sup> Drysdale, *op cit.*, pp. 5-6

<sup>32</sup> *Alt.* Xeer. Sometimes this word is more correctly understood to mean a treaty or contract, with the wider idea of familial law being rendered *Heerka* (*Xeerka*) - Lewis (1993), *op cit.*, p. 87. The idea of *Heer* has also been rendered as a social contract, mediating between the dictates of Islamic *Sharia* and the native common laws - Samatar, *op cit.*, p. 10

<sup>33</sup> Bradbury, *op cit.*, p. 12; Chopra, *op cit.*, p. 503-505; FitzGibbon, *op cit.*, pp. 2-4; Hirsch and Oakley, *op cit.*, pp. 3-4; Lewis (1993), *op cit.*, pp. 47-49; Samatar, *op cit.*, pp. 12-13, 26

One view of the Somali mistrust of hierarchical central governmental administration is their characterisation of centralised civil law as *Al-Jabr*, "the tyranny" - Chopra, *op cit.*, p. 504. However, an alternative self-perception is that the Somalis are a "gentle and easily governable people" - Omar, M.O. 'Somalia: A Nation Driven to Despair' (New Delhi: Somali Publications, 1996), p. xvii

<sup>34</sup> Lewis and Mayall, *op cit.*, p. 101

<sup>35</sup> Bradbury, *op cit.*, p. 1

The complex structures of the nomadic clans usage of the land, based upon cyclical migration between water wells and pasturelands, is both a reflection of the communal nature of all land, and of the necessity of clan co-operation and understanding. It is true that clan and sub-clan divisions arguably prevented the formation of a single State prior to external involvement, but it is equally true that mediation by clan elders, and intermarriages, successfully maintained the necessary balance to allow these peoples to survive in hostile natural conditions. Yet, when the colonial powers - Britain, France, and Italy - sought areas of control in the horn of Africa, in the late Nineteenth Century, they used the clan-divisions as levers to divide the peoples, and so to gain control more easily. In so doing they did not take account of the nomadic nature of the people, nor of the delicate balance of the society.

*[T]he colonizing countries drew up boundary lines that mutilated kinship units into bewildered fragments, and when the colonial administrators attempted to turn their boundaries into blockades... this cut off entire clans from their traditional sources of water and/or pasture for their herds.<sup>36</sup>*

By the turn of the Twentieth Century, the colonial powers had split the region occupied by the Somali peoples into: French controlled Djibouti; British Somaliland; Italian Somaliland; Ethiopian Ogaden and Haud regions; and the Northern Frontier District of British colonised Kenya (NFD). This basic division subsisted largely unchanged until 1960, with only the temporary Italian occupations of Ethiopia and British Somaliland during WW II, and Italian Somaliland becoming a trust territory after the war. The Italian aggression against Ethiopia during the war was atoned for by the 'permanent' transfer of the Haud pasturelands and the Ogaden - traditional Somali seasonal grazing lands - to Ethiopia in 1954.

Whilst they had never formed a single unitary whole, the forcible division of the Somali peoples, and the manner in which it had been imposed, caused a new and growing sense of desire to be united as one people. Alongside the wider African questioning of the legitimacy of colonial occupation, there grew a strong nationalist sentiment amongst the people, which included calls for political unity and large-scale debate of supratribal issues. It was from these roots that the desire for unification of the five separated

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<sup>36</sup> Laitin and Samatar, *op cit.*, p. 61

territories became so embedded within the Somali psyche - ultimately reflected in the five pointed star chosen as the national emblem, and centrepiece of the flag of the newly independent State in 1960.

The colonial legacy across the whole Somali region was one of curbed mobility for the pastoralists, rendering them more susceptible to the vagaries of climate. It was also one in which the clan structures were used in a Western governmental manner, including an emphasis on security forces and political control, both of which were anathema to traditional clan interaction. Finally, the emphasis was upon urban development and control, which was again in contrast to the traditional Somali organisation. The various areas differently controlled also fared differently: Djibouti became economically developed through the French desire to secure trading routes from the rest of Africa; British Somaliland slipped into partial neglect as the Empire's energies were focused on greater prizes, including Kenya; and Italian Somaliland became relatively developed as the minnow of the European colonialists worked to develop what little it had. These disparities remained, and were to set the tone for much of the post-colonial period.<sup>37</sup>

As pressure was growing through the 1950s for decolonisation, the Italian administered trust territory of Somaliland was gradually moved towards its planned independence. Political parties were fostered from 1954 onwards, allowing time for development before the eventually planned-for independence, due in 1960. Djibouti, in line with wider French decolonisation policy in Africa, remained under French control until its eventual, and long prepared for independence in 1977. Meanwhile, in contrast to both of these, British control remained constant through much of the aftermath of WW II, then early in 1960 it was announced that independence of British Somaliland would be timed to coincide with that of the Italian colony. As a result of this, the discussions of the two 'Somalilands' to create a "unitary, democratic and parliamentary state" where hasty and had been little thought out. Nevertheless, the British protectorate gained self-rule on 26 June 1960, as did the Italian protectorate just four days later. At midnight on 30 June, by

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<sup>37</sup> Bradbury, *op cit.*, p. 5; Drysdale, *op cit.*, p. 10; Lewis (1993), *op cit.*, pp. 25-28; Lyons and Samatar, *op cit.*, pp. 10-11; Samatar, *op cit.*, p. 15-16

joint act of the two entities, they joined to form the Republic of Somalia, which was admitted to membership of the UN on 20 September.<sup>38</sup>

The unification of the two areas, to form a single State, brought together two very different entities. Major divergences were evident in all sectors of the administrations: judicial systems; currencies; armies; police forces; civil services; systems of national and local government; and, educational systems. It is true that all decolonised African States have faced the task of nation building, but in the Somali case this difficult task was made more taxing by the extent of difference in the two entities joining together, and by the fact that, as they saw it, the entity was still not complete. The Somali 'nation' remained dismembered, and would continue to do so until the Ogaden region, the NFD, and Djibouti were brought together within the new State.<sup>39</sup> This sense of nationalism is not purely an emotive or cultural one, but is, in addition, backed by economic necessity - when the delicate balance of the region is altered, economic hardship is almost certain to follow.

*Reinforcing the powerful appeal of Somali nationalism is the reality of economic necessity. The Somalis live in a desert environment where centuries of experimentation and social adaptation have established a fragile balance between people, animals, scarce water supply, and plant forage. Any disruption of that balance tends to set off an economic crisis, which leads to famine and loss of life.*<sup>40</sup>

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<sup>38</sup> Laitin and Samatar, *op cit*, pp. 62-68, quotation at p. 67; Bradbury, *op cit*, p. 5; Lewis (1993), *op cit*, pp. 28-29; Keesings, Vol. 12, 17524A; Vol. 13, 17870A

Some doubt remained as to the precise legality of the joining of the two entities: When the two legislatures met on 1 July to elect a new President, the Act of Union remained unsigned due to disagreements in the north. Whilst this situation did not change, the single State became accepted externally, and by the majority internally, as a fact - Drysdale, *op cit.*, p. 12. See further below, section 5.4.1

<sup>39</sup> Lewis and Mayall, *op cit*, p. 103.

*The new state was thus based on the principle of self-determination applied to a single ethnic group, parts of which still languished under foreign rule. Unlike the majority of ethnically heterogeneous African states dedicated to 'nation-building', Somalia's predicament was its incomplete statehood, the spur to pan-Somali unification which neighbouring states found so threatening*

See also: Lewis (1993), *op cit.*, pp. 26-27.

<sup>40</sup> Laitin and Samatar, *op cit*, pp. 62-68, quotation at p. 68

### 3.2.3 *Independence*

Somali independence brought with it democracy, but it was a democracy consistent with the pastoral nature of the people - somewhat anarchic, with frequent challenges to all levels of government, and with an astonishing proliferation of political parties. The new State immediately faced the difficulties of unifying the two territories, addressing the issue of agreeing upon a single writing script for the whole State, and dealing with the urgent economic needs. Whilst trying to tackle these issues, President Adan Abulle Osman<sup>41</sup> (Darod) and Prime Minister Abdi Rashid Ali Shermarke<sup>42</sup> (Hawiye) had to balance the representations from north and south, and as between clans. Such balancing became a prominent feature of the new Somali parliamentary democracy. “Clan fission and fissure, so apparent in traditional Somali politics, were transferred to a modern arena.”<sup>43</sup>

The drafters of the new constitution, which was adopted in June 1961, particularly faced the difficulty of the integration of the north and south. As one example, the judicial system had to integrate both British and Italian orthodoxies, whilst also incorporating traditional customary laws, and the Islamic *Shariah*. The underlying conflicts inherent within the unification process were never far from the surface. Important issues remained unresolved, often because governments focused on uniting the Somali people, or simply on fighting to maintain power, rather than on exercising it. The north-south problems were part of, and were exaggerated by, the clan divisions and rivalries. These were clearly evident during the March 1969 elections when 64 parties, most of which were only thinly disguised clan fronts, proposed 1,002 candidates for the election of just 123 deputies.<sup>44</sup> However, the period 1960-1969 saw a level of democracy unprecedented in post-colonial Africa - in 1967, President Osman was defeated in election by former Prime Ministers Shermarke and Mohammed Haji Ibrahim Egal<sup>45</sup> (Isaq), and power was handed over peacefully.

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<sup>41</sup> *Alt.* Aaden Abulle Osmaan

<sup>42</sup> *Alt.* Abdirashiid Ali Shermaarke

<sup>43</sup> Laitin and Samatar, *op cit.*, p. 73

<sup>44</sup> Although the particular form of proportional representation used in the elections contributed to this situation.

<sup>45</sup> *Alt.* Mahammad Haaji Ibrahim Igaal/Igal

Despite the apparent north-south balance represented by Shermarke and Egal, their administration emphasised clan patronage, which led to inequities and public cynicism - the latter almost a national characteristic of Somalis. This then was the atmosphere in which the same two were re-elected in 1969. In addition, despite the scale of opposition, in terms of numbers of parties, following the election, virtually all of the 'independent' candidates joined Egal's government party, leading to what was essentially a one-party administration. The discontents, and the underlying clan rivalries within the structures of power - structures for which the clan system was ill adapted - were to be the undoing of Somalia's experiment with parliamentary democracy. On 15 October 1969, President Shermarke was assassinated, presumably by a clan rival. Just six days later, Prime Minister/Acting President Egal offered little resistance to the 'bloodless military coup' led by Major General Siyad Barre (Darod).<sup>46</sup>

Siyad Barre's rule began with socialist, anti-clan pretensions. He abolished the National Assembly and replaced it with the Supreme Revolutionary Council (SRC), made up of military and police personnel, assisted by civil servants and ministers. In these early days, and for the first time in the history of Somalia, appointments were made primarily on merit, rather than on clan affiliations. The new regime quickly condemned the old, highlighting the corruption within it, and fostered the already present popular anti-Americanism. It was not long before the regime was allied with the USSR - just days after the coup, Radio Mogadishu began referring to the 'Somali Democratic Republic', where previously it had been the Somali Republic. The regime was built upon Siyad Barre's absolute authority; upon the supremacy of the SRC; and upon the information networks of the National Security Service (NSS), which had agents within every subclan in Somalia. In addition, the familiar socialist regime trappings of youth military training (the Victory Pioneers) and local 'socialist orientation meetings' were evident. The system adopted was referred to as 'scientific socialism', again following the soviet influence. A Treaty of Friendship and Co-operation was signed between the Somalia and the USSR in 1974. The new regime aimed to achieve equality between urban and

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<sup>46</sup> Bradbury, *op cit.*, p. 5; Laitin and Samatar, *op cit.*, pp. 69-77; Lewis (1993), *op cit.*, p. 28-31; Samatar, *op cit.*, pp. 16-17

rural populations, and between the sexes. In both areas, it could claim some limited success, but more broadly, the regime faced a harsher reality.

Following the early popular acceptance of anti-corruption socialism, the realities of sustaining a complex ideological regime were not to the tastes of a military man such as Siyad Barre. Accordingly, he turned his attentions to the Ogaden region, and the Haud pasturelands, of Ethiopia. The reasoning was the Ethiopian revolution in 1974, which had seen the overthrow of Emperor Haile Selassie and his replacement by Colonel Haile Mariam Mengistu; combined with the supplies of military equipment gained from the USSR and a need for a distraction from the growing ills on the domestic front. This was an extension of a Somali policy that had persisted since independence - that the Ogaden region, first ceded to Ethiopia from British Somaliland by treaty in 1897<sup>47</sup>, was one of the legitimate territories of the State of Somalia.

Whether intended or not, the military campaign had potential clan ramifications. Siyad Barre had maternal clan ties to the Ogadeni (Darod) - a detail not missed by those opposing the intervention, or those opposed to his government. Initially the intervention took the form of supporting the Western Somali Liberation Front (WSLF), which was native to the Ogaden, but, by 1977, Somali regular forces had become directly involved. The USSR opposed the Somali war effort from the start, and by 1977 their support had switched to Ethiopia, replacing the previous US patronage, which had itself dwindled following Mengistu's rise to power. This new support for the Ethiopians, and loss of backing for the Somalis, which had been mirrored exactly by Castro's Cuba, forced Siyad Barre's troops back into Somalia, and destroyed all hope of victory.

The Ogaden defeat can be seen as the turning point in Siyad Barre's rule. His responses were pragmatic in the extreme, and whilst possibly prudent, were generally accepted as a means to maintain him in power, rather than a plan for the future of the State. This was the perception of his acceptance of capitalism, and of his criticism of the US in not coming forward to assist Somalia against the USSR when they backed Ethiopia, both of

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<sup>47</sup> Text of treaty reproduced in FitzGibbon, *op cit.*, pp. 126-128. That author gives a detailed account of and argument as to legal status of the Ogaden, on historical, tribal and legal grounds - pp. 20-55

which were done without the slightest decrease in his vocal adherence to scientific socialism.

Perhaps most significant was the re-emergence of clan rivalries. Despite his rhetoric to the contrary, Siyad Barre was unable to exclude clan terminology from his rule, especially when challenges to his leadership came from clan-based groups. Simply in countering these he, possibly inadvertently, re-legitimated clan terminology. The situation was exacerbated by the fall-out from the Ogaden defeat. Refugee flows of over 500,000 people were received into Somalia. They were largely Darod, but were based in camps in the northwest - an Isaq region. As well as having been traditionally anti-Ogadeni, the Isaq clan had been the most resistant to Siyad Barre's ascension to power, regarding it simply as another regime dominating from the south. This was one of the catalysts for the underlying social forces to push clan-based social fragmentation back to the fore. Such pressures were compounded by the three traditionally strongest clans (Majerteen, Hawiye, and Isaq) who were not significantly represented in the ruling regime, and consequently from whom Siyad Barre felt most threatened. Accordingly, he increasingly followed the clan-line, and surrounded himself with members of his own clan, from his mother's clan, and from his son-in-law's clan (Marehan, Ogadeni, Dolbahante, all Darod - the acronym MOD became synonymous with his rule). By thus using the clans, he also helped to increase the clan-basis of social interaction, which was ultimately to contribute to his downfall. Once these social mores had been reawakened, they became self-reinforcing.<sup>48</sup>

### 3.3 Towards the Collapse of the Somali State

*There's no more Somalia... Somalia's gone. You can call the place where the Somali people live 'Somalia', but Somalia as a state disappeared in 1991.*<sup>49</sup>

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<sup>48</sup> Bradbury, *op cit.*, pp. 6-9; Laitin and Samatar, *op cit.*, pp. 79-99; Lewis (1993), *op cit.*, pp. 31-43; Lyons and Samatar, *op cit.*, pp. 14-17; Samatar, *op cit.*, pp. 17-18

<sup>49</sup> Daniel Simpson, US Somalia Ambassador, from Washington Post Interview as quoted in Somalia News Update Vol. 3, No 23, p. 2

*These days, the square [in Mogadishu] looks like an empty, dirt parking lot beside a ruined monument to a state that died long ago.*

- Watson, P. 'Death By Stoning on a Hot Afternoon in Somalia' Somalia News Update Vol. 3, No 28, pp. 3-5, at p. 3



*No single factor can explain the causes of the war. The legacies of European colonialism, the Somali kinship system, contradictions between a centralised state and a pastoral culture, Cold War politics, militarism, marginalisation and uneven development, ecological decline, lack of power-sharing, corruption, oppression and the cumulative impact of decades of armed conflict have all contributed.*<sup>50</sup>

The fallout from the Ogaden defeat included organised insurrection, primarily from the Somali Salvation Democratic Front (SSDF - Darod-Majerteen; formerly the Somali Salvation Front) and the Somali Nationalist Movement (SNM - primarily Isaq, with some Dir), based in the northeast and northwest respectively. Both originally had to operate from within Ethiopia, due to internal security measures, and were tacitly supported by the Mengistu government. Siyad Barre's response was to utilise existing clan rivalries by arming those friendly to his regime. The massive expansion of the military under Siyad Barre, enabled by Cold War 'support', first from the USSR and later from the US, and coupled with his manipulation of these underlying and never-dealt-with clan rivalries, undoubtedly provided the conditions for collapse and civil war, if not the particular spark.

The force used by the government against the SSDF and SNM grew ever more fearsome and brutal as the level of threat increased. But, as the atrocities committed spread during the 1980s, including against civilian populations, the level of general resistance likewise increased. Notably: the Southern Somali National Movement (SSNM - Hawiye, Rahanweyn, Ogadeni, and Dir), which was to become the Somali National Alliance (SNA) in 1992; the United Somali Congress (USC - primarily Hawiye, formed in 1987), led by General Mohamad Farrah Hassan Aideed<sup>51</sup> (Hawiye-Habar Gedir); the Somali Patriotic Movement (SPM - primarily Darod-Ogadeni), led by Colonel Omar Jess, and based in southern Somalia around Kismayo<sup>52</sup>; and, the Somali Democratic Movement (SDM - Digil and Rahanweyn). Peaceful political means were also employed in attempting to overthrow or reform the government, in particular the activities and appeals of the 'Manifesto Group' of Mogadishu based intellectuals, and business and political leaders.

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<sup>50</sup> Bradbury, *op cit.*, p. 1

<sup>51</sup> *Alt.* Aydid, Aidid

<sup>52</sup> *Alt.* Kismayu

Some eleven years after the Ogaden defeat, Siyad Barre found himself in similar domestic straits to those then being experienced by Mengistu with regard to Eritrea's ongoing rebellion in Ethiopia. Both leaders faced strong internal resistance, coupled with some calls for secession of parts of the respective States. As such, the two governments signed a non-aggression and non-interference agreement in 1988, which included provisions covering the expulsion of insurgent groups in each other's territory. Tragically, this precipitated the SNM launching a last-ditch movement in northern Somalia, in May-June 1988, which resulted in brutal fighting in and around the three main northern cities of Hargeisa<sup>53</sup>, Berbera, and Burao<sup>54</sup> (largely Isaq territory). The response from Siyad Barre was brutal - his was a regime trying to cling to the last vestiges of its power. The SNM faced harsh and indiscriminate reprisals from the government forces, which resulted in mass destruction of property and land, and major refugee flows into Ethiopia and Djibouti. Hargeisa, Somalia's second largest city, which had been the capital of British Somaliland, was more than 70 percent destroyed by the 'total aerial bombardments' carried out by the government forces. The nature of the conflict was such that it was government-armed clans that followed these attacks and managed to gain some control over the largely devastated urban areas, whilst the SNM roamed the countryside relatively freely. However, the only true reign across the entire northwestern region during this period, 1988-1990, was that of lawlessness.

This aggression in the north had triggered, or coincided with, a similar pattern of clan-based clashes in the south, including strong anti-government aggression from the USC. As the country slipped increasingly into disorder, the population sought sanctuary in their clans, which exacerbated the inter-clan conflicts and accelerated the State collapse. The increasing fragmentation and disintegration meant that, towards the end of 1990, the conflict between Siyad Barre and his direct rivals was reduced to the forum of Mogadishu and its environs. Siyad Barre's grip even on the capital slipped, and he finally resorted to turning his heavy artillery on parts of the city that had fallen from his control. This was the spark that caused the general uprising on 26 January 1991, at the head of which were the USC forces, led by General Aideed. It was Aideed's forces that

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<sup>53</sup> *Alt. Hargeysa*

<sup>54</sup> *Alt. Burco, Bur'o*

finally flushed Siyad Barre from Mogadishu, on 27 January, and forced him to flee south to the 'safety' of the Gedo region - his clan-homeland. In the succeeding months of early 1991, Aideed's USC forces pursued and fought with Siyad Barre and his newly formed Somali National Front (SNF). This conflict in southern Somalia, and the means of warfare used - crop burning, looting, and destruction of property - caused havoc. The result was economic collapse<sup>55</sup>, destruction, famine, and massive refugee flows to Kenya, Ethiopia, and to a lesser extent Yemen and elsewhere.<sup>56</sup> The area between the three cities of Baidoa<sup>57</sup>, Bardera and Kismayo, to the west of Mogadishu - the only relatively fertile area of the whole of Somalia - became known simply as the 'Triangle of Death'.

By this point, the entire country had essentially disintegrated as a centralised State, and reverted to clan divisions akin to those of the Nineteenth Century, before the Europeans had interfered. However, it was not a return to the old division, but a new one, in that it was reached with the experiences, memories, and sores of the preceding years underlying it. It was also a division of clans now heavily armed with the weaponry of the Cold War and of Siyad Barre's divisive rule. Violence and atrocities on an horrendous scale were the seemingly inevitable result.<sup>58</sup>

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<sup>55</sup> This had also been contributed to by the significant drop in external economic aid to Somalia from 1988-89 onwards, as a result of the atrocities and increasing instability of the Siyad Barre regime - Adam, *op cit.*, pp. 75-76

The aid culture had grown since the refugee problems following the Ogaden war:

*As the government and many thousands of Somalis became dependent on refugees for income, humanitarian aid became a major public source of corruption. As armed insurgencies brought hostility to the regime into the open, the distribution of aid only exacerbated those tensions*

- Bradbury, *op cit.*, p. 9-10, at p. 9

<sup>56</sup> The scale of the consequences was magnified by the very nature of Somali existence - above, text at n. 40

<sup>57</sup> *Alt. Baidoba*

<sup>58</sup> Adam, *op cit.*, pp. 70-76; Bradbury, *op cit.*, pp. 10-13, Hirsch and Oakley, *op cit.*, pp. 5-11; Lewis, I.M. 'Making History in Somalia. Humanitarian Intervention in a Stateless Society' Discussion Paper 6 (London: The Centre for the Study of Global Governance, LSE, 1993), pp. 4-5; Lewis (1993), *op cit.*, pp. 67-74; Lewis and Mayall, *op cit.*, pp. 103-106; Lyons and Samatar, *op cit.*, pp. 17-24; Sahnoun, M 'Somalia: The Missed Opportunities' (Washington, DC: United States Institute for Peace, 1994), pp. 5-8.

Despite the clan appearance of many factions, the significance of this can be misread.

*The[se] experiences illustrate that "clanism" contributed to the civil war primarily because Barre attacked regions as clans, not because the movements naturally*

*The Barre regime found itself engulfed in civil war as its policy of clan repression was repaid with blood. On January 26, 1991, Barre fled Somalia with the insurrectionists poised to capture Mogadishu. From that point onward, Somalia was subjected to a brutal civil war waged by clans, a severe famine, a serious refugee problem, and ecological disaster.<sup>59</sup>*

During this time, the remainder of the USC had formed an interim government in Mogadishu, with Ali Mahdi Mohammed (Hawiye - Abgal) declared as 'interim president' in February 1991. This was done without consultation with the other main groups: SSDF, SPM, SNM. The claims made by the USC that they deserved this ultimate prize of power because they had ousted Siyad Barre finally served to destroy the co-operation there had been between the various main rebel groups, in part because it failed to account for the long-standing efforts of, especially the SSDF and SNM, which significantly predated even the existence of the USC.<sup>60</sup>

In addition to the inter-faction dissents, it was not long before the two sections within the USC grew mistrustful of each other and conflict between them escalated. This was despite a party congress, and multi-faction talks, in July, which confirmed Aideed as party chairperson and Ali Mahdi as 'interim president' of Somalia.<sup>61</sup> Between November 1991 and April 1992, Mogadishu became a total bloodbath, with vicious fighting between the Abgal and Habar Gedir sectors of the city, and involving other minor Hawiye factions who had also secured their own small sections in what remained of the city.<sup>62</sup> Estimates of the death toll of this period range as high as 30,000.<sup>63</sup>

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*coalesced along clan lines. Clan-based factions arose as a matter of defensive pragmatism: their unity was forged in opposition to Barre.*

- Tulumello, *op cit.*, pp. 233-234, at p. 234. Above, n. 17

<sup>59</sup> Ramlogan, *op cit.*, pp. 219-220

<sup>60</sup> Drysdale, *op cit.*, pp. 19-21; 'United Nations Peacekeeping Operations: Somalia - UNOSOM I' (Dept. of Public Information - 21 March 1997), p. 2

<sup>61</sup> Keesings, Vol. 37. 38322-23

<sup>62</sup> The ouster of Siyad Barre and the collapse had led to most foreign governments withdrawing their personnel from the city, with the last major action being on 4-6 January 1991, by US aircraft carrier 'Guam', and the Italian air force - Drysdale, *op cit.*, p. 19. Similar withdrawals of all UN agencies had also occurred, creating in the minds of the remaining NGOs - International Committee of the Red Cross, Save the Children UK, International Medical Corps, and Médecins sans Frontières - a feeling that

This pattern of conflict in the central and southern regions was not exactly mirrored in the north. The Majerteen-Darod dominated northeast, once liberated by the main body of the SSDF, gradually established stability in concert with the local clan leaders. In the Isaq dominated northwest, the SNM took control and, on 18 May 1991, declared independence as Somaliland.<sup>64</sup> Although this region experienced its own internal clan conflicts, they were never as intense, nor the consequences so severe as those experienced in the south.<sup>65</sup>

*[Somalia had] disintegrated into its traditional component units... This situation, of loosely articulated clan political units, was exactly the same as that described by Burton and other nineteenth Century foreign explorers in the course of their travels in the Somali hinterland.*<sup>66</sup>

### 3.4 Yugoslavia

*Necemo rat, necemo mir (Serbo-Croat saying: "No war, no peace")*<sup>67</sup>

*In the Balkans, the observation that a nation is a group of people united by a common error about their ancestry and a common dislike of their neighbours is particularly appropriate.*<sup>68</sup>

#### 3.4.1 From Defeat at the Field of Blackbirds to the First Yugoslav State

The history of the south Slav peoples is a long one. Significant historical events stretch back for almost a thousand years. It was during the Eleventh Century that Croatia first

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they had been deserted, along with the Somali people, by the UN - Hirsch and Oakley, *op cit.*, pp. 17-18; Ramlogan, *op cit.*, pp. 226-228

<sup>63</sup> Chopra, *op cit.*, p. 507. "In an institutional vacuum, the factions were poised for mutual destruction in an unprecedented chaotic anarchy."

<sup>64</sup> The position of Somaliland will be dealt with further in subsequent Chapters, especially sections 6.4.1-6.4.2. For the present, it is sufficient to note that it failed to secure any significant international recognition.

See Appendix A for a basic map illustrating the areas of Somaliland and the Darod-northeast.

<sup>65</sup> Hirsch and Oakley, *op cit.*, pp. 12-16; Lewis and Mayall, *op cit.*, pp. 106-107; Sahnoun, *op cit.*, pp. 8-11

<sup>66</sup> Lewis (1993) 'Making History', *op cit.*, p. 5

<sup>67</sup> Quoted in Stiles, K W 'Case Histories in International Politics' (New York: HarperCollins, 1995), p. 252

<sup>68</sup> Carter, F W. *et al* 'Interpreting the Balkans' Geographical Intelligence Paper No. 2 (London: Royal Geographical Society with the Institute of British Geographers, 1995), p. 4

rose as a strong nation<sup>69</sup>, whilst Bosnia and Serbia became kingdoms of some note during the Fourteenth Century.<sup>70</sup> Despite the age of these heritages, the memory of them, and of the territorial borders within which they existed, remains. Whilst the recent conflicts in the region are not always accepted as simply modern continuations of a troubled past - Ambassador Türk, the permanent representative of Slovenia to the United Nations, refers to the phenomenon of “historical mythology” - they nonetheless form a part of the reality in the Balkans.<sup>71</sup> Thus, Professor Stojanovic, of the University of Belgrade, regards the past as a more concrete factor - “The principle Yugoslav fissures... followed the lines that divide nationalities, religions, cultures, histories, and civilizations.”<sup>72</sup> One American commentator takes this view even further, when referring to the conflicts in Yugoslavia:

*The most common impression of the war is that it is a civil war of irrational historical transgenerational ethnic antagonisms, and that interventions to resolve the problem may be futile.*<sup>73</sup>

These factors can be seen to have been significant in fanning the flames, if not being the ultimate cause of the tragic events across the region, and in particular in Kosovo. The importance of this province to the Serb nation has its roots in the defeat of the Serbian peoples by the Ottoman Turks, which took place in the ‘Field of Blackbirds’ (the literal meaning of ‘Kosovo’) on 28 June 1389. Whilst being a defeat, it is also seen as the

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<sup>69</sup> Although the first Croat kingdom was that under Tomislav in 910 CE. It should also be noted that, when the history is taken back this far, considerable tension exists in modern Croatia as to whether the true origin of the Croats is Slavic, or Gothic-Iranian, and about which no acceptable conclusions have ever been reached - Cviić, C. “Croatia”, in Dyker, D.A. and Vejvoda, I. (Eds.) ‘Yugoslavia and After’ (London and New York: Longman, 1996), pp. 196-212, at pp. 197-198; Fine, J.V.A.Jr ‘The Early Medieval Balkans: A Critical Survey from the Sixth to the Late Twelfth Century’ (Ann Arbor, MI: University of Michigan Press, 1991), pp. 248-291

<sup>70</sup> Fine, J.V.A.Jr ‘The Late Medieval Balkans: A Critical Survey from the Late Twelfth Century to the Ottoman Conquest’ (Ann Arbor, MI: University of Michigan Press, 1994), pp. 217-224, 255-266, 270-285.

For an overview of the earlier history of the entire Balkan region, see: Fine (1991), *ibid.*, p. 9-73; and of the Serbs in particular, pp. 202-247

<sup>71</sup> Türk, D. ‘Remarks Concerning the Breakup of the Former Yugoslavia’ (1993) 3 TLCP 1, pp. 49-56 at p. 50

<sup>72</sup> Stojanovic, S. ‘The Destruction of Yugoslavia. (The Former Yugoslavia: Implications for International Law and Policy)’ (1995) 19 Fordham ILJ 2, pp. 337-362 at p. 361

<sup>73</sup> Nagan, W.P. *et al* ‘Yugoslavia: A Case Study of International Consequences of Independence Movements (includes discussion)’ (1993) Proc. ASIL, pp. 205-228, per Nagan at p. 206

traditional founding date of the Serb nation<sup>74</sup> - much as defeat at the Battle of Hastings in 1066 is taken as the traditional starting date of the modern English nation. As such, during his 1989 Presidential election campaign, Slobodan Milošević used the 600th anniversary as part of his 'Serbian nationalist' credentials. In so doing, he ignited the tensions and ethnic unrest that were already present between the ruling Serbs and the resident majority Albanian population. This phase of the modern conflict arguably led to the increasing Kosovan resistance to Serbian rule, and eventually to the Serbian repression of the region towards the end of the decade, which precipitated unprecedented external military intervention.<sup>75</sup> However, for the present, the key consideration is that once ethnic nationalism came to the fore of the political agenda, as it was to do increasingly across the entire Yugoslav region, it was almost impossible to dismiss.

The defeat of the Serbs in the Fourteenth Century also served to usher in a new phase in the Yugoslav region. The Ottoman Empire's expansion into and beyond the Balkans brought with it an era of domination and saw the first spreading of Islam west of the Black Sea. The Muslim-Ottoman control remained largely unchallenged until the Seventeenth Century, when the Orthodox-Russian and Catholic-Habsburg empires turned their attentions to the region. These external factors, combined with internal dissents, saw the Ottoman rulers gradually losing control as the Eighteenth Century drew on, particularly in Croatia and Slavonia, as well as other territories around the edges of the region. In Serbia, it was local Muslim strongmen who emerged to secure control, whilst Montenegro remained beyond the control of any external administration. The result of these factors was to leave in each area a considerable ethnic and linguistic

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<sup>74</sup> Fine (1994), *op cit.*, pp. 408-414

<sup>75</sup> On Kosovo, see: Maliqi, S. "The Albanian Movement in Kosova", in Dyker and Vejvoda, *op cit.*, pp. 138-154; Young, T. and Dodds, T. 'Kosovo - Research Paper 98/73' (London: House of Commons, 1998)

On the NATO intervention in the region in 1999, see for example: - Contemporary Practice of the United States, Legal Regulation of the Use of Force: 'Humanitarian Intervention in Kosovo' (1999) 93 AJIL 1, pp. 167-170; 'Kosovo: Air Strikes Against Serbia' (1999) 93 AJIL 3, pp. 628-635; 'Kosovo: Deployment of Peacekeeping Force' (1999) 93 AJIL 4, pp. 879-883

mix<sup>76</sup>, to which had also been added a religious dimension, which remains a part of the regional dynamic even today - thus the classifications of Bosnian-Muslims, Eastern Orthodox Serbs, or Catholic Croats<sup>77</sup>:

*The latest wars in the débris of Yugoslavia have been wars of religion in the sense that without the religious element they would have been much less ghastly and might possibly not have occurred at all.*<sup>78</sup>

A cycle of wars seemed then to become the regional norm for the next two centuries or so. Whilst Croatia and Slovenia remained firmly under Austro-Hungarian control, Serbia, and to a lesser extent Bosnia-Herzegovina, were able to make greater moves towards independence within the Ottoman Empire. This Serbian activity included gradual expansion to encompass Kosovo and Macedonia. The Balkan region was the subject of a number of international meetings and agreements across the Nineteenth Century, but the most important was the Congress of Berlin in 1878. The outcome was a slight restructuring of the various power influences in the region - the incorporation of Bosnia and Herzegovina into the Habsburg Empire, whilst returning the Macedonia region to Muslim-Ottoman control, and the acknowledgement of independence, and slight expansion, of the Kingdoms of Serbia and Montenegro.<sup>79</sup>

The Congress had only provided a temporary respite, and tensions remained high in the region at the turn of the century. Serbia and Croatia both regarded Bosnia-Herzegovina as their rightful heritage, on medieval and ethnic considerations; Serbia had a similar attitude towards Macedonia; and both the Serbs and Croats regarded the Muslim population of Bosnia-Herzegovina as 'inauthentic', as purely the result of Ottoman imperialism. Across the region, each of the constituent entities was aware that they existed in a very delicate situation - no one could ensure its own survival

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<sup>76</sup> One key issue of language is that the shared Serb-Croat tongue, between the Serbs and Croats, seems to have done nothing to mitigate their hostility - Calvocoressi, P. 'Discorda Demens or What Next in the Balkans?' (London: David Davies Memorial Institute of International Studies, 1994), p. 1-4

See also above, nn. 12 & 19

<sup>77</sup> On the issues of religion in Croatia, see: Powers, G.F. 'Testing the Moral Limits of Self-Determination: Northern Ireland and Croatia (Ethnic Identity, National Identity: The Future of the Nation-State)' (1992) 16 FFWA 2, pp. 28-49

<sup>78</sup> Calvocoressi, *op cit.*, p. 3

<sup>79</sup> Jelavich, C. and Jelavich, B. 'The Establishment of the Balkan National States, 1804-1920' (Seattle and London: University of Washington Press, 1977), pp. 155-157



against a combination of the others. A small balance of power had developed, but was to be eclipsed by the wider European great power games.

When Austria moved south to strengthen its borders, it took control of Bosnia-Herzegovina in 1909, and the Ottoman leadership was overthrown by the “Young Turk” revolt. The policies of this new regime were perceived across the Balkans as a direct threat. As such, a tentative alliance across the region succeeded in significantly curbing the Turkish power. However, the aftermath of this success saw a reversion to ever-greater intra-Balkan conflict as each group perceived its contribution to entitle it to more spoils of war than any agreement could offer. The Balkan Wars broke out in October 1912, and no attempt at resolution came close to succeeding. As such, the outbreak of World War I across Europe was, for the Balkans, simply a continuation of an already ongoing conflict. Indeed, it was arguably the Balkan War that provided the spark to ignite the World War - it was a Serbian nationalist gunman who shot the Austrian Archduke Ferdinand in Sarajevo, the capital of Bosnia-Herzegovina.<sup>80</sup>

During WW I, the Balkan situation had remained partially isolated from the wider conflicts. As such, towards the end of the war, discussion between primarily the Croats and Slovenes had envisaged a united State of the south Slav peoples, free from external domination. Accordingly, in the post-war settlements, when the defeated Habsburg and Ottoman Empires were dismantled, many ‘new’ States formed, and one of these was in the Balkans. Formally agreed at a meeting in London in 1918, the Kingdom of the Serbs, Croats, and Slovenes was founded - the first Yugoslav State.<sup>81</sup>

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<sup>80</sup> Sekulic, D. ‘The Creation and Dissolution of the Multinational State: The Case of Yugoslavia’ (1997) 3 Nations and Nationalism 2, pp. 165-179, at pp. 167-170

However, some care should be exercised when perceiving the Balkan region as having a history of continuous war - this is an easy assumption, but belies a truth of much peaceful coexistence, albeit usually through necessity or/and in opposition to external threats, as opposed to representing any genuine kinship - Anderson, K. ‘Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States’ (1993) 33 Virg. JIL 2, pp. 385-431, at pp. 386-391

<sup>81</sup> Dragnich, A.N. ‘Serbs and Croats: The Struggle in Yugoslavia’ (New York, Delhi, London: Harcourt Brace Jovanovich, 1992), pp. 20-35

It has been argued that these agreements only recognised the interests of the ruling elites, and not of the majority of the populations. This is partially borne out by reference to the parliamentary elections of 1920 in Croatia-Slavonia, which reveals over 60% of voters favouring non-unification candidates. This is further

However, this new State was founded upon very different aims and perspectives from its constituent peoples. For the Kingdom of the Serbs, the main war aim had been the unification of lands with significant Serbian populations - in particular Bosnia-Herzegovina and Vojvodina - as well as securing an outlet to the Adriatic Sea. This view, allied with the massive losses they had suffered during the war (25% of its population and 40% of its army), easily rendered a popular view of unification as territorial conquest and annexation to Serbia. In contrast the Habsburg Slavs (Croats, Slovenes, and Slavic Muslims), especially the Croats, saw the union as an equal partnership with the Serbian Kingdom (and the Montenegrin Kingdom). To an extent the lie was given to this latter view in that those South Slavs who had served in the Austro-Hungarian army against Serbia and the Allies were either barred or restricted from serving the new State. Throughout the process, it was difficult to avoid the fact that only Serbia had fought on the side of the victorious allies, and was regarded to have acted heroically by the major powers. This had led to the geopolitical consequence of some States, especially Great Britain and France, viewing an expanded Serb State as being a wise precaution for any future conflict.<sup>82</sup>

### 3.4.2 *The Inter-War Years*

The various, contradictory perspectives of its constituent peoples meant that the first Yugoslav State never really constituted a single nationality. "From its formation ...[it] was a *non-synchronized and contradictory state*."<sup>83</sup> Throughout the inter-war years, it suffered internal nationalist pressures - although some have argued that these were only prevalent because of the failures of the parliamentary democracy, which was a relatively common occurrence in Southern, Central and Eastern Europe during this period.<sup>84</sup> The parliament in Belgrade, which was already constituted along nationality lines, gradually demanded greater autonomy for the regions than the government was willing to grant. The main rivalry was between Croats and Serbs and eventually led to violent

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reflected in the political unrest and instability which characterised the first Yugoslav state - Sekulic, *op cit.*, at pp. 170-173

<sup>82</sup> This last point is listed alongside Serb legitimacy and the internal centralist strategies of the Serb elite, as the factors impacting upon the original creation of the Yugoslav State - *ibid*

<sup>83</sup> Stojanovic, *op cit.*, p. 337

<sup>84</sup> Zametica, J. 'The Yugoslav Conflict' (1992) 270 Adelphi Paper, pp. 6-8

demonstrations in Zagreb in 1929. This, coupled with the assassination of Stepan Radič, the founder of the HSS (the Croatian Peasants' Party), on the floor of the Assembly by a Montenegrin deputy, led King Aleksander I Karadjordjevic to dismantle the parliamentary institutions and impose a dictatorship, but he was himself assassinated just five years later. Whilst the successor regimes tried to re-establish some of the democratic structures, there was a growing recognition that there was a need for change, for some form of separation. However, as had happened in 1914, the Balkans was swamped by wider European events, and by WW II. In this instance, the significant involvement was the Nazi occupation of Croatia in 1941.<sup>85</sup>

Nazi occupation of Croatia meant that it was accorded independence and granted membership of the various axis-led organisations, although it cannot be regarded as having possessed genuine international Statehood. The so-called Independent State of Croatia included Croatia-Slavonia, parts of Dalmatia and Vojvodina, and all of Bosnia-Herzegovina. The creation of the new State was not universally welcomed - the dominant HSS refused to co-operate with the invaders. However, the more extreme groups saw fascism as the means to achieve the independence from Serb domination that had been sought for so long. Thus, the Axis powers supported, and essentially installed, the extreme, right wing, and marginal political group, the *Ustasi*<sup>86</sup>, as the government, under the leadership of Ante Pavelic. It was their rule that led to considerable internal maltreatment of, in particular, the Orthodox Serbs - forcible conversion to Catholicism, torture, and mass executions.<sup>87</sup> However, the Nazi occupation was never a complete one, which meant that significant, and effective, resistance movements existed, primarily in the mountains around Serbia and Bosnia-

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<sup>85</sup> Dragnich, *op cit.*, pp. 36-99

<sup>86</sup> Various alternate renderings. "*Ustaše*" - Gagnon, V.P.Jr. "Historical Roots of the Yugoslav Conflict", in Esman, M.J. and Telhami, S., Eds. 'International Organizations and Ethnic Conflict' (Ithaca and London: Cornell UP, 1995); "*Ustashi*" - Stojanovic; "*Ustashe*" - Zametica. The word means 'uprising'.

<sup>87</sup> German military records give figures of: 350,000-700,000 Serbs; 50,000 Jews; and 20,000 Gypsies killed by the *Ustasi* regime. One means of this were the infamous *karst* pits into which people were thrown alive and then simply concreted over. These memories were to haunt the Yugoslav population for decades to come, as Tito's post-war regime pursued a policy of denial. Thus, the pits were left untouched - often simply built over, until the beginnings of State collapse in 1991, when their excavation, and the burial of the corpses within them served to heighten already tense ethnic relations - Stojanovic, *op cit.*, p. 340 n. 5 *et seq*

Herzegovina. Two main groups were the Serbian royalist *Chetniks*<sup>88</sup>, and the communist multi-ethnic (Croatian and Bosnian Serbs, Croats, and Muslims) group led by Josip Broz Tito.<sup>89</sup>

### 3.4.3 *Comrade Tito*<sup>90</sup>

Throughout the period of WW II, internal regional tensions remained high and large-scale national (ethnic) killings occurred in Yugoslavia. This was the legacy of the political dynamics of the inter-war years. In a sense, the primary ethnic ingredient had not been added until the *Ustasi* massacres began, followed by the *Chetnik* reprisals. Nevertheless, once raised, these nationalist sentiments remained strong, since they were able to build upon their respective histories. Thus, it was that Tito's partisans, who drew upon the wider population of the region, had to present proposals sensitive to the interests of each nation and region. Such a process had begun during the war when the partisan forces had been organised along regional lines, with units being led by local commanders.

As the attention of the Axis powers was focused elsewhere, Tito's partisan government had proclaimed the federal State of Yugoslavia in November 1943. It moved quickly to pull Macedonia<sup>91</sup>, previously a province of Serbia, into Yugoslavia as a fully-fledged Republic. The economic and political system established was based upon the Soviet model, requiring large-scale central control. Tito received Soviet support and made early moves to join the Soviet Bloc. However, a failed Soviet-inspired attempt at a Balkan federation in 1948 was to sow the seeds of eventual separation of Yugoslavia and the

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<sup>88</sup> "Četniks" - Gagnon

<sup>89</sup> Dragnich, *op cit.*, pp. 101-115; Stojanovic, *op cit.*, pp. 337-341; Vejvoda, I. "Yugoslavia 1945-91 - From Decentralisation Without Democracy to Dissolution", in Dyker and Vejvoda, *op cit.*, pp. 9-27, at pp. 10-11

<sup>90</sup> Perhaps the most accessible entry into the study of Tito and Titoism remains: Pavlowitch, S.K. 'Tito: Yugoslavia's Great Dictator - A Reassessment' (London: Hurst, 1992)

<sup>91</sup> For a brief account of Macedonia's long history, and its relevance in the Yugoslav State, see for example: Muhić, F. "Macedonia - an Island on the Balkan Mainland", in Dyker and Vejvoda, *op cit.*, pp. 232-247, at pp. 235-239

USSR.<sup>92</sup> This excommunication from the Soviet Bloc led to a greater reliance upon popular support, which had begun to wane as Stalinist policies had been introduced. It was the foundation of Yugoslavia's unique position between East and West during the Cold War.

Tito's Yugoslavia was a federation of six Republics: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. Serbia included two 'autonomous regions' - Vojvodina, in the north, with a mainly Hungarian population; and, Kosovo, in the south, with a mainly Albanian population. Tito, himself half-Croat half-Slovene by birth, was careful to construct a regime within which the unity of the Yugoslav federation was paramount above the individual nationalities. His policy of ethnic balancing in the ruling elite of the Communist Party and the army, built up during WW II, served this end well. In addition, the lack of an ethnic-nationality, or rather the strain of competing ethnic-nationalities, was to some extent counter-balanced by the pressures to create a Yugoslav political-nationality out of the defeat of a common enemy in the War and a common political destiny.<sup>93</sup>

The camaraderie of the remembered partisan struggle faded as the war generation was replaced by the children of it. The feelings of solidarity came to be replaced by the ethnic rivalries that had never been pushed far below the surface, despite the official policies aimed at maintaining the historic images.<sup>94</sup> These tensions, which grew towards

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<sup>92</sup> A taste of the unique position of Tito's regime, as seen from a fictional account of the reaction of Stalin, can be found in: Solzhenitsyn, A. 'The First Circle' Trans. Guybon, M. (Fontana: London, 1972), pp. 116-119

<sup>93</sup> Sekulic, *op cit.*, pp. 173-175

<sup>94</sup> For example: Todorović, M. (President of the Federal Assembly and Chairman of the Joint Constitutional Commission of all the Chambers of the Federal Assembly) "Report on the Final Draft of the S.F.R.Y. Constitution", in Durovič, D. (Ed. in Chief) 'The Constitution of the Socialist Federal Republic of Yugoslavia', Trans. Pavičić, M. (Ljubljana: Dopolna Delavska Univerza, 1974), pp. 11-50, at p. 42:

*The foundations of the new relationships within the Federation, based on agreements and compacts, respect for differences, but also on the deepening of mutual trust and mutual solidarity, were laid in the common National Liberation War and Revolution. They form a basis for the further development of equality among the nations and nationalities, and it is this which constitutes a guarantee of the unity and stability of our Federation.*

Todorović's account is a fascinating insight into the history of a communist State. It is historically and contextually idiosyncratic and anachronistic. As just one example, throughout his work, he relies, directly and indirectly, on just two 'valid' sources - Karl Marx and Comrade Tito.

the end of the 1960s, even saw Croatia make calls for separate sovereignty, albeit within the Yugoslav federation, including its own UN seat, much as those held by the Ukraine and Byelorussia.<sup>95</sup> Similar claims and denunciations were made in the other Republics. However, Tito remained resolute - all calls threatening the integrity and welfare of the Yugoslav State were stamped down upon heavily. This was a part of the wider policy of the communist Yugoslav State; that past national grievances were not a permitted subject of discussion. The desire for unity was such that the very existence of past atrocities, especially those during WW II, was officially denied.<sup>96</sup>

The moves for independence, coupled with the decentralist currents of the 1950s and 1960s, had led Tito to produce the fourth Federal Constitution, in 1974.<sup>97</sup> As well as seeking to balance the identities of the six Republics, this last incarnation of the Yugoslav State sought to curb wider Serbian authority by strengthening the position of the two autonomous provinces within that Republic, and thereby to appease the Hungarian and Albanian populations as well. The structure created was ostensibly based upon equal regional representation, from the six Republics and the two autonomous provinces. The Executive Bureau of Presidential Commission comprised two representatives from each federal Republic, plus one from each of the two autonomous regions, but it had Tito as the permanent federal President. This then signified the real kernel of the State's unity - Tito himself.<sup>98</sup> As such, he made complex provision for how the presidency should be constituted on the event of his death. Since no one could succeed him, the position was to be vested in the Federal State Presidency, with the chair revolving between the various Republican members of it. However, this superficial compromise did nothing to tackle the real issues, and left no real means for actual unity

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<sup>95</sup> On anomalous position of these two entities, see below Chapter 6, n. 127

<sup>96</sup> See above, text at n. 87

<sup>97</sup> The previous constitutions had been promulgated in 1946, 1953 and 1963. It was in the last of these that the name was formally changed to the Socialist Federal Republic of Yugoslavia (SFRY), which was retained until the break-up - Bagwell, B. 'Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics' (1991) 21 Georgia Journal of International and Comparative Law 3, pp. 489-523, p. 497, n. 48

<sup>98</sup> Lytle, P.F. "Electoral Transitions in Yugoslavia", in Shain, Y. and Linz, J.J. 'Between States: Interim Governments and Democratic Traditions' (Cambridge: CUP, 1995), pp. 237-254, at n. 4:

*[T]he joke (now relegated to the status of historical curiosity) that Yugoslavia was a country with six republics, five nations, four languages, three religions, two alphabets and one Yugoslav - Tito*

in the face of Republican conflict. It was perhaps inevitable then that, following Tito's death in 1980, these thinly plastered over cracks began to show through.<sup>99</sup>

### 3.5 The Road to Break-up of the Yugoslav State

*Yugoslavia was a federation whose parts did not federate because its several ethnic-religious nationalisms distrusted, feared and ultimately hated one another.*<sup>100</sup>

The 1980s were a decade of economic hardship and lack of central leadership. The federal system required the genuine good will and co-operation of each of the six Republics, as well as the two autonomous provinces, whose positions had been strengthened by the 1974 Federal Constitution. The system required that each of these eight constituent parts be prepared to submit to compromise for the 'greater good' of the whole. At exactly the point when the pressures against this were strongest - severe economic hardship caused by the world recession in the late 1970s, and massive foreign debts (approaching \$20M in early 1980s) - the death of Tito had removed the only extra-systemic moderating factor.<sup>101</sup>

The pull between the conservatives, advocating a return to Marxist orthodoxy, and the reformists, advocating further radical change to the economic and political systems, soon began to tell in the weakening of the consensual federal system. The unitary nature of the role of each Republic/region at the federal level exaggerated these differences. Reformists sufficiently dominated at the local level in Slovenia, Vojvodina, and Serbia, to dominate totally at the federal level, despite the conservative leaderships in Croatia, Macedonia, Kosovo, Montenegro, and Bosnia-Herzegovina.

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<sup>99</sup> Anderson, *op cit.*, pp. 389-391, 408-416; Müllerson, R. 'International Law, Rights and Politics: Developments in Eastern Europe and the CIS' (London: Routledge, 1994), pp. 127-128; Stojanovic, *op cit.*, pp. 341-343; Vejvoda, *op cit.*, pp. 13-22; Zametica, *op cit.*, pp. 9-11

<sup>100</sup> Calvocoressi, *op cit.*, p. 5

<sup>101</sup> On the impact of economic factors on the fate of Yugoslavia, see: Anderson, *op cit.*, pp. 406-408; Bojičić, V. "The Disintegration of Yugoslavia: Causes and Consequences of Dynamic Inefficiency in Semi-command Economies", in Dyker and Vejvoda, *op cit.*, pp. 28-47; and Radošević, S. "The Collapse of Yugoslavia - Between Chance and Necessity", in Dyker and Vejvoda, *op cit.*, pp. 65-83, at pp. 67-74

The economic problems, along with the conflict and deadlock at the centre, caused old rivalries and nationalist demands to re-emerge. The concept of 'ethnic injustice' was able to flourish exactly because aspects of national cultures had been suppressed under Tito's regime. As a forerunner to Milošević's 'Kosovo campaigning' in 1989, the Serbian Party leader had encouraged 'street democracy' with its calls for greater Serb control in Belgrade, which was the Republic capital as well as being the capital of the federal State. Ethnic sentiments were fuelled by perceived threats to the nation. The communist monopoly of media, especially television, which was delimited along Republic lines, made this process of the instrumentalisation of history much easier for the respective leaderships to pursue. Just as had occurred in Somalia, once ethnic identity came onto the political agenda, it was next to impossible to remove. The nationalist sentiments, once raised, led to calls for increased national (Republican) autonomy, first in Serbia, but soon in each of the Republics. Such sentiments and calls also prompted the rise of counter-nationalist voices - those of national minorities within Republics, as well increased opposition from those seeking to reform the unitary federal State.

At the federal level, the reaction against the conservative-nationalist rhetoric saw the reformist Croatian Ante Marković appointed federal Prime Minister, in March 1989. However, the pressures were in place for the fall of communism, and of the central governmental structures. The final piece to this jigsaw was the *Jugoslovenska Narodna Armija* (JNA - Yugoslav National Army)<sup>102</sup>, which had its roots in Tito's partisan forces of WW II. The JNA was closely linked with the ruling League of Communists (LC) and had achieved a level of political involvement such that it was almost the 'ninth Republic' of the federal presidency<sup>103</sup>. The LC links, and the historical internal role of the JNA, confirmed its conservative credentials, as did its traditionally strong economic position, making it unlikely to support economic reform. It tended to recruit from underdeveloped regions (more likely to be conservative) many of which had also

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<sup>102</sup> At the time of the break-up, the JNA was Europe's fifth largest military force - for example: Nagan, *et al.*, *op cit.*, *per* Nagan at p. 207; and *per* Šarčević at p. 216. On the role it played in the conflict and break-up, see: Zametica, *op cit.*, pp. 40-45

<sup>103</sup> Assuming Kosovo and Vojvodina were the seventh and eighth.



suffered at the hands of the Ustasi regime, meaning that most army leaders were receptive to the sentiments then being expressed by Milošević, and other conservatives.

The escalation of the internal pressures within Yugoslavia happened to coincide with the collapse of Communism across Eastern Europe at the end of the 1980s. In addition to the air of reform and revolution across the continent, the specific equalising pressure of the Cold War rivalry was suddenly removed, causing a wave of Western-style capitalism and democracy to sweep forward, with significant initial impact, regardless of how long it was to last.

*[T]he rigidities of the Cold War international system held Yugoslavia together for a while, but the demise of communism and the ensuing cataclysmic changes in eastern Europe released the centrifugal pressures which had previously been contained.*<sup>104</sup>

This wave did not bypass Yugoslavia, and something approaching democracy occurred in the form of federal elections. However, the extent of federal fragmentation was such that the elections were held separately in each of the six Republics, between April and December 1990. The outcome was similarly mixed with a rough split between reformists and incumbent Communists.<sup>105</sup> Whilst impressive in the sense of transition from dictatorship (oligarchy) to democracy, the changes also increased regional and ethnic nationalist calls, and further divergence appeared in policies at the federal level. Once the dust had settled, and the new regimes were in place, the key issue on the federal agenda had been the main electoral issue in each of the Republics' elections - the future of the Federal State.

The debate focused around the issues of the various national-minorities within the Republics, and the manner of their representation within any future federal structure. The desirability of reform was generally accepted; it was the nature of it that was in issue. The first manoeuvres were various post-election constitutional reforms within Republics aimed at securing nationality rights. These caused backlashes from minorities, and even flared into violence, most notably the Serb populations within Croatia. This pressure was coupled with that from Slovenia and Croatia, fearing the dominance they

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<sup>104</sup> Economides, S. and Taylor, P. "Former Yugoslavia", in Mayall, *op cit.*, pp. 59-93, at p. 59

<sup>105</sup> The election results are given in more detail below, Chapter 4, n. 131

perceived Serbia to be seeking. The resultant conditions were sufficient to see violence, attempted secessions, and federal paralysis during 1991.

*Yugoslavia, without outside pressures to hold it together, no charismatic leadership, and with no possibility of creating and sustaining internal legitimacy, because of the crisis of communism and the deteriorating economic situation, simply exploded. The internal forces keeping it together were too weak or too clumsy, but the forces acting in the direction of dissolution were not capable of managing the transition in a peaceful way.*<sup>106</sup>

### 3.6 Conclusions

*[Somalia was]...the coldest bucket of water dropped on the international community.*<sup>107</sup>

*Because of its complex structure, the Yugoslav multi-national community is in a way a world in miniature.*<sup>108</sup>

The foregoing accounts could not hope to address rigorously all of the aspects of history that have contributed to the situations in Somalia and Yugoslavia.<sup>109</sup> Their purpose has been somewhat different from such an aim. The first purpose has merely been to contextualise the accounts that are to be given of specific aspects of international law relating to the failure of States. By referring to just two case-studies, it is hoped that a sufficient degree of depth can be achieved in analysing the political, social and historical context in which the legal process was taking place. The second purpose has been to provide sufficient detail to allow the identification of some general features of State failure. Finally, by similarly highlighting the distinctions

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<sup>106</sup> Sekulic, *op cit.*, pp. 176-177

<sup>107</sup> Lieut.-Gen. Maurice Baril, commander of the Canadian Army and former military advisor to UN Secretary-General Boutros Boutros-Ghali, *Time International*, 23 October 1995, p. 45

<sup>108</sup> Todorovič, *op cit.*, p. 45. Of course, this is not always the view: Major-General Pyótr Makarýgin "The Balkans are not the world." - Solzhenitsyn, *op cit.*, p. 449

<sup>109</sup> Vejvoda, *op cit.*, p. 9:

*The need for an approach which brings out the intricacy and many-sidedness of the political, social, and economic dynamics of the situation is palpable. Former Yugoslavia cannot be understood outside the context of a complex approach... Only if painstakingly delineated in its historical, cultural, social-anthropological, political and social dynamics, can the narrative take on the forcefulness required to come to grips with the questions which present themselves: not just the why of the disintegration, but the how and especially the why of the extreme violence.*

Although referring only to the Yugoslav situation, the author's comments would seem to apply equally to Somalia.

between the two situations, it will be possible to assess to what extent, if at all, such distinctions in fact contributed to or necessitated any differences in the legal treatment of the two failed States. The overall aim then is to provide a contextual backdrop against which the international legal treatment of failed States can be presented.

Both Somalia and Yugoslavia were States comprised of a number of ethnic<sup>110</sup> groups, with histories of co-operation and conflict. The unifications of each of them were based upon perceptions of possible advantage, arising in conditions largely created by external actors - European decolonisation in Africa and the post-WW I settlement in Europe. For Somalia, the unification was of some parts of a wider ethnic group: for Yugoslavia, it was more broadly a union of a number of ethnic groups. Yet the Somalia homogeneity is often overstated, in that the six Somali clans were very much separate in their own ways, and arguably more so than their counterparts in South-east Europe. Likewise, one of the suggested motivations behind the Serb support of the south Slav State was as a path to the achievement of 'Greater Serbia'<sup>111</sup>, which would eventually cover all Serbs, including those in neighbouring States.

Whatever the distinctions or similarities between the natures of the ethnic mix in the two States, ethnicity remained a critical political issue in both. Their respective leaders sought to suppress ethnic rivalry and promote co-operation, in part through careful balancing of representation and governmental influence. In Somalia, under Siyad Barre, following the Ogaden defeat, this process became weakened, and the clan structures were politicised to become lines of division and conflict. In Yugoslavia, Tito's suppression of dissent and his balance of representation was largely successful at a superficial level, but following his death, the balance turned into a stalemate, and the long-suppressed tensions rebounded violently. In both States, once the ethnic divisions were present, they proved impossible to overcome.

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<sup>110</sup> For the remainder of this section, the word 'ethnic' will be used to encompass both Somali clans and Yugoslav national groups

<sup>111</sup> The term itself has resonance in the Somali context:

*Somalilanders' decision to unite with the south in 1960 had been controversial. At the time, however, the Somali nationalism was vigorous. It was surmised that unity was the first step towards the realisation of 'Greater Somalia', combining all Somali territories*

- Bradbury, *op cit.*, p. 11

The external pressures on both States extended far beyond the circumstances of their independencies. For Somalia, the pressures included the war with Ethiopia, and the changing patronage as a result of the Cold War. This latter factor was also largely responsible for massive amounts of weaponry within the State, which was put to such destructive use in the last phase of Siyad Barre's regime, 1988-1991, and perhaps more brutally since then.<sup>112</sup> In Yugoslavia, the chief pressures were the opposing ideologies of East and West, which remained largely balanced, albeit slanted to the East, for most of the Cold War era. However, at the collapse of the Soviet Bloc, this delicate balance was upset with immediate consequences. Following this process, other historical externalities have played a part, in particular the (territorial) concerns of neighbouring States, which will be returned to below in the context of Recognition.

Ethnic pressures, having already caused/contributed to the governmental collapse, were also then released in both States in the absence of any central and centralising authority. This moved the respective debates from Government to Self-determination, and then ultimately to secession and Recognition. And it is in this latter context that the real international legal difference arises. Somaliland attempted to secede and declared its independence on 18 May 1991. Croatia and Slovenia did likewise just over a month later, on 25 June 1991. For Somaliland, the international response was a lack of recognition. In international legal terms, the factual existence of the single State of the Republic of Somalia persisted<sup>113</sup>, despite some conflicting references in academic commentary<sup>114</sup>. It continued to have a single seat at the UN; Security Council Resolutions carefully founded their legitimacy for intervention in ways that would not conflict with Article 2(7) of the Charter<sup>115</sup>; and, the dialogue has always

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<sup>112</sup> "Somalia was armed in the Cold War in quantities not witnessed in other African crisis areas, and these arms are still available, often at prices cheaper than food." - Adams, *op cit.*, p. 79

<sup>113</sup> "It is important immediately to discount the notion that Somalia may have lost its Statehood (a possible error especially given the scale and extent of UN intervention)." - Osinbajo, Y. 'Legality In A Collapsed State: The Somali Experience' (1996) 45 ICLQ 4, pp. 910-923, at p. 910

<sup>114</sup> For example "previously sovereign state" - Lewis and Mayall, *op cit.*, p. 114

<sup>115</sup> Art 2(7) - "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State..."

SC Res. 794 (3 December 1992) at para. 10, where Chapter VII of the Charter is expressly relied upon, for the first time, to authorise humanitarian assistance; and SC Res. 814 (26 March 1993) at section B. See generally, for example: Helton, A.C. 'Opinion - The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign' (1992) 4 International Journal of Refugee Law 3, pp. 373-375;

been about the restoration of the (single) Somali State. In contrast, despite early attempts to maintain the situation as still being one involving a single State, the inevitability of Yugoslavia's break-up was accepted before the end of 1991. In December, the Badinter Arbitration Commission of the EC found "that the Socialist Federal Republic of Yugoslavia [wa]s in the process of dissolution".<sup>116</sup>

What remains without doubt is that both States experienced sufficient governmental and societal collapse to be said to have failed. In both cases, such collapse led to significant internal conflict, such that neither entity appeared able to sustain itself internationally.<sup>117</sup> The difference was seen in the nature of the outcome of their respective failures. For Somalia, the situation of collapse persisted, and persists. Whilst the State has failed, its death has not been declared, because no new States have emerged, or been acknowledged as having emerged, to replace it. In contrast, the failure of Yugoslavia came to an end relatively swiftly, in that five (new) States were seen to emerge and so to terminate its period of failure through terminating its existence.<sup>118</sup> The focus of the remainder of this study is to be on the periods of failure of these two States.

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Murphy, S.D. 'Nation-building: A Look At Somalia' (1995) 3 *Tulane Journal of International and Comparative Law* 1-2, pp. 19-43, at pp. 33-37

<sup>116</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) reprinted in 31 ILM 1494-1497, at p. 1497. This process was found to have been completed by July 1992 - EC Arbitration Commission, Opinion No. 8 (4 July 1992) reprinted in 31 ILM 1521-1523, at p. 1523. See further below, section 6.3.5

<sup>117</sup> Above, section 1.2.1

<sup>118</sup> Above, section 1.2.2

## Chapter 4: (Failure of) Government (as a Criterion of Statehood)

*[M]an, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.<sup>1</sup>*

*If you really believe in the principle of self-determination, then they have the right not to have a government. If they don't want to have a nation-state, that's their right. The old saying is true; you can lead a horse to water, but you can't make him drink. The world cannot force a people to constitute a government.<sup>2</sup>*

### Abstract

Government is one of the key elements of Statehood. Its presence is normally a prerequisite for a State to emerge. In this section, the connection, if any, between loss of government in an existing State and the failure of that State will be considered. The corollary of the governmental requirement for emergent States will only be addressed insofar as it further informs the subject of State failure through loss of government. It will, however, be returned to in the subsequent Chapters dealing with Self-Determination and Recognition respectively.

Somalia presents one of the clearest examples of government failure in an existing State. The response to it was the traditional approach to the loss of a criterion of Statehood in a pre-existing State - Statehood was not affected; failure was essentially disregarded. This then can be contrasted with the experience in Yugoslavia, which was determined to be 'in the process of dissolution' because of the adjudged governmental collapse at the federal level. Failure of government in Somalia, led to State failure, but no further; whilst in Yugoslavia it led to break-up and the demise of the State. Some attempt will be made to offer an interim explanation of this difference.

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<sup>1</sup> Brierly, J.L. 'The Law of Nations: An Introduction to the International Law of Peace' 6 Edn., Waldock, Sir H. (Ed.) (Oxford: Clarendon, 1963), p. 56

<sup>2</sup> Daniel Simpson, US Somalia Ambassador, from Washington Post Interview as quoted in Somalia News Update Vol. 3, No 23, (14 September 1994), p. 2

#### 4.1 Introduction

*Whereas “statehood” was expected to be determined by legal criteria, international law did not dictate whether and how de facto authorities within states must be treated.*<sup>3</sup>

Professor Schachter is not commenting on government as a criterion of Statehood, but his words nevertheless shed some light on that issue. His comments are concerned simply to introduce the work of Professor Roth on the subject of governmental illegitimacy, but this treatment implicitly supports the assertion that governmental legitimacy is distinct from State legitimacy - from the existence of the State. This position is reinforced by the references to internal governmental determinations being within the sovereignty of the State and thereby beyond the ambit of international (legal) determination, or adjudication.<sup>4</sup>

The view that the continuity of State and government are separate, at least insofar as State identity is not directly affected by government discontinuity, has prevailed, albeit not absolutely, throughout the history of international legal scholarship for as long as the topic of Statehood has been subject to treatment within the discipline.<sup>5</sup> By discontinuity is meant change in government.

*Governments come and go, sometimes by constitutional process, sometimes by revolution.*<sup>6</sup>

When ‘change of government’ is referred to in domestic politics, or in constitutional law, it usually relates to a change of ruling party, or individual, in accordance with the constitution, whether by election or other means. Such domestic personnel changes remain domestic matters so far as the international legal system is concerned, because the State and the particular individuals who act in its name are entirely separate

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<sup>3</sup> Schachter, O. “Forward”, pp. xv-xix, at p. xv in Roth, B.R. ‘Governmental Illegitimacy in International Law’ (Oxford: Clarendon, 1999)

<sup>4</sup> *ibid.*

<sup>5</sup> On the issue of continuity generally, see above, section 2.4

<sup>6</sup> Wright, Q. ‘Editorial Comment - United States Intervention in the Lebanon’ (1959) 53 AJIL 1, pp. 112-125, at p. 120

entities - *Reges esse mortales, Civitas aeternas*.<sup>7</sup> The same remains true even for changes of regime that are not in accordance with the Constitution of the State, and which will usually alter that Constitution.

*The nation... is not changed with a change in the form of government.  
The same is certainly true of a state when it is governed now by this  
form, now by that.*<sup>8</sup>

This basic position is known as the ‘principle of continuity of States’, and can be recast thus:

*Changes in the government or the internal polity of a state do not as a  
rule affect its position in international law.*<sup>9</sup>

This principle of continuity extends a stage further, to cover the period between governments (constitutional change), and between governmental systems

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<sup>7</sup> ‘Kings are mortal, and States are eternal’ - Pufendorf, S. ‘*De Jure Naturae et Gentium Libri Octo*’ (Eight Books on the Law of Nature and of Nations, 1688) Oldfather, C.H. (Trans.) (Oxford: Clarendon, 1934), pp. 1364-1367, at §7

<sup>8</sup> Bynkershoek, C. van ‘*Quaestionum Juris Publici Libri Duo*’ (Two Books on Question of Public Law, 1737) Frank, T. (Trans.) (Oxford: Clarendon, 1930), p. 276. See also: Pufendorf, *op cit.*, pp. 1360-1361. The like conclusion is implicit in Vattel’s comments on the right of a nation to change its government or its constitution - Vattel, E.de ‘*Le Droit des Gens ou Principes de la Loi Naturelle*’ (The Law of Nations or the Principles of Natural Law, 1758) Fenwick, C.G. (Trans.) (Washington: Carnegie Institution, 1916), pp. 18-19.

A slight distinction might be made as to the discontinuity in ‘sovereignty’. Thus, at least one classical jurist, in listing the ways in which sovereignty could come to an end, included the idea of ‘transference’, one meaning of which was a change within a State to another form of government - Textor, J.W. ‘*Synopsis Juris Gentium*’ (Synopsis of the Law of Nations, 1680) Bate, J.P. (Trans.) (Washington: Carnegie Institution, 1916), pp. 315-319. However, in this context it seems that the sovereignty being referred to is simply the regime of that individual sovereign, as opposed to the sovereign Statehood of the entity in question.

<sup>9</sup> Moore, J.B. ‘A Digest of International Law’ (Washington: Government Printing Office, 1906), Vol. 1, §78, pp. 249-252, at p. 249. The “as a rule” caveat, other than inherent lawyerly caution, seems only to refer to the fact that certain changes may result in an alteration of “rank”, e.g. from Kingdom to Principality.

See also: Hackworth, G.H. ‘Digest of International Law’ (Washington: Government Printing Office, 1940), Vol. 1, §25, p. 127:

*Once a state has come into existence it continues until it is extinguished by  
absorption or dissolution. A government, the instrumentality through which a state  
functions, may change from time to time both as to form - as from a monarchy to a  
republic - and as to the head of the government without affecting the continuity or  
identity of the state as an international person.*



(revolution).<sup>10</sup> For example, in an editorial comment concerning the then recent insurrection in Spain led by General Franco, it was observed that:

*The outbreak of insurrection in a state has no effect on its juridical status as a member of the international community.*<sup>11</sup>

Or more comprehensively, in the aftermath of WW II:

*Germany has been assumed to continue as a state, although occupied, divided, and only gradually acquiring the organs of self-government.*<sup>12</sup>

More recently, in the leading work on the subject of (the creation of) Statehood, Professor Crawford observed that:

*[I]nternational law does distinguish between change of State personality and change of government. Thus, prima facie, the State continues to exist, with concomitant rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government.*<sup>13</sup>

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<sup>10</sup> Although it remains the case that there may be some impact on the State's actual relations with other States during the period without government - for example, Wheaton, H. 'Elements of International Law' 8 Edn., Dana, R.H.Jnr (Ed.) (1866) Wilson, G.G. (Ed.) (Oxford: Clarendon, 1936), §23, pp. 29-32. However, this is an issue of ability, and therefore does not impact upon capacity - see above, Chapter 2, text at n. 128

<sup>11</sup> Garner, J.W. 'Editorial Comment - Questions of International Law in the Spanish Civil War' (1937) 31 AJIL 1, pp. 66-73, p. 67

<sup>12</sup> Wright, Q. 'Editorial Comment - The Status of Germany and the Peace Proclamation' (1952) 46 AJIL 2, pp. 299-308, at p. 300. And at p. 307:

*International law distinguishes between a government and the state it governs. This distinction makes it clear that the extinction of the Nazi Government and the temporary absence of any German Government did not necessarily mean that Germany as a state ceased to exist. States have frequently survived protracted periods of non-government, civil war, anarchy and hostile occupation.*

The specific situation of the Allied occupation of Germany after WW II generated its own debate as to the continuity, or not, of German Statehood. For example: Kelsen, H. 'The Legal Status of Germany According to the Declaration of Berlin' (1945) 39 AJIL 3, pp. 518-526 - arguing that the allied control amounted to territorial sovereignty, which thereby necessarily defeated German Statehood. Or: Jennings, R. 'Government in Communion' (1946) 23 BYIL, pp. 112-141, especially at pp. 120-123 - arguing that the specific meaning of the Berlin Declaration was to limit the extent of the Allied presence and control so that it did not amount to sovereignty, such that Germany as a State continued to exist, albeit temporarily without a government.

Jennings seems to indicate that the situation is *sui generis* in terms of the Berlin Declaration, but it is arguable that most such 'difficult cases' will by their nature be *sui generis*. In a sense this was the approach the Security Council took as regards Somalia in the wording of, for example, Resolution 794. See below, section 4.3.1

<sup>13</sup> Crawford, J. 'The Creation of States in International Law' (Oxford: Clarendon, 1979), p. 28

This flow of opinion has not, of course, been entirely one way. There does exist, within the academic commentary at least, a general strand which suggests that some basic limitation must be placed upon the extent of the governmental failure. Crawford himself observed that:

*[T]he lack of a coherent form of government in a given territory militates against that territory being a State... The continued absence of a government will tend to the dissolution of any State area.*<sup>14</sup>

However, he fails to provide any further explanation as to the manner or impact of this, or how it is to be interpreted alongside his earlier comment as to governmental change. Perhaps more strongly, it has been observed that:

*Even when internal change takes the form of temporary dissolution, so that the state, either from social anarchy or local disruption, is momentarily unable to fulfil its international duties, personal identity remains unaffected; it is only lost when the permanent dissolution of the state is proved by the erection of fresh states, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable...*<sup>15</sup>

From these two observations it would appear that there is a distinction drawn between a temporary situation of no governmental control, and a situation of such full-scale failure as to effectively end the life of the State. With regard to the former, the difficulty would appear to be in ascertaining what sort of time-scale is envisaged. For example:

*No case can be cited where a state has been recognized as still existing after the fall of its government, unless a new government has at once (i.e., within a few a days) succeeded to its power throughout its territory.*<sup>16</sup>

However, the above-mentioned references to Spain, and more especially to post-WW II Germany would seem to belie this characterisation, which was made largely in reliance on Eighteenth and Nineteenth Century experience. As to the latter scenario, of

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<sup>14</sup> *ibid.*, p. 46

<sup>15</sup> Hall, W.E. 'A Treatise on International Law' 8 Edn., Higgins, A.P. (Ed.) (Oxford: Clarendon, 1924), p. 22

<sup>16</sup> Baty, T. 'Can An Anarchy Be A State' (1934) 28 AJIL 3, pp. 444-455, p. 445. The corollary of which is, at p. 444:

*If a recognized government falls, and no single government at once succeeds it throughout the whole extent of its territory, the state must ipso facto cease to exist.*

an end to the Statehood, as opposed to its 'suspension', the two alternatives seem little developed. Multiple State succession, in terms of replacing the entire pre-existing State, will require, or will at least be difficult to achieve, without some prior determination of extinction of the former State, before the new States could be said to have emerged, yet such a determination would seem possible only after the new States had emerged - a Catch-22. These difficulties bring into focus both the extent of governmental collapse sufficient to constitute a situation of State failure, and the difficulty surrounding the termination of that failure through the break-up of the State.

The assertion that a State cannot "...continue to exist indefinitely in a state of suspended animation, so to speak, without any responsible government"<sup>17</sup>, creates its own difficulties. In addition to the various possible examples of such Statehood, or possibly sovereignty, existing in suspension - the Baltic States under Soviet occupation being an obvious case, albeit through different causes<sup>18</sup> - the major stumbling block is the conceptual gap as regards what this situation would result in; what would the resultant entity be? This is the ambiguity at the heart of the concept of State failure: When governmental collapse occurs to such an extent as to render the entity "incapable of sustaining itself as a member of the international community"<sup>19</sup>, and new States do not emerge to replace it, what is the result? International legal theory lacks a concept to deal with this situation - it lacks a concept of 'not-a-State'. This is perhaps the ultimate difficulty faced by international law in dealing with the most questions of Statehood, and is the dilemma faced when dealing with States that have failed.

The final element of legal imprecision within this context arises as to the identification of which individuals can actually represent the State externally; which people are the government. The general approach, discernible from State practice, is a largely pragmatic one, based upon *de facto* control within the territory of the State.<sup>20</sup>

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<sup>17</sup> *ibid.*, p. 451

<sup>18</sup> See below, Chapter 6, text at nn. 117-120

<sup>19</sup> Helman, G.B. and Ratner, S.R. 'Saving Failed States' (1992) 89 Foreign Policy, pp. 3-20, at p. 3 - above, Chapter 1, text at n. 59

<sup>20</sup> Doswald-Beck, L. 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) LVI BYIL, pp. 189-252. at pp. 190-195

Government as a criterion of an emerging State requires something approaching a “coherent political structure” exercising “effective control”<sup>21</sup> over the whole territory, since “an effective and independent government is the essence of statehood”<sup>22</sup>. The detail of this is unclear - “international law lays down no specific requirements as to the nature and extent of this control”. In addition, the requirements are flexible depending upon circumstances - in particular, whether there is any opposition to title internally, or upon the consent or opposition to title from any former sovereign over the territory.<sup>23</sup> These requirements are likely to be less strict in the case of pre-existing States:

*[T]here 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. There is normally no presumption in favour of the status of the former, and the criterion of effective government therefore tends to be applied more strictly.*<sup>24</sup>

Accordingly, for extant States, the pragmatism that characterises the effective control doctrine will be of greater importance than for emergent States. This is likely to be emphasised through the nature of the process of making determinations as to governmental status - the domestic contexts of the governments of other States. The resultant situation is one that seems to lack legal precision and instead to emphasise ambiguity. The theory is that the doctrine allows for acceptance of a diversity of

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These considerations will usually only come under discussion externally, when issues of recognition arise. As one example of a consideration of the Somali situation, Hobhouse, J. in the English High Court, set forth that the appropriate criterion was:

*[W]hether the relevant regime is able of itself to “exercise effective control of the territory of the state concerned” and is “likely to continue to do so.”*

- *Republic of Somalia v. Woodhouse Drake and Carey (Suisse) S.A. and others* [1992] 3 WLR 744, 753 - see further on this case: Crawford, J. ‘Who Is A Government? The Executive and the Courts’ (1993) 52 Cambridge Law Journal 1, pp. 4-6; Kingsbury, B. ‘Judicial Determination of Foreign “Government” Status. (United Kingdom)’ (1993) 109 LQR 3, pp. 377-382; Warbrick, C. ‘Recognition of Governments’ (1993) 56 MLR 1, pp. 92-97

<sup>21</sup> Shaw, M.N. ‘International Law’ 4 Edn. (Cambridge: Grotius, 1997), p. 139 and Cassese, A. ‘International Law in A Divided World’ (Oxford: Clarendon, 1986), p. 77 respectively

<sup>22</sup> Brownlie, I. ‘Principles of Public International Law’ 5 Edn. (Oxford: OUP, 1998), pp. 90-91, quotation at p. 91. See further, for example: Jennings, Sir R. and, Watts, Sir A. (Eds.) ‘Oppenheim’s International Law’ 9 Edn., Vol. 1 “Peace” (London: Longman, 1992), pp. 146-154

<sup>23</sup> Crawford (1979), *op cit.* pp. 42-47, quotation at pp. 45-46

<sup>24</sup> *ibid.*, p. 46

organisational regimes without the hegemony of particular political ideologies.<sup>25</sup> An alternative view is that standards and requirements remain unclear, and the reality is that governments and States will only choose to accord equivalent status to entities in which they recognise characteristics they also see in themselves. As such, it is the trappings of familiarity that are more likely to be interpreted as sufficient political organisation, rather than the actual control exercised by, for example, “[c]ertain, particularly nomadic, tribes” or other indigenous forms of ‘government’.<sup>26</sup> It is likely to perpetuate the *status quo*.

These ideas will most easily be explored in the context of the situation in Somalia after the fall of the military government in 1991. Having pursued a detailed consideration of the issues of governmental failure in Somalia, they can then be compared with the experience in Yugoslavia. This will then allow an assessment of the relationship between the loss of government and State failure, and the manner in which international law uses these concepts to deal with failed and failing States.

## 4.2 Lack of Government in Somalia

*Somalia was persistently regarded as a sovereign state in international law, despite the loss of such critical criterion as a legitimate and effective government.*<sup>27</sup>

### 4.2.1 Introduction

Following the fall of Siyad Barre’s regime in January 1991, the situation in Somalia could roughly be divided into two areas, each of which was itself divisible into two parts. The impact of the collapse, and the inter-relationship between the four areas was complex and varied over time. Accordingly the treatment of them will be similarly divided across the three broad time periods. In the earliest stages there was an

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<sup>25</sup> Roth, *op cit.*, pp. 26-30. This is partially militated against by ideas such as those of ‘democratic governance’. The topic will be dealt with within the discussion of self-determination in Chapter 5 - see below, section 5.2.5 and generally.

<sup>26</sup> Crawford, *op cit.*, p. 46, and further, pp. 177-181. See below, text at n. 114

<sup>27</sup> Chopra, J. ‘Achilles’ Heel in Somalia: Learning from a Conceptual Failure’ (1996) 31 TILJ 3, pp. 495-525, p. 513

approximate north-south split - between, on the one hand, Mogadishu and its environs, and the areas to its south, and on the other, the northern regions. This same split remained during the majority of the period of international intervention, although the northern region split roughly in half, into Isaq-Somaliland and the Darod-Northeast. Finally, following the withdrawal of the international community, the northern split remained, whilst the southern agricultural region seemed to gradually ease away from the situation in Mogadishu and its environs. These approximate divisions will be utilised in the phases of the analysis.

#### *4.2.2 Collapse in the South*

The capital, Mogadishu, which had already been partially devastated as Siyad Barre's power had contracted to just a small part of the city before his final ouster, was quickly engulfed by the consequences of the vacuum of power. Whilst there was some disorder and inter-clan fighting, it was relatively limited in extent in the early months after the fall of the military regime. Ali Mahdi (USC - Hawiye-Abgal) had been proclaimed interim president early in February - the belief being that the USC had finally driven Siyad Barre from power, and so had earned the right to assume power. This was strongly opposed by the other factions - especially those groups that had been opposing the military regime long before the USC was even formed.<sup>28</sup> Some of these dissents appeared to have been appeased by the multi-faction talks in Djibouti in June and July.<sup>29</sup> However, further dissent came from rival factions within the USC, which saw Aideed's (USC - Hawiye-Habar Gedir) group split away and essentially become another rival faction in the city, later known as the Somali Nationalist Alliance (SNA). This was despite a party meeting in July, which had confirmed Ali Mahdi as President and Aideed as party chairperson. The tensions in the city escalated through the year, and finally, when no resolution presented itself, and the lack of basic

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<sup>28</sup> Including the Somali Salvation Democratic Front (SSDF - Darod-Majerteen), based in the northeast of Somalia, the Somali Nationalist Movement (SNM- primarily Isaq, with some Dir), based in the north west, and the Somali Patriotic Movement (SPM - primarily Darod-Ogadeni), based in the south around Kismayo - Tulumello, A. 'Rethinking Somalia's "Clanism"' (1993) 6 Harvard Human Rights Journal, pp. 230-234

See above, section 3.3

<sup>29</sup> Omar, M.O. 'Somalia: A Nation Driven to Despair' (New Delhi: Somali Publications, 1996) pp. 1-8

administrative structures showed their effect, the inevitable use of the mass of weaponry available had to occur. Between November 1991 and April 1992, Mogadishu became a blood-bath of inter faction fighting, with an estimated death toll of between 20,000 and 30,000. Numerous warlords and gangs were involved, but it was anarchic warfare on a devastating scale. The fight was purely to gain or keep resources, and to eliminate any opposition - no objectives or strategies could exist beyond these limited purposes.<sup>30</sup>

*Unlike earlier when the clans fought each other with arrows, knives and later with rifles, this time the leaders contending for power exchanged artillery and rocket barrages, causing the death of innocent citizens and the destruction of national and private properties.*<sup>31</sup>

In the region south and south west of Mogadishu, the remnants of Siyad Barre's forces - the Somali National Front (SNF) - had been engaged in conflict with the resident populations of the area. These were primarily the two agro-pastoralist Saab clans - Digil and Rahanweyn - occupying the relatively fertile region between the Juba and Shebeelle rivers. The activities of the SNF included looting, crop burning, destruction of villages, and killing the civilian population. The consequences were refugee flows out of Somalia, famine and death - hence the region became known as the Triangle of Death. The impact was to be more widespread in later months as Somalia's only source of agriculture was destroyed.

As such, there can be little doubt that, following Siyad Barre's ouster, the previous retraction of central authority over the northern areas of Somalia had been matched in the south. By 1991, Somalia lacked not only a government, but any form of

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<sup>30</sup> Bradbury, M. 'Somaliland Country Report' (London: Catholic Institute for International Relations, 1997), p. 13, Sahnoun, M. 'Somalia: The Missed Opportunities' (Washington, DC: United States Institute for Peace, 1994), pp. 8-11

*The fighting was so severe in Mogadishu that most of the remaining infrastructure of the city was destroyed - virtually every building in the central city was ripped apart by artillery shelling, bridges and water lines were blown up, underground utility lines were dug up for the copper wiring they contained*

- Clark, J. "Debacle in Somalia: Failure of the Collective Response", in Damrosch, L.F. (Ed.) 'Enforcing Restraint. Collective Intervention in Internal Conflicts' (New York: Council on Foreign Relations, 1993), pp. 205-239, at p. 211

See above, section 3.3

<sup>31</sup> Omar, *op cit.*, pp. 9-18, quotation at p. 9

governmental structure, general infrastructure, or societal cohesion. It is arguable that this condition began earlier, possibly even as far back as 1988 with the initial repression of the SNM resistance in the north. Whatever the precise interpretation of this:

*Following the uprising and overthrow of the legitimate government, whatever common interest there had been between these groups ceased and they began to fight each other. The central government ceased to exist.*<sup>32</sup>

In traditional international law terms, the only possible classification was in terms of revolutionary overthrow of a government - one regime had been ousted, and had not yet been replaced. As such, there was simply a temporary lack of central administration. Whilst this might have caused some diminution in the ability of Somalia to act internationally, no question of Statehood arose.<sup>33</sup> This remained true despite the extent of the internal collapse that seemed to occur.

*There was full-scale civil war, and all vestiges of civil society and government institutions had disappeared.*<sup>34</sup>

*There is no government in Somalia. Law and order have broken down - anarchy prevails.*<sup>35</sup>

In some cases it is reasonable to assert that the absence of a government contributed to these processes, especially the famine, due to the lack of infrastructure and order to allow what little aid there was to reach those in need of it.<sup>36</sup> It was this destruction and devastation, as well as the lack of infrastructure, which was eventually to prompt the international community to become involved in Somalia.<sup>37</sup> For this reason, the

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<sup>32</sup> *Somalia v. Woodhouse, Drake* [1992] 3 WLR 744, 746

<sup>33</sup> Above, text at nn. 10-13

<sup>34</sup> Hirsch, J.L. and Oakley, R.B. 'Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping' (Washington, DC: U.S. Institute of Peace Press, 1995), p. 12

<sup>35</sup> Former U.S. President George Bush, Public address, quoted in Omar, *op cit.*, p. 49

<sup>36</sup> "The problem was never predominantly insufficient food but the absence of political authority and security for civil society to operate." - Lyons, T. and Samatar, A.I. 'Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction' (Washington, DC: Brookings Institution, 1995), p. 32. This reality was to persist during each phase of the international involvement, seriously hindering the process delivering humanitarian aid - Hirsch and Oakley, *op cit.*, pp. 20-25 *et seq.*

<sup>37</sup> It is arguable that this is in fact an inherent problem with UN intervention in situations of governmental collapse. The weight of principles of independence and sovereignty means that such



international focus was on a Somalia in collapse, seen through the suffering in the south, which was a consequence of the civil war and anarchy in Mogadishu.<sup>38</sup>

Throughout, in accordance with the conventional reasoning on loss of government, the treatment was of a State that temporarily lacked a central administration. There was no acknowledgement of the stage beyond 'normal' revolutionary transition - the situation of State failure was not acknowledged.

#### 4.2.3 *Northern Reversion and Separation*

The characterisation of Somalia based upon events in the southern half did not truly describe the entire picture. Whilst the areas north of Mogadishu were by no means isolated from the conflicts in the south, they had gradually diverged from them. The Northeast area, stretching from the plains above Mogadishu all the way to the northern coasts, very quickly adapted to the post-Mogadishu era. With the Somali capital city engulfed by its own internal civil war, and the southern agricultural region wracked with violence and famine, this central Darod nomadic region was left to slip back into its traditional, pre-colonial clan based existence. The dominant Somali Salvation Democratic Front (SSDF - Darod-Majerteen) swiftly dealt with what residual conflict there was in the region, but remained aloof from the conflicts elsewhere in the country, not least by avoiding the confrontational step of seeking independence. Instead, the clan-homogeneity in the region allowed the traditional structures to re-emerge.

A similar, if more pronounced, sequence took place in the Northwest region, which corresponded with what had previously been the British colony of Somaliland. In a

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intervention will not occur until the collapse is virtually complete, in which case it is likely to face almost insurmountable challenges to its success, as was the case in Somalia - Murphy, S.D. 'Nation-building: A Look At Somalia' (1995) 3 *Tulane Journal of International and Comparative Law* 1-2, pp. 41-42

<sup>38</sup> Ramlogan, R. 'Towards A New Vision of World Security: The United Nations Security Council and the Lessons of Somalia' (1993) 16 *Houston Journal of International Law* 2, pp. 213-260, pp. 236-237; Sahnoun, *op cit.*, 25-41; United Nations Peacekeeping Operations: *Somalia* - UNOSOM I (Dept. of Public Information - 21 March 1997), pp. 2-3

SC Res. 767 (27 July 1992) Authorised emergency airlift to provide food and medical supplies to the 'Triangle of Death'; SC Res. 775 (28 August 1992) Authorised increase of UNOSOM peacekeeping troops, with the emphasis on securing the humanitarian environment.

sense, its future had been marked earlier than for the rest of Somalia. There had been dissent at unification in 1960, which had never completely disappeared. When Siyad Barre gained power in 1969, the dissent had remained a factor, despite attempts at clan balancing within the government. Following the Ogaden defeat in 1978, the resistance to Siyad Barre, and to the consequences of his regime - in particular the refugee flows into the northern regions - had grown. The Somali Nationalist Movement (SNM) was formed in 1981, and reflected the Isaq domination of the region, albeit with a significant, if small, Darod-Warsangali and -Dolbahante, and Dir-Gadabursi and -Issa presence. The strength that the SNM found from the population in the north was unlike that experienced by other clan-factions elsewhere in the country. The reason was not purely the historical sentiment. It was a result of the manner of treatment of the people during Siyad Barre's rule.

*From the early 1980s, the north was administered by increasingly harsh military rule emanating from the capital, with savage reprisals meted out to the assumedly pro-SNM local population who were subject to severe economic as well as political harassment. The north... began to look and feel like a downtrodden colony under a foreign military tyranny.<sup>39</sup>*

The resistance of the movement escalated through the 1980s, although it remained based in Ethiopian territory. However, the Somali-Ethiopian agreement of 1988 had forced a final push against the government in the north. The response from Siyad Barre's increasingly pressured regime had been swift and brutal. As the violence escalated in the south, and as Siyad Barre's regime contracted, so did its influence in the north. Sporadic violence and anarchy persisted in the north as the civil war escalated in the south, through 1988-1991. Once the central government had fallen, indeed even before it had, when its power was contracting towards Mogadishu, the SNM had sought to secure control of the north, although with little thought of anything other than stability. However, the swift assumption of control of 'Somalia' by the USC in Mogadishu served to fan the flames of anti-southern sentiments. The initial SNM response was to send a delegation to talk with the USC leadership about possible future federal structures for Somalia, but with little effect. Meanwhile, the

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<sup>39</sup> Lewis, I.M. 'Understanding Somalia: Guide to Culture, History and Social Institutions' 2 Edn. (London: HAAN, 1993), pp. 67-68

effective power vacuum in the north led Djibouti to seek slight territorial gains along the Somali border. Although easily defeated by the SNM, a warning had been signalled.

The final stage came not from the SNM, but from the clan elders, who had regained their traditional position - the entire SNM movement had been a people's movement, loyal to traditional Somali values. Various *Guurti* - meetings of clan elders - built-up to the Great Conference/*Guurti* of Northern Peoples in Burao in May. Here the call was made for independence, which SNM Chairman Abdurahman Ahmed Ali 'Tour'<sup>40</sup> reluctantly accepted.<sup>41</sup>

*On 18 May 1991 the Somali National Movement (SNM) and the people of north-west Somalia seceded from Somalia and reclaimed their independent sovereignty as the 'Republic of Somaliland'. By revoking the 1960 Act of Union, which had united the colonial territories of the British Somaliland Protectorate and Italian Somalia, 'Somalilanders' signalled the demise of the Republic of Somalia.'*<sup>42</sup>

It is arguable that this verdict of the death of Somalia was at least premature. The early months, and even years, of the 'Republic of Somaliland' were not obviously those of an independent State. The SNM did largely secure control and stability across the region. However, small inter-faction conflicts flared, and the mainstay of settlements and actual organisation of the society on the ground remained with the *Guurti*.<sup>43</sup> Nevertheless, both internationally and in the rest of Somalia, it remained perceived as just another region of the single State of Somalia, as did the Darod-northeast. Likewise, the fact of these two divergent areas of the State did not do anything to alter the initial basic perception of a State in the process of revolutionary governmental change.

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<sup>40</sup> *Alt* Abdel-Rahman; Abdirahman; Abdulrahman, but known as 'Tuur'

<sup>41</sup> Drysdale, J. 'Somaliland: The Anatomy of Secession' (Brighton: Global Stats, 1992), pp. 19-36; Gilkes, P.S. 'Two Wasted Years: The Republic of Somaliland, 1991-1993' (London: Save the Children Fund, 1993), pp. 3-8; Lewis, *op cit.*, pp. 74-77

<sup>42</sup> Bradbury, *op cit.*, p. 2

<sup>43</sup> Gilkes, *op cit.*, pp. 9-36, 41-47; Omar, *op cit.*, pp. 109-141

### 4.3 Somali Sovereignty

#### 4.3.1 UNOSOM & UNITAF - Intervention

The UN involvement in Somalia had not begun in earnest until January 1992, when the situation in Mogadishu had collapsed. The early focus of the UN Operation in Somalia (UNOSOM) was upon seeking to end the conflict in the city, and thereby securing the future of the rest of the State through largely diplomatic means.<sup>44</sup> The focus of the resolutions establishing UNOSOM was “Somalia”, and simply referred to the “parties, movements and factions” within it, as opposed to any specific government. The aim of the intervention was the “reconciliation and reconstruction” of Somalia.<sup>45</sup> This continued legal existence of the State of Somalia presented the UN with potential difficulties in terms of authorising intervention, which could not contravene Article 2(7) of the Charter. Accordingly, even in these early resolutions, the situation was referred to as “a threat to international peace and security” to bring it within the auspices of Chapter VII. Despite some initial success, the scale of the collapse in the south, coupled with the various institutional and personnel problems experienced by the mission meant that these early efforts proved to be largely fruitless.<sup>46</sup>

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<sup>44</sup> Initial UN involvement was focused on arms embargoes and cease-fires, supported by a minimal presence, under the steerage of the Secretary-General’s Special Representative, Mohamed Sahnoun. However, differences with UN headquarters over his manner of carrying out his mandate caused him to resign in October 1992, to be replaced by Ismat Kittani. Aside from the inherent destabilising effect of such a change, Sahnoun’s style of dealing with the various factions was widely regarded as more sympathetic, and therefore more likely to succeed than Kittani’s. A further difficulty for the UN was the new Secretary-General, Boutros Boutros-Ghali, who had been appointed in December 1991. Despite his best efforts, many Somalis remained wary of him due to the role he had previously played in the Egyptian government, when it had maintained quite warm relations with Siyad Barre’s Somali government.

<sup>45</sup> SC Res. 733 (23 January 1992) Under Chapter VII called for cease-fire and arms embargo; SC Res. 746 (17 March 1992) Requests the Secretary-General to pursue humanitarian effort in Somalia, and asks parties to respect security of UN technical team recommended in the resolution; SC Res. 751 (24 April 1992) Agreed in principle to establish UNOSOM, to consist of 500 peacekeeping troops and to deploy immediately 50 observers to monitor cease-fire in Mogadishu

<sup>46</sup> Lewis, I. and Mayall, J. “Somalia”, in Mayall, J. (Ed.) ‘The New Interventionism, 1991-1994: United Nations Experience in Cambodia, former Yugoslavia and Somalia’ (Cambridge: CUP, 1996), pp. 94-124, at pp. 107-110; Murphy, *op cit.*, pp. 19-43, at pp. 24-25; Omar, *op cit.*, pp. 19-66; Ramlogan, *op cit.*, pp. 235-236, 250; Sahnoun, *op cit.*, 15-21

The UN's lack of success coincided with US domestic political factors<sup>47</sup>, and with the international perception of the problem as characterised by the famine and suffering in the south. This combination was sufficient to prompt an agreement between the US and the UN for a greater degree of military involvement. The UN Task Force (UNITAF) was a US-led multi-national force operating under a UN mandate. Its mandate was set out in December 1992 in Security Council Resolution 794.

*10. Acting under Chapter VII of the Charter of the United Nations, authorizes the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia*<sup>48</sup>

For the first time in its history, the UN had authorised intervention under Chapter VII on humanitarian grounds.<sup>49</sup> In addition, the previously maintained pretence of invitation from the government in the form of various agreements with numerous factions was dropped “since no government existed with the authority to issue such an invitation.”<sup>50</sup> Nevertheless, the Resolution did make reference in its preamble to “the urgent calls from Somalia for the international community to take measures to ensure the delivery of humanitarian assistance”. The reliance on Chapter VII meant that an invitation from Somalia was not a legal requirement, but this reference to non-

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<sup>47</sup> For a discussion of the US domestic political activities surrounding ‘Operation Restore Hope’, see Hirsch and Oakley, *op cit.*, pp. 35-47. Also: Clark, *op cit.*, pp. 225-228; Lewis and Mayall, *op cit.*, p. 110

<sup>48</sup> SC Res. 794 (3 December 1992)

However, it has been pointed out that in SC Res. 794, there was just the one reference to a threat to international peace and security, contrasting with eighteen uses of the word ‘humanitarian’.

*UN Charter provisions were being stretched to the limit to accommodate legitimate collective forcible humanitarian intervention within a rubric which had not envisaged it.*

- Ramsbotham, O. and Woodhouse, T. ‘Humanitarian Intervention in Contemporary Conflict: A Reconceptualization’ (Cambridge: Polity, 1996), p. 207. But *cf.* Sahnoun, *op cit.*, pp. 45-50

<sup>49</sup> Murphy, *op cit.*, pp. 33-38.

This aspect of the conflict has created a significant debate in itself. See further, for example: Crawford, S.M. ‘U.N. Humanitarian Intervention in Somalia’ (1993) 3 TLCP 1, pp. 273-291; Gordon, R.E. ‘Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti’ (1996) 31 TILJ 1, pp. 43-56; Helton, A.C. ‘Opinion - The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign’ (1992) 4 International Journal of Refugee Law 3, pp. 373-375; Hutchinson, M.R. ‘Restoring Hope: U.N. Security Council Resolutions For Somalia and an Expanded Doctrine of Humanitarian Intervention’ (1993) 34 Harv. ILJ 2, pp. 624-640

<sup>50</sup> Lewis and Mayall, *op cit.*, p. 94

specified “calls from Somalia” sought to allay possible fears of UN-US imperialism and interventionism - the international community still regarded Somalia as a State, just one without a single voice through which to speak.<sup>51</sup>

Although the view was almost certainly not present at the time, it is possible to argue that this caveat represented recognition of a ‘peoples sovereignty’, in the absence of (a voice of the) State sovereignty.<sup>52</sup> However, the fact of the UN’s reference in practice to only a small amount of the population serves to defeat this argument. Their reference was primarily to the USC, and some other factions allied with it, which supported intervention, despite strong and vociferous opposition from the SNA. In addition, little reference was made to the areas outside of the control of the Mogadishu factions, especially the two northern areas.

A further caveat in the preamble to Resolution 794 was:

*Recognizing the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature requiring an immediate and exceptional response,*

The Security Council recognised the potentially undesirable precedential role that the intervention could play, such that this was a further attempt to allay fears of imperialism and western domination. Nevertheless, the underlying reality of the situation for the Security Council was that, having failed to act, or even to have a UN presence in Somalia, for the first year of the conflict, there was suddenly immense pressure as a result of the world media’s portrayal of the worst kind of humanitarian disaster - the ‘CNN-effect’ - which prioritised swift action over legal niceties.

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<sup>51</sup> The lack of government had also contributed to the delay in UN involvement. The UN was only used to dealing with governments of States, as opposed to other sub-statal groupings - Ramsbotham and Woodhouse, pp. 200-201. See also: Ramlogan, *op cit.*, p. 230

However, the alternative view has also been expressed:

*[T]he lack of an effective government in Somalia actually helped the Security Council in reaching its mandate under chapter VII... Absent a legitimate authority which could speak for the entire state, the Security Council could point to any number of secondary groups within Somalia as a source of invitation for U.N. intervention.*

- Hutchinson, *op cit.*, pp. 632-633

<sup>52</sup> The idea of peoples sovereignty, as opposed to sovereign’s sovereignty, as the foundation of State sovereignty is expressed in: Reisman, W.M. ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) 84 AJIL 4, pp. 866-876, at p. 869. See further below, Chapter 5, text at n. 82

*Notwithstanding the institutional bias of the UN toward governments... public outcry from repeated exposure to innocent children starving forces a new interpretation of "sovereign".*<sup>53</sup>

Despite these possible suggestions of compromise to Somalia's sovereignty, UNITAF's brief was narrowly defined, to secure internal stability sufficient to facilitate the provision of humanitarian aid. It was an unprecedented operation, carried out in severe conditions, with inadequately established communications procedures between the UN and US, and between military and diplomatic arms of the operation. Nevertheless, within a few weeks, partial successes had been achieved in terms of securing supply routes for aid to the southern regions. However, such successes were necessarily temporary in that they relied on UNITAF's physical presence. In addition, the limitations UNITAF placed upon itself, and in its conception of its own mandate, meant its functions were essentially short-term. More long-term solutions would require a further degree of intervention, and domestic involvement - including re-establishing a police presence in Mogadishu, disarming factions and empowering clan elders - which would constitute a further degree of compromise to Somali sovereignty.<sup>54</sup>

#### 4.3.2 *The Transitional National Council - Somali Sovereignty?*

During the period of the UNITAF mission, the efforts of Secretary-General Boutros-Ghali, and of his Special Representative Ismat Kittani, were focused on political settlement at the State level, with the planned Addis Ababa conferences of the major factions. Following the preliminary meeting in January 1993, and the Humanitarian Conference in early March,<sup>55</sup> the political Conference of National Reconciliation took place from 15-27 March.<sup>55</sup> The conference was attended by all of the main Somali factions, from Mogadishu and from those elsewhere in the country, including the SSDF, but with the one notable exception of the SNM or any other representatives

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<sup>53</sup> Clark, *op cit.*, pp. 217-223, and quotation at p. 235

<sup>54</sup> Hirsch and Oakley, *op cit.*, pp. 17-33, 49-79, 81-93; Lewis and Mayall, *op cit.*, pp. 110-113; Lyons and Samatar, *op cit.*, pp. 25-43; Murphy, *op cit.*, pp. 26-28

Such aims had been key tenets of Sahnoun's approach, but were de-prioritised by Kittani - see above, n.

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<sup>55</sup> Omar, *op cit.*, pp. 67-73

from Somaliland. The delegates included representatives from religious and women's groups, NGOs, as well as intellectuals and elders, in addition to the main constituent delegations from the political factions.

The political factions formed into two groups, allied respectively with Ali Mahdi and Aideed, illustrating the political impasse that the Mogadishu conflict represented. This spread into the conference, which had originally only been scheduled to last five days, but eventually lasted for two weeks. Despite some of its characteristics of traditional Somali society, the outcome of the Conference was negotiated by the political factions, and was actually triggered by UN action. When the Security Council passed Resolution 814, on 26 March, which provided for an expanded UN role in Somalia, they also precipitated a final conclave of the faction leaders. After some twelve hours of negotiation on 27 March, they emerged with a final agreement.<sup>56</sup> The Agreement assured that the Somali leaders would, "with the assistance of UNOSOM", re-establish "a secure environment for relief, reconstruction and rehabilitation". However, the main tenet of the Agreement was "the establishment of transitional mechanisms", which would have two years to "prepare the country for a stable and democratic future". The primary means of achieving this was to be the Transitional National Council (TNC), which was to represent the various regions of Somalia, and of Mogadishu, as well as the fifteen political factions present at the meeting.<sup>57</sup>

The composition of the TNC was largely based upon regional representation, despite Somalia's traditional nomadic composition. In addition, no provision was made as to the definition of the regions, the implementation process, the problem of Somaliland, and the time-scale of the scheme. Perhaps unsurprisingly then, like so many previous agreements, no further progress was ever made.<sup>58</sup>

Despite the failure to make any progress on the establishment of the TNC, the Addis Ababa process does raise a number of issues relating to the sovereignty of Somalia. It

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<sup>56</sup> Text of the Addis Ababa Agreement reproduced in Omar, *ibid.*, pp. 305-314

<sup>57</sup> Bradbury, *op cit.*, pp. 14-15; Lewis and Mayall, *op cit.*, pp. 113-115; Lyons and Samatar, *op cit.*, pp. 44-47, 49-52; Omar, *op cit.*, pp. 81-108; 'Somalia - UNOSOM I', *op cit.*, p. 4

<sup>58</sup> Hirsch and Oakley, *op cit.*, pp. 93-99; Omar, *op cit.*, 142-162



again raises the concept of a peoples sovereignty in the absence of government. Whilst concerns must remain, including the absence of any representatives of Somaliland, as well as the manner of its constitution, and of the role played in that process by external actors - notably the UN and the government of Ethiopia. With regard to the idea of the conference representing a form of Somali sovereignty, serious doubts must persist. The foundation of a government's right to represent a State externally rests on both its legal and practical existence - upon its *de jure* and *de facto* control.<sup>59</sup> The reality of the Addis Ababa Agreement, whatever the authenticity of the actual Conference, was that it was an agreement concluded solely by representatives of the fifteen political factions. None of those factions individually could have been, or was, regarded as being the government of Somalia. If such an idea as peoples sovereignty is to be developed in the context of governmental failure, then the individuals taken to represent the population would presumably have to demonstrate some form of legitimacy more than merely being warlords with enough weaponry and personnel to dominate an area of the anarchic and devastated (former) capital city, or of the territory around it.

This aspect of sovereignty comes further into focus in the actual terms of the Agreement. The first statement in the Agreement detailing the TNC declares that it will "be the repository of Somali sovereignty". The precise meaning of this is obscure, and no explanation of it has been offered from within Somalia. Given that the TNC was never formed, the matter is, to a certain extent, of purely academic interest. However, it does highlight the interesting and crucial question: "[W]hen the whole state is breaking down - with whom does sovereignty ultimately reside?"<sup>60</sup>

The only apparent precedent for this form of set-up was the then recent experience in Cambodia. During the transition period there, the Supreme National Council (SNC) had been established to embody Cambodia's "independence, sovereignty and unity". Whilst this body had originated in a proposal from the five Permanent Members of the

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<sup>59</sup> See above, text at nn. 20-26

<sup>60</sup> Sahnoun, *op cit.*, p. 49

Security Council (P-5)<sup>61</sup>, it had been accepted by the two main groups in Cambodia - the then incumbent regime of the State of Cambodia (SOC), which had held effective control since January 1979, and the remains of the Royal government in exile, allied with the other major opposition groups, collectively known as the Coalition Government of Democratic Kampuchea (CGDK), which included the then accredited UN representative.<sup>62</sup> These two groups were accepted internally and externally as representing the full range of possible authority regimes for the entirety of Cambodia. Accordingly, no opposition was forthcoming to their right to agree to take on such a mantle. The seal on this was set when Prince Norodom Sihanouk accepted the position as Chair and Head of the SNC.<sup>63</sup> He had been crowned King in 1941, and since then had variously been President, Prime Minister, or Head of Government, in numerous subsequent regimes, never being far from the centre, and always being regarded as the national leader, whether he actually held such a position or not.

The position of the SNC had been confirmed in the Paris Agreement (1991), which also confirmed its role as representing Cambodia externally and its right to occupy the UN seat.<sup>64</sup> This process, and the Paris Agreement specifically, served to retain Cambodian sovereignty, and to provide a body with sufficient authority, in the absence of a single recognised government, to delegate specific administrative authority to the UN Transitional Authority for Cambodia (UNTAC). UNTAC itself was mandated by the Security Council in Resolution 745, and its role was to administer Cambodia insofar as was necessary to ensure that free and fair elections could be held.<sup>65</sup> This meant that it had:

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<sup>61</sup> Peou, S. 'Conflict Neutralization in the Cambodia War: From Battlefield to Ballot-Box' (Kuala Lumpur: OUP, 1997), pp. 93-95. Although the first incarnation of the idea originated from an earlier Australian proposal - pp. 91-93

<sup>62</sup> Heininger, J.E. 'Peacekeeping in Transition: The United Nations in Cambodia' (New York: Twentieth Century Fund, 1994), pp. 16-21

<sup>63</sup> Keesings, Vol. 36, 37712; Vol. 37, 38343

<sup>64</sup> The Agreement on A Comprehensive Political Settlement of the Cambodian Conflict (23 October 1991) reprinted in 31 ILM 183. See for example: Doyle, M.W. 'U.N. Peacekeeping in Cambodia: UNTAC's Civil Mandate' (Boulder, CO and London: Lynne Rienner, 1995), pp. 25-26; Ratner, S.R. 'The Cambodia Settlement Agreements' (1993) 87 AJIL 1, pp. 1-41  
The Agreement was signed as between nineteen States. Cambodia's assent was given by the individual signatures of the twelve members of the SNC - Heininger, *op cit.*, p. 31

<sup>65</sup> SC Res. 745 (28 February 1992)

*[“Direct control” over] ...all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security, and information.<sup>66</sup>*

Whilst *sui generis*, the Cambodian process served to establish a means through which an extant State could speak in the absence of an agreed and recognised government. However, the nature of the resultant entity, the SNC, remains unclear. It was never intended to replace the then extant SOC regime, or for that matter the CGDK, which were to remain in place, but subject to UNTAC oversight. Instead, the SNC was to be “largely symbolic and advisory”.<sup>67</sup> Its relationship with the UN was complex - created by the Paris Agreement, it also in that same agreement delegated authority to UNTAC, and the UN Special Representative, who nevertheless had to take full account of the views of the SNC, but ultimately did not have to comply with them. UNTAC had ‘legitimate authority’, but it was authority based upon “consent and not coercive power”.<sup>68</sup> As such, “the idea of government was set aside” and the SNC was simply “an entity all states could accept as capable of delegating governmental functions to the United Nations”.<sup>69</sup> Whatever its precise nature, the process illustrated a perhaps not previously utilised separability between the possession of sovereignty (the State) and its exercise (the government, or possibly the people). Whilst there were aspects of doubt, not least as to the level of external influence<sup>70</sup>, the fact remained that there was broad internal political support for the process from the two competing governmental regimes. This position was also apparently backed-up by widespread domestic

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This resolution built upon the mandate set forth in Annex 1 to the Paris Agreement.

<sup>66</sup> Paris Agreement, Art 6

<sup>67</sup> Findlay, T. ‘Cambodia: The Legacy and Lessons of UNTAC’ (New York: OUP, 1995), pp. 8-10, quotation at p. 8

Another perspective on its importance, as well as its status is:

*The SNC was a part - indeed the symbolically vital Cambodian part - of the circle of authority in Cambodia, though it lacked the resources or coherence it would have needed to have governing effect.*

- Doyle, M.W. and Suntharalingham, N. ‘The UN in Cambodia: Lessons for Complex Peacekeeping’ (1994) 1 International Peacekeeping 2, pp. 117-147, p. 120

<sup>68</sup> Peou, *op cit.*, pp. 95-106, quotations at p. 97

<sup>69</sup> Ratner, *op cit.*, p. 40

<sup>70</sup> For example: “On October, 23, 1991, the rebels and the government, under pressure from their various sponsors, signed the Paris Agreement.” [Emphasis added] - Vu, N.T. ‘The Holding of Free and Fair Elections in Cambodia: The Achievement of the United Nations’ Impossible Mission’ (1995) 16 Michigan Journal of International Law 4, pp. 1177-1241, at p. 1186

support. These two factors almost certainly sealed the ultimate (relative) success of the process.<sup>71</sup>

The contrasts between the Cambodian SNC and the proposed Somali TNC are many and various. In addition to the relative legitimacy of the two Cambodian groups as opposed to the fifteen Somali ones, between the two they maintained effective control over the whole of Cambodia. In Somalia, the fifteen basically controlled very little. Even the SSDF did not so much control the northeast as possess an administrative role in a region dominated by the Darod clan. And of course the major exception of Somaliland remained. The SNC was conceived of to deal with the problem of a functioning State's lack of a clear government, as a result of a number of successful revolutions, including varying degrees of external influence and involvement. The TNC was conceived of in a State that had failed in all major respects. Thus, whilst the existence of a Cambodian sovereignty was undeniable, albeit without a clear voice for it; the Somali sovereignty was at least in a questionable position - although in terms of traditional concepts such a situation is hard to deal with. Finally, the SNC was established to delegate a specific authority to the UN that was deemed necessary to ensure a transition to democratic governance, whilst the TNC was envisaged as holding a much greater role, with an unclear relationship with the UN<sup>72</sup>, and was charged with the task of essentially rebuilding the Somali State.

It would appear that the SNC was a confirmation that Cambodia was in the process of failure. As such, it was unable to exercise governmental functions, and represent itself internationally. This was the justification of the unique process of the SNC, which had the relatively limited functions of maintaining the external existence of the State, and facilitating the transition to more traditional governmental control. Whilst the same assessment of the proposed TNC for Somalia could have applied, it is arguable that the extent of its failure had progressed too far, and its nature was too fragmented and destructive. The proof of this was in the realities of practice - the fact remained that

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<sup>71</sup> On the outcome of the electoral process in Cambodia, see for example: Shawcross, W. 'Cambodia's New Deal' (Washington, DC: Carnegie Endowment for International Peace, 1994); Vu, N.T. 'The Cambodian Elections and the Benefits of Legitimacy' (1996) 20 FFWA 1, pp. 81-102

<sup>72</sup> See further below, text at n. 90

the TNC never advanced from the printed page. Instead, the next phase of the UN's activity took centre stage, which process itself raised further issues of sovereignty in the failed State.

#### 4.3.3 UNOSOM II - UN Sovereignty?

The US government had only ever conceived of the role of UNITAF as short term. After less than two months, early in 1993, the need to hand control back to the UN became clear. However, the UN had not always shared this view, such that when UNOSOM II did take-over from the US-led coalition in May 1993, there was a considerable lack of co-ordination and communication. UNOSOM II began its operations with insufficient personnel and equipment, which contributed to low staff morale. The operation itself was again unprecedented - it included "to assist" in: provision of relief and economic rehabilitation of Somalia, repatriation of refugees, promotion and advancement of political reconciliation, re-establishment of the police and restoring law and order.<sup>73</sup> As well as being under-prepared, the operation proved to be bureaucratically unwieldy, not least because it comprised three distinct arms - military, humanitarian, and political<sup>74</sup> - with 20,000 peacekeeping troops, 8,000 logistical support staff, and 3,000 civilian personnel. Finally, the infrastructure the operation brought with it - such as pre-fabricated buildings, vehicles, office equipment and residential resources - only served to further alienate the mission from the Somali population. So many of these problems were to have their worst effect when the mission faced a major crisis just one month after its arrival.<sup>75</sup>

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<sup>73</sup> SC Res. 814 (26 March 1993).

US Ambassador to the UN, Madeleine Albright, addressing the Security Council, described it as "an unprecedented enterprise aimed at nothing less than the restoration of an entire country" - quoted in Hirsch and Oakley, *op cit.*, p. 111; and, Omar, *op cit.*, p. 55

<sup>74</sup> Annan, K. 'Peace-keeping in Situations of Civil War. (Annual United Nations Issue)' (1994) 26 NYUJIL&P 4, pp. 623-631, at p. 625:

*[T]he instability inherent in civil war makes a purely humanitarian response both dangerous and impractical... [A]ll three forms of intervention open to the international community - humanitarian, security and political - must be closely and carefully coordinated if our presence is to be effective.*

<sup>75</sup> Bradbury, *op cit.* pp. 15-17, 40-42; Hirsch and Oakley, *op cit.*, pp. 101-114; Lewis and Mayall, *op cit.*, pp. 115-116; Lyons and Samatar, *op cit.*, pp. 52-57; Murphy, *op cit.*, pp. 28-29; 'Somalia - UNOSOM I', *op cit.*, pp. 4-5; 'United Nations Peacekeeping Operations: Somalia - UNOSOM II' (Dept. of Public Information - 31 August 1996 & 21 March 1997), pp. 1-3

UNOSOM II's attempt to close down a SNA radio station in Mogadishu, part of their intolerance of Aideed's posturing, along with their policy of weapons inspection, led the SNA to launch an attack on Pakistani UN troops engaged in patrols and not prepared for direct confrontation, on 5 June 1993. By the time that reinforcements arrived, a number of UN personnel had been killed, and some of their bodies had been mutilated.<sup>76</sup> The UN response was Security Council Resolution 837, which reaffirmed the Secretary-General's authorisation to use "all necessary measures" against those responsible and specifically named the USC/SNA in its preamble. This was backed on 17 June when the UN effectively issued a warrant for Aideed's arrest.<sup>77</sup> This process caused significant tension within the UN forces, even leading to some member States issuing their own orders to their troops in contravention of the UN orders. In addition, it signalled the end of any perceived impartiality the UN might have held. Over succeeding weeks and months, the UN presence came to be seen as an anti-SNA force, exacerbated by a US attack on the SNA headquarters in July. The result was waning support for and co-operation with the entire UNOSOM II mission, as well as a degree of increased internal support for Aideed and the SNA. Later attempts by the Security Council to rectify matters proved futile.<sup>78</sup>

The final straw for UNOSOM II proved to be the US withdrawal. On 3 October, US Army Rangers attempted an attack on the SNA leadership. During the raid, SNA retaliation was severe: two US helicopters were shot down, 18 US soldiers were killed and 78 wounded, alongside between 500 and 1,000 Somali casualties.<sup>79</sup> The media

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<sup>76</sup> 25 UN soldiers killed, 10 missing, and 54 wounded - '*Somalia - UNOSOM II*', *op cit.*, pp. 3-4. See more specifically: Freeman, K.S. 'Punishing Attacks on United Nations Peacekeepers: A Case Study of Somalia' (1994) 8 *Emory International Law Review* 2, pp. 845-875

<sup>77</sup> SC Res. 837 (6 June 1993) & S/26022 Report of the Secretary-General on the Implementation of Security Council Resolution 837, 1 July 1993. In addition, a \$20,000 reward was placed on Aideed's head. This has been described as "a ridiculous (as well as humiliating) gesture in clan society!" - Adam, H.M. "Somalia: A Terrible Beauty Being Born?", in Zartman, I.W. (Ed.) 'Collapsed States: The Disintegration and Restoration of Legitimate Authority' (Boulder, CO and London: Lynne Rienner, 1995), pp. 69-89, at p. 85

<sup>78</sup> SC Res. 885 (16 November 1993) - Suspended the warrant for Aideed's arrest and established a Commission of Inquiry to investigate the attack of 5 June

<sup>79</sup> According to Hirsch and Oakley, *op cit.*, p. 123. Lyons and Samatar, *op cit.*, p. 59, quote the number as: 18 US soldiers killed and 84 wounded, plus 1 helicopter pilot captured; 1 Malaysian peacekeeper killed and 7 wounded; 312 Somalis killed and 814 wounded.

pictures, in particular of one US corpse being dragged through the streets of Mogadishu, finally forced the US government's hand - the so-called "CNN factor"<sup>80</sup>. President Clinton swiftly announced that the US would be pulling out of the UNOSOM II mission.<sup>81</sup> The final US withdrawals did not occur until March 1994, when UNOSOM II was downsized significantly. In that interim period the focus of the international presence returned to the political situation and attempts to resurrect the TNC process. Although slight progress appeared to be made, along with a lull in fighting, the gradual shrinking of UNOSOM II, and the concomitant inability to curb the resurgent power of the various warlords, marked a return of the conflict. When UNOSOM II finally withdrew in March 1995, the situation they left in Mogadishu was depressingly reminiscent of that which had greeted UNITAF on its arrival in December 1992.<sup>82</sup> Since that time, the situation in and around Mogadishu has remained largely unchanged - faction fighting persists, and what *de facto* control there is on behalf of a faction is generally localised and limited.

The mandate for UNOSOM II had been described with similar care to that for UNITAF.<sup>83</sup> However, by the point of the authorisation, the collapse of Somalia was all the more advanced.<sup>84</sup> As a consequence, the UN involvement included elements of civil administration. One such aspect was the attempt to establish district councils, which were to draw in part on clan structures, but which were to be integrate with a

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<sup>80</sup> For example: Annan, *op cit.*, p. 624

<sup>81</sup> The American public had only been told their soldiers were going to aid food delivery. It was supposed to be low-cost restoration of order. When they saw images of violent conflict, the reaction was swift and strong. "In the end, Washington took the advice it had long rejected once before in Vietnam: declare victory and get out." - Lyons and Samatar, *op cit.*, p. 59

<sup>82</sup> Bradbury, *op cit.*, p. 13; Hirsch and Oakley, *op cit.*, pp. 115-148; Lewis and Mayall, *op cit.*, pp. 116-121; Lyons and Samatar, *op cit.*, pp. 57-60; Murphy, *op cit.*, pp. 30-33; Omar, *op cit.*, pp. 278-293; 'Somalia - UNOSOM II', *op cit.*, pp. 4-8

<sup>83</sup> Above, text at n. 73

<sup>84</sup> Adam, *op cit.*, p. 78:

*The visible collapse of the Somali state has lasted half a decade. In some respects the country appears to have reverted to its status of the nineteenth century: no internationally recognized polity; no national administration exercising real authority; no formal legal system; ... no educational and reliable health system; no police and public security services; ... weak officials serving on a voluntary basis surrounded by disruptive, violent bands of armed youths.*

See also: 'Somalia - UNOSOM II', *op cit.*, pp. 2-6

State-wide system.<sup>85</sup> Other aspects included attempting to establish local police forces, justice systems and the Mogadishu Port Operation Corporation, which were almost exclusively focused in the capital. Nevertheless, the international community still did not regard the activities as in any way compromising Somalia's Statehood. The mandates were carefully phrased such that the UN role was only to "assist" the Somali population in these matters.<sup>86</sup> Yet the Security Council's own wordings were at best equivocal, if not confused. As just one example, in a later resolution, the Council welcomed "the progress made by UNOSOM II in establishing the justice and police programmes", with no mention of assisting the Somali population.<sup>87</sup>

The nature and scale of the UNOSOM II involvement in civil administration was again reminiscent of the role of UNTAC in Cambodia. However, again, a number of differences presented themselves. The most obvious was that the UNTAC mandate included fairly specific detail of the areas over which it could exercise "direct... supervision or control", "to ensure a neutral political environment conducive to free and fair elections".<sup>88</sup> These areas were largely listed, and the relationship between UN authorities and Cambodian representatives, largely through the SNC, were worked out. Whilst the actual implementation did not always match this theory, the basic scenario did provide clarity and certainty for both parties. In contrast, UNOSOM II's mandate carried with it vague and far-reaching elements, such as "to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia".<sup>89</sup>

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<sup>85</sup> The system included the appointment of 'Zonal Directors' by UN staff. Since these posts were essentially regional governors, in theory at least, the charge of illegitimate interference was easy to make. More fundamentally, the process reflected the perception of Somalia as a single entity, which was out of step with the practical realities:

*[W]hile placing some emphasis on decentralised political structures, the state-centric political leaning of the United Nations meant that the ultimate aim of the programme was to rebuild a national body politic. This contradicted other tendencies in Somalia that thrived on statelessness.*

- Bradbury, *op cit.*, pp. 14-17, quotation at p. 16. But *cf.*, 'Somalia - UNOSOM II', *op cit.*, p. 7

<sup>86</sup> For a critique of the suitability of the UN bureaucracy for such a function, see: Chopra, *op cit.*, pp. 508-518

<sup>87</sup> SC Res. 923 (31 May 1994)

<sup>88</sup> Paris Agreement, Art 6

<sup>89</sup> SC Res. 814 - above, n. 73



UNTAC's mandate was also based upon the Comprehensive Political Settlement Agreement from the Paris Conference. It was to operate within and alongside a process of internal political reconciliation that was, whilst not without grave problems, still reasonably advanced in its own right. The only similar endorsement of UNOSOM II came from the Addis Ababa Agreement, which made a number of references to UNITAF and UNOSOM. Primarily, these were:

- Requesting assistance in complete disarmament throughout the country, and handover of weapons to UN agents;
- Stressing the need for the external borders of Somalia to be guarded by UNITAF/UNOSOM to "prevent any flow of arms into the country and to prevent violation of the territorial waters of Somalia"; and,
- Calling upon UNOSOM to "assist in the rehabilitation of essential public and social services, and necessary infrastructure".

In addition, one of the roles of the TNC was to "interact, as appropriate, with the international community, including UNOSOM".<sup>90</sup> The content of the Addis Ababa Agreement was much more general than the detail that was included in the Paris Agreement for UNTAC. It also relied on liaison between the UN mission and a Somali body that was never established - the TNC.

In terms of authority, the Addis Ababa Agreement was only agreed to by the fifteen faction leaders. Between them they did not represent even *de facto* authority over a considerable degree of Somalia. The two who were regarded as politically most important - Aideed and Ali Mahdi - between them did not even control the whole capital city. In contrast, the Cambodian consent came from the SNC, which represented all of the main factions, which between them did control the vast majority of Cambodia. The SNC also represented Cambodian sovereignty itself, as well as containing the incumbent governmental regime, and elements of its main opposition and predecessors. As such, it could be argued to have something approaching *de jure* authority, insofar as that was possible, to authorise the UN action. Again, in contrast, the fifteen Somali factions lacked any governmental authority between them, either individually or collectively. They did not even represent the best collection of

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<sup>90</sup> See above, text at n. 72

representative voices, in that they did not account for the SNM or Somaliland, nor did they include the various clan, religious and other groups that had taken part in the rest of the Addis Ababa Conference.<sup>91</sup> Finally, the role played by external elements differs between the two mandates. UNTAC was authorised at an international conference which included the P-5 States - the Cambodians and those who were going to implement the agreements worked it out between them, albeit with some justified accusations of 'pressure' being imposed on the various Cambodian factions.<sup>92</sup> In contrast, the Addis Ababa Agreement was hastily drawn-up basically only by Somali factions, and was so done after the international community had determined to act, when the Security Council had passed the Resolution authorising UNOSOM II on the previous day.

These questions as to mandate and authority, as well as the actual nature of the role played by UNOSOM II, have led to its description variously as "peace-enforcement military administration"<sup>93</sup>, or as "assertive multilateralism"<sup>94</sup>, and its assumption of *de facto* territorial control, at least in Mogadishu, was undeniable.<sup>95</sup> Nevertheless:

*It is important immediately to discount the notion that Somalia may have lost its Statehood (a possible error especially given the scale and extent of UN intervention). The mere fact that a "foreign" legal order is imposed or imposes itself on a State does not necessarily terminate Statehood; neither does the absence of effective government or extensive civil strife obliterate Statehood.*<sup>96</sup>

The grounds for this statement must then be considered. The UN has been described as having operated in a "previously sovereign state"<sup>97</sup>, or in a situation of

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<sup>91</sup> Osinbajo has argued that the Somali leadership "impliedly abdicated authority" to UNOSOM - Osinbajo, Y. 'Legality In A Collapsed State: The Somali Experience' (1996) 45 ICLQ 4, pp. 910-923, at pp. 917-921. This can be criticised in that: the fifteen factions did not represent Somalia, and so did not have the authority to abdicate; and, they actually sought to expressly pass on authority, their only abdication was in failing to establish the TNC. As such, it was their lack of *de facto* or *de jure* authority that left the vacuum which UNOSOM II filled.

<sup>92</sup> See above, n. 70

<sup>93</sup> Lewis, *op cit.*, p. 78

<sup>94</sup> Hirsch and Oakley, *op cit.*, p. 151

<sup>95</sup> Osinbajo, *op cit.*, pp. 912-917. "[T]he United Nations may assert that it properly exercised temporary sovereignty over the territory of Somalia." - Freeman, *op cit.*, pp. 862-863

<sup>96</sup> Osinbajo, *ibid.*, p. 910

<sup>97</sup> Lewis and Mayall, *op cit.*, p. 114.

“statelessness”<sup>98</sup>, or in a “non-existent state”<sup>99</sup>. These though are not terms of art, and lack definition in legal theory. A stronger thesis has been advanced that, whilst Somalia’s Statehood was not compromised, it nevertheless suffered a diminution of sovereignty, for example, in that it lacked the power to make laws or treaties.<sup>100</sup> Arguably then, failure had occurred such that Somalia could no longer perform its Statal functions.<sup>101</sup> Nevertheless, in the absence of alternatives - either newly emerging States, or of sufficient potential for reconstitution, like that in Cambodia - the international community continued to confirm the existence and integrity of Somalia’s Statehood through their treatment of the situation. The lack of existing legal categories meant that the affirmation of its continued Statehood was inevitable. However, this process remained primarily focused on the southern half of Somalia, and the northern half continued to develop in relative isolation.

#### 4.3.4 *Events Beyond Mogadishu*

The period of the UNOSOM II’s involvement remained largely focused on Mogadishu and its surrounds. Some efforts did extend further into the country, but with little general impact. In Mogadishu, the focus was upon rebuilding a society in collapse - trying to replace anarchy with order. However, this situation contrasted significantly with other Somali experiences, both in the Darod-northeast, and in Somaliland.

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“Somalia had in effect forfeited both its juridical and its empirical sovereignty.” - Mayall, J.

“Introduction” in Mayall, *op cit.*, p. 14

<sup>98</sup> Bradbury, *op cit.*, p. 43 and Lewis and Mayall, *ibid.*, p. 94

<sup>99</sup> Ramsbotham and Woodhouse, *op cit.*, p. 196

Another example is the view of Boutros-Ghali, expressed at the World Conference on Human Rights, in Vienna on 14 June 1994, that it falls upon the international community to “replace a failing government” when human rights violations are widespread. He continued:

*[T]he question of international action should come up when States prove to be unworthy of this mission [to protect human rights]... under such circumstances it is up to the international community, i.e. the international world-wide or regional organizations, to take over from failing States.*

- Quoted in: Lubin, W. ‘Towards The International Responsibility Of The United Nations In Human Rights Violations During “Peace-keeping” Operations: The Case of Somalia’ (1994) 52 *International Commission of Jurists Review*, pp. 47-55, at p. 47

<sup>100</sup> Osinbajo, *op cit.*, pp. 910-912, which recalls Wheaton’s idea of loss of government impacting on a State’s actual relations with other States - above, n. 10

<sup>101</sup> Above, section 1.2.1

In the northeast, the years following the fall of Siyad Barre had seen an almost complete reversion to traditional Darod clan structures. Whilst the SSDF did retain a sense of control, it was largely an organisational oversight of basic co-ordinated activities, which relied on the clan structures for their ultimate authority. As just one example, when conflict arose over the leadership of the SSDF at the summer congress in 1994<sup>102</sup>, it was a meeting of the *Isimada* - of the clan elders - that was called to settle it. Whilst they did not achieve a settlement in the short term, the fact of resort to this process, even to deal with what was essentially an internal political struggle for the SSDF, was illustrative of the nature of the society in the region. The aftermath of this conflict is also illustrative of just how far the Darod-northeast was from the events in Mogadishu. During September 1994, a small degree of fighting broke out in the town of Bosaso as a continuation of the internal SSDF conflict. This was the first real fighting in the Darod-northeast since the very early days of the post-Siyad Barre era. The reported result of the conflict was the death of two men. Whilst tragic in itself, it marks an almost unbelievable contrast to the inter-faction civil war, and the international involvement, that had been a reality in Mogadishu since November 1991.<sup>103</sup>

The nature of the clan rule in the Darod-northeast emphasised its distance from the Somali processes at Addis Ababa and beyond. Whilst the SSDF did attend the conference and was a party to the Agreement, they cannot be said to have represented the region in the manner of traditional political process. The SSDF was less a ruling regime, than an organising bureaucracy. It was the *Isimada*, the clan elders, which truly held sway and was the actual ruling regime. But such a structure did not fit the pseudo-international, western political-style approach taken at Addis Ababa, especially at the Agreement stage. Accordingly, whatever mandate UNOSOM II had from the Agreement, its weight in the Darod-northeast was less than in it was in Mogadishu and the south.

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<sup>102</sup> Between incumbent leader General Mohamed Abshir Muse, and his rival Colonel Abdullahi Ysuf [Alt. Abdullahi Youssef Mohammed]

<sup>103</sup> Lewis and Mayall, *op cit.*, p. 107; Somali News Update, Vol. 3, No 21 (13 August 1994); Vol. 3, No 24 (28 September 1994)

This position was even more pronounced for Somaliland, where no representatives either from the SNM or from the *Guurti* played any role in the Addis Ababa Conference or the Agreement. Indeed, the Conference took place at the same time that the Somalilanders were addressing their own future at the Great *Guurti* on National Reconciliation. The original independence process had established an interim regime, due to be replaced by elections in 1993. For the five months leading up to this, the Great *Guurti* was held. Its duration and process allowed many problems to be worked through without external conflicts arising. This was facilitated by it occurring in almost total isolation from the rest of Somalia, including the events in Addis Ababa and the ongoing conflicts. The *Guurti* determined the structure for the next interim government - a lower house of elected representatives and a *guurti* upper house. A new president was also appointed - Mohammed Haji Egal, who had been the last civilian Prime Minister of Somalia, in 1969.

President Egal's regime succeeded in attaining a considerable amount of societal stability, including establishing a police force, civil service, education and taxation systems, and even issuing its own currency and passports. This represented a marked advance from the first two years of 'independence'. It also contrasted with the problems elsewhere in Somalia, and with the aims of UNOSOM II, which was engaged in seeking to establish regional councils.<sup>104</sup> In August 1994, these attempts to impose a central regime over the existing Somaliland structures prompted Egal's government to expel all UNOSOM II personnel from the region.<sup>105</sup> Not only was UNOSOM II without mandate in Somaliland, it was also without a purpose - the societal and infrastructure aims it had in Mogadishu and the south had already been achieved internally in Somaliland. Yet all of these developments failed to secure any international recognition for Somaliland - externally, Somalia remained a single State, which it was believed was located in Mogadishu.<sup>106</sup>

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<sup>104</sup> Above, text at n. 85

<sup>105</sup> Bradbury, *op cit.*, pp. 22-30; Gilkes, *op cit.*, pp. 48-55; Gilkes, P.S. 'Acceptance Not Recognition: The Republic of Somaliland, 1993-1995' (London: Save the Children Fund, 1995); Somalia News Update, Vol. 3, No 22 (27 August 1994) & Vol. 3, No 25 (11 October 1994)

UNOSOM II personnel had been accepted in the region insofar as they were concerned with aid and refugee efforts, despite the lack of mandate in the view of the Somaliland government.

<sup>106</sup> Bradbury, *op cit.*, 19-22; Gilkes, *op cit.*, pp. 37-40; Lewis and Mayall, *op cit.*, p. 107

The final aspect of the apparent separation of the various 'Somalias' was seen in the area that had been known as the Triangle of Death. During 1993, the events in Mogadishu had dominated the political and military agendas. This had left the humanitarian efforts a relatively free hand outside of the city. With weather conditions favourable, and with significantly reduced faction fighting, crops began to grow and were harvested. Of course, looting and some disorder were still present, but advances were made. The result was a decrease in tension - simplistically, more food meant less need to fight. By the summer of 1994, an agreement was reached between the main warring factions, and grain harvests began to approach their pre-civil-war levels. The structures that were emerging were again traditionally clan-based, emphasising the historical link between co-operation and survival, and they remained largely removed from the international attention and inter-factional conflict in Mogadishu.<sup>107</sup>

This account of the events across the whole of Somalia drew to a close with two significant occurrences in the early months of 1995. In accordance with its plans, the final withdrawal of UNOSOM II took place in March, leaving the country essentially to its own, various devices. Just two months earlier, on 2 January, Siyad Barre, the central player in Somalia for over two decades prior to the collapse, died in exile in Nigeria.<sup>108</sup>

#### 4.4 Somali Statehood?

*[I]t may be taken as an axiom of international law that a nation must possess a government... It would seem to be a necessary corollary that, to continue to be a state, the people must continue to have a government. No doubt, it need not continue to be an unchallenged government... A weak government, or even a civil war, does not destroy a state.*<sup>109</sup>

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The issue of the denial of Recognition of Somaliland will be dealt with in Chapter 6, sections 6.4.1-6.4.2

<sup>107</sup> 'Somalia - UNOSOM II', *op cit.*, pp. 4-8

<sup>108</sup> SC Res. 954 (4 November 1994) - Called for full UNOSOM II withdrawal by 31 March 1995; Keesings, Vol. 41, 40349; Lewis and Mayall, *op cit.*, p. 121

<sup>109</sup> Baty, *op cit.*, p. 444

Despite these observations concerning various ‘Somalias’, a conventional consideration of Statehood as applied to Somalia in the early part of 1995 would remain:

*[T]hat Somalia has virtually returned to the pre-UNOSOM days; a State without a government, but with several local chieftains (or warlords) struggling to gain maximum control...*<sup>110</sup>

The difficulty with such an account is that it persists in the failing that the international community made throughout its involvement in Somalia - it perceives the situation in Mogadishu as characterising the situation in the whole country. It fails to account for the *Isimada* structures in the Darod-Northeast. It fails to note the State-like governmental structures under the Isaq *Guurti*-SNM regime in Somaliland. It fails to note the ‘regression’ to clan organisation, and progression to stability and reconstruction through 1994, in the southern region between the Juba and Shebeelle rivers, which had, just three years earlier, been known as the ‘Triangle of Death’. The description ‘no government’, in the sense of organising societal structure, was only really true of Mogadishu and its environs - functioning regimes existed elsewhere. Warlords and faction fighting were phenomena largely restricted to what had been the capital city. What conflict there was in the rest of the region was that of political and civil societies experiencing difficulties, but nevertheless functioning. It was only Mogadishu that remained, and remains, something approaching anarchy in all its worst connotations.<sup>111</sup>

Nevertheless, the Somali government has failed. No government of the State has existed at least since January 1991. The situation would appear to have gone beyond being “a period in which there is no, or no effective, government”.<sup>112</sup> However, it is not the case (yet?) that “the permanent dissolution of the state [has been] proved by the erection of fresh states”.<sup>113</sup> True, three areas have emerged which can be

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<sup>110</sup> Osinbajo, p. 922

<sup>111</sup> This is notwithstanding the various developments in Mogadishu that did approximate a form of society within each faction’s area of the city. As one example, Islamic ‘courts’ appeared in USC-controlled region of Mogadishu in August 1994 - Somalia News Update, Vol. 3, No 28 (14 December 1994)

<sup>112</sup> Crawford (1979) - above, n. 13

<sup>113</sup> Hall - above, n. 15

territorially defined, insofar as any of the regions of Somalia can be, given the nomadic nature of the society; and, each of which has a relatively ethnically homogenous population, in terms of major clan grouping. But only one of the three - the Republic of Somaliland - has formed governmental structures that would be recognisable as such by the governments of other States. Arguably, the clan-based nature of the societal-organisational structures elsewhere in Somalia insufficiently reflect the traditional governmental structures that the international community is used to dealing with, such that they are unlikely to be regarded as entities for international negotiation - they were insufficiently 'State-like'.<sup>114</sup> In addition, Somaliland is the only one of the regions to have asserted its claim to sovereignty externally, yet it has remained resolutely unrecognised by the international community.<sup>115</sup>

The third alternative set out in the introduction to the present chapter was of the demise of the State being the result of "the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable"<sup>116</sup>, although a conceptual gap remains as to the consequence of such a determination. But, this idea too fails adequately to describe the situations in Somalia. Anarchy is true of Mogadishu, and the likelihood of its reconstitution is difficult to assess. As to the remainder of the country, anarchy is largely absent, but the order that there is appears to be at the cost of national-Somali unity. The element of order seems to have devolved to the clan level, as opposed to the former nationality built upon the shared ancestry in the mythical *Samaale*.<sup>117</sup> The situation is accordingly more complex than these conventional accounts have allowed for.

*The Somali state has collapsed. However, terms like 'anarchy', 'chaos' and 'madness' to describe the disintegration and condition of statelessness in Somalia, indicate an inadequate understanding of Somali society and the dynamics of the conflict.*<sup>118</sup>

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<sup>114</sup> See above, text at n. 26

<sup>115</sup> See above, Chapter 2, nn. 135-136. The non-recognition of Somaliland will be dealt with more fully in Chapter 6, in the context of Recognition generally.

<sup>116</sup> Hall - above, n. 15

<sup>117</sup> Above, section 3.2.1

<sup>118</sup> Bradbury, *op cit.*, p. 43



Nevertheless, the reaction of the international community to the loss of government in Somalia has remained doggedly that the Republic of Somalia continues to exist.

Arguably, part of the reason for this has been a perception of the destabilising effect that State failure might have on the international community of States. It is this reasoning that has justified the ‘unprecedented’ UN and State interventions.

*For the first time, statelessness was acknowledged to be a threat to an international society composed of sovereign states.*<sup>119</sup>

If this perception was present, it remained unexpressed in the international decision-making process. Instead, what did remain was the single reality, despite all of the foregoing account - Somalia remained “recognized as still existing after the fall of its government” despite the fact that no “new government has... succeeded to its power throughout its territory”.<sup>120</sup> Even the temporary assumption of what amounted to *de facto* sovereignty by the UN in some parts of the region did not alter this.

*[T]he phenomenon created by the absence of an effective politico-legal authority and UN intervention to fill the vacuum escapes categorisation by existing precedents.*<sup>121</sup>

The alternative - that “[t]he Republic of Somalia has ceased to be a state”<sup>122</sup> - remains beyond the realm of international legal determination. The extent of failure, in terms of its lack of government and inability to exercise the functions of sovereignty, either internally or externally, including the ability to engage in foreign relations, is undeniable.<sup>123</sup> However, the failure was not accompanied by break-up - the various regions did not emerge as separate States to replace the failed Somalia. Nor was there sufficient stability to overcome the failure, as had been the case in Cambodia. Accordingly, the difficulty of an absence, or vacuum, of Statehood would have arisen if the failure of Somalia’s Statehood had been accepted. Instead, such a situation was

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<sup>119</sup> Lewis and Mayall, *op cit.*, p. 94

<sup>120</sup> Thereby serving as exactly the example Baty might have been seeking - above, text at n. 16

<sup>121</sup> Osinbajo, *op cit.*, p. 911

<sup>122</sup> Wallace-Bruce, N. L. ‘Taiwan and Somalia: International Legal Curiosities’ (1997) 22 Queen’s Law Journal 2, pp. 453-485, at p. 480 *et seq.*

<sup>123</sup> Wallace-Bruce, *ibid.*, refers to the lack of “capacity” to enter foreign relations, but capacity is a consequence of Statehood. As such, it is ability that should be considered when examining whether the entity has ceased to function as a State - capacity will then be determined by whatever conclusion is reached as to the existence of Statehood - above, n. 10

avoided by the continued support for the existence of the State of Somalia. Sadly, it is arguable that the persistence of this view served to deny, ignore, or even hinder the ‘successes’ of the various areas away from Mogadishu. To this extent, the external view of Somalia’s continued existence may well have contributed to its continued failure.<sup>124</sup>

The Somali experience also reinforces the traditional approach to government as a criterion of Statehood for extant States - that this criterion is concerned only with the emergence of new States.<sup>125</sup> Failure of government, however abject, and no matter how far it extends to failure of the State, will not affect the continued existence of that State in terms of international practice, notwithstanding the internal realities.

*[G]enerally, the presumption - in practice a strong one - is in favour of the continuance, and against the extinction, of an established State. Extinction is thus, within broad limits, not affected by more or less prolonged anarchy within the State, nor, within equally broad limits, by loss of substantial independence, where the original organs of the State remain formally separate and retain at least some semblance of effective control.*<sup>126</sup>

Arguably, given the Somali experience, these suggested limits are exceedingly broad indeed. What little dissent there is to this view, in terms of international legal argument, suffers from a lack of alternative for the existence of the State in the absence of replacement States.<sup>127</sup> These ideas will be returned to following a consideration of the events that had been unfolding in Yugoslavia during this same period.

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<sup>124</sup> Certainly, the effective separations between the regions served to limit the spread of the conflicts, but also hindered the UN’s activities - Hirsch and Oakley, *op cit.*, pp. 12-16; ‘Somalia - UNOSOM I’, *op cit.*, p. 3

<sup>125</sup> Grant, T.D. ‘Defining Statehood: The Montevideo Convention and its Discontents’ (1999) 37 CJTL 2, pp. 403-457, p. 435:

*To be sure, the Montevideo Convention was concerned with whether an entity became a state, not with how an entity might cease to be a state. Cases of entities subsisting as states while lacking one or another Montevideo criterion are nonetheless illuminating.*

See above, text at n. 24

<sup>126</sup> Crawford (1979), *op cit.*, pp. 417. See above, section 2.4

<sup>127</sup> See above, text at n. 17

## 4.5 And in Yugoslavia - State Failure as Termination

### 4.5.1 *The Road to Break-up*

The ten years following Tito's death had seen significant debate within Yugoslavia as to the future of the State. The largely reformist agenda in Slovenia, Vojvodina and Serbia had dominated the federal government, which was itself trying to deal with the State's economic difficulties. Such pressures also saw the re-emergence of old 'ethnic' rivalries, some of which became highly politicised within the Republics. This ethnicisation of Republican politics, and the very nature of the federal structure, seemed to emphasise the centrifugal pressures. The various political machineries within the Republics each worked at a slightly different pace, and to a slightly different agenda, in terms of their perception of the future. After almost a decade of these internal pressures, the external release of the fall of Communism across Eastern Europe provided the extra impetus necessary to eventually weaken the central bonds. The result was the process of democratic elections in 1990.<sup>128</sup>

The nature of the federal structure<sup>129</sup>, and the extent of the federal fragmentation already seen, was such that the elections were held separately in each of the six Republics, between April and December 1990.<sup>130</sup> The fragmentation was evidenced in the different results across the Republics - the incumbent Communists retained power in Serbia and Montenegro, but candidates largely representing democracy and change were elected in Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia.<sup>131</sup> In addition, the conflicting

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<sup>128</sup> See above, section 3.5

<sup>129</sup> Radošević, S. "The Collapse of Yugoslavia - Between Chance and Necessity" in Dyker, D.A. and Vejvoda, I. (Eds.) 'Yugoslavia and After: A Study in Fragmentation, Despair and Rebirth' (London and New York: Longman, 1996), pp. 65-83, at pp. 74-77

<sup>130</sup> Shain, Y. and Linz, J.J. 'Between States: Interim Governments and Democratic Traditions' (Cambridge: CUP, 1995), pp. 87-91

<sup>131</sup> Lytle, P.F. "Electoral Transitions in Yugoslavia" in Shain and Linz, *op cit.*, pp. 237-254, at pp. 241-254; Zametica, J. 'The Yugoslav Conflict' (1992) 270 Adelphi Paper, pp. 12-40; Keesings, Vol. 36, 37381-82, 37463-64, 37511-14, 37923-24

Bosnia-Herzegovina - President Alija Izetbegović (Muslim, but with two Vice-Presidents, one Croat and one Serb)

Croatia - President Franjo Tudjman (Croatian Democratic Union - HDZ)

Macedonia - President Kiro Gligorov, Hung Parliament,

Montenegro - President Momir Bulatović (League of Communists)

Serbia - President Slobodan Milošević (Socialist Party, formerly the League of Communists)

policies of the conservatives and the reformers served to further undermine the co-operation required by the centralists, and so to sabotage Federal Prime Minister Ante Marković's relatively limited proposed federal reforms. Not only had the staggered Republic-based electoral process weakened the federal unity, but it had also seen the issue of the future of the federal State firmly entrenched on all political agendas - and for the democratic reformists, there was the pull from Europe and the West, and so away from the conservatism of communism.

*The earlier discussion of the shape of a new Yugoslavia reopened in early 1991 with all of the actors in place. This does not imply that it had not been ongoing between the republics over the course of 1990, but positions had crystallized through the elections... The ongoing destabilization of Yugoslavia thus had been brought into focus by the electoral transitions.*<sup>132</sup>

It was from Serbia, under President Milošević, that the clearest calls for a re-structured federation came, but it was a federation that most feared would have Serbs and Serbia at its centre. These fears were fuelled by the recent centralisation of Serbian control over Kosovo and Vojvodina, and the consequent unrest in those areas.<sup>133</sup> There were also calls from Serbia for all Serbs in the other Yugoslav Republics to exercise their right of self-determination, which were backed by the JNA, but which were denounced by the other Republics as attempts to construct a so-called "Greater Serbia".<sup>134</sup> It was in this manner that the ever-present and recently re-emergent nationalist pressures were inextricably tied into the debate as to the future of

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Slovenia - President Milan Kučan (Communist-Party of Democratic Renewal - ZKS-SDP), DEMOS Parliamentary majority

<sup>132</sup> Lytle, *ibid.*, p. 252

<sup>133</sup> Keesings, Vol. 34, 36065, 36256, 36372A; Vol. 35, 36514; Vol. 36, 37621-22, 37725-26.

The direction of these moves, and of the 'subtle' imposition of nationalism over Montenegro in the immediate aftermath of the break-up is examined in - Mertus, J.A. 'Nationalism and Nation-Building: Milosevic Turns to Montenegro and Kosovo' (1994) 26 NYUJIL&P 3, pp. 511-519. See below, Chapter 5, n. 135

<sup>134</sup> Cerovic, S. 'The Rise of Serbian Nationalism' (1994) 26 NYUJIL&P 3, pp. 527-530; Zametica, *op cit.*, pp. 20-25

The basis of this claimed right of self-determination was the 1974 Constitution. The Basic Principles, in the Introductory part, open with the statement: "The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession..." - Durovič, D. (Ed. in Chief) 'The Constitution of the Socialist Federal Republic of Yugoslavia', Trans. Pavičič, M. (Ljubljana: Dopolisna Delavska Univerza, 1974), p. 53. This was reaffirmed by the emphasis placed on the sovereignty of the Republics in the substantive articles of the Constitution. See further below, section 5.3.1

the federal State. The consequent importance of national-minority rights was evident in all of the electoral and post-electoral debates in each of the Republics. The Yugoslav political climate was such that each Republic made moves to protect its own dominant nationality first, with the inevitable consequence of increasing the anxieties of the minorities. The first flaring of these pressures occurred in Croatia in October 1990. The Serb majority in the Krajina region of eastern Croatia, having experienced their own nationalist demonstrations being suppressed and wider anti-Serbism from the newly elected Croatian government, held a referendum of Serbs, and then declared themselves independent as Republika Srbska Krajina (RSK).<sup>135</sup>

As the violence flared in Krajina, and elsewhere in Croatia, and to a lesser extent in Bosnia-Herzegovina, the political pressure from Slovenia and Croatia also increased. Through 1990 both had adopted resolutions emphasising their sovereignty and independence, albeit exercised within the federal State, in line with their respective electoral mandates. Such moves prompted some muscle flexing from the JNA, as well as constitutional challenges at the federal level. The respective moves and counter moves saw an increasing emphasis from Serbia and Montenegro, and the Serb populations elsewhere, of the strengthening of federal unity, whilst Croatia, Slovenia, and to a lesser extent Macedonia, sought to entrench their respective autonomies. Although Bosnia-Herzegovina remained largely neutral at this stage, there were considerable fears amongst the various populations of external domination of one form or another. At the federal level, the major consequence of this process was almost total paralysis of the governmental structures. In particular, during March 1991, a number of members of the Federal State Presidency resigned, leaving it temporarily powerless as being below its quorum. In addition, at the end of the month, weekly meetings commenced between the Presidents of the six Republics, which effectively took over the role of negotiating the future of Yugoslavia. Over the succeeding months of 1991, as tensions rose, and violence escalated, primarily in Croatia, the Federal authorities became increasingly marginalised, and the JNA

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<sup>135</sup> Keesings, Vol. 36, 37666, 37789-90

appeared as either autonomous of the State government, or as under Serbian influence, if not control.<sup>136</sup>

The political processes in the various Republics moved in parallel to these central developments. Slovenia and Croatia moved closer to effective secession, as their respective proposals for increased autonomy within a federal State appeared ever more at odds with pressures from Serbia and Montenegro. One example of this process was the conclusion of a mutual defence pact between Croatia and Slovenia in January 1991, primarily to protect against the increasingly Serb-influenced JNA, which had previously intervened in both Republics. The destabilising political pressures in the various Republics forced a meeting of Federal Presidents in April to call for referenda across each of the Republics on the future of Yugoslavia. Given that the elections had already been held individually within each Republic, and that a non-federally-sanctioned referendum had already taken place in Slovenia, it was inevitable that each Republic would hold its own referendum. This separation was compounded by the slight variations in the questions put in the various referenda.<sup>137</sup>

Four of the six referenda resulted in calls for some form of independence. These were most pronounced in Slovenia and Croatia, both of which had essentially been moving towards effective independence over the previous months. Accordingly, just over two months later, on 25 June 1991, the Croat and Slovene Assemblies adopted declarations of independence.<sup>138</sup> These declarations mark a useful point of reference for the situation of the SFRY. At the point they were made, and for some months afterwards, there remained a sense of the continued existence of the federal State, especially as

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<sup>136</sup> Keesings, Vol. 36, 37621-22, 37789-90, 37923-24; Vol. 37, 37973-74, 38019, 38163-64

<sup>137</sup> Keesings, Vol. 37, 38019, 38080-81, 38163-64

<sup>138</sup> Keesings, Vol. 37, 38203-04, 38274-75

The respective referenda were:

Bosnia-Herzegovina (29 February to 1 March 1992) - 99.4% support for full independence (63% turnout)

Croatia (19 May 1991) - 93.2% support for a "sovereign and independent country"; and 92.2% against remaining within a Yugoslav federal state (83.6% turnout)

Macedonia (8 September 1991) - 95% support for a "sovereign and independent Macedonia" (75% turnout)

Slovenia (23 December 1990) - 94.6% support for an "independent and sovereign state" (93.5% turnout)

viewed by the international community. However, they also triggered an element of increased attention being paid to the position of individual Republics.<sup>139</sup>

#### 4.5.2 *International Responses to Yugoslavia*

The immediate aftermath of the Croatian and Slovene declarations saw talks, brokered by the EC States, held in Brioni on 7 July. The talks were between representatives of the federal government, and the two Republics. The main substantive development at the talks was an agreement to suspend the implementation of the two declarations of independence for three months pending collective talks on the future of the federal State. On 22 July, talks were held between the federal Presidency and the six Republican Presidents to discuss the future of the State. Although no agreements were reached, it did signify that there remained a coherence to the federal State and that its governmental machinery had remained considerably more intact than that seen in Somalia at this time. Nevertheless, conflict continued, especially around the Serb areas of Croatia, and involving the JNA, which had withdrawn from Slovenia early in July. In addition, talks were occurring across Republican lines, notably between Serbia and the Serb populations of Croatia and Bosnia-Herzegovina.<sup>140</sup>

The summer of 1991 saw the primary role in the international response to the situation in Yugoslavia being taken by the EC Member States. The response was largely focused around joint statements of the Member States under the auspices of 'European Political Co-operation'. Soon after the Croat and Slovene declarations, they emphasised that it was "only for the peoples of Yugoslavia themselves to decide on the country's future".<sup>141</sup> Yet just under a month later, they emphasised their potential role in the matter, and their interest in it:

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<sup>139</sup> Guicherd, C. 'The Hour of Europe: Lessons from the Yugoslav Conflict' (1993) 17 FFWA 2, pp. 159-181, pp. 160-166; Türk, D. 'Remarks Concerning the Breakup of the Former Yugoslavia' (1993) 3 TLCP 1, pp. 49-56, at pp. 51-56; Keesings, Vol. 38274-75, 38314, 38373-76, 38420-22, 38512-13, 38559-60, 38600-01; 38684-85; Vol. 38, 38703-04

<sup>140</sup> Keesings, Vol. 37, 38373-76

<sup>141</sup> Bull. EC 7/8-1991, 1.4.3 - EPC Statement, published 5 July 1991

*They express the Twelve's strong interest in a peaceful solution to Yugoslavia's problems, not only for the sake of Yugoslavia itself and its constituent peoples, but for Europe as a whole.*<sup>142</sup>

Despite the difference in process and status, this wording would nevertheless become familiar in succeeding months, when the Security Council declared the situations in both Yugoslavia and Somalia as threats “to international peace and security”.<sup>143</sup> The difficulty highlighted by this wording was the actual status of the situation and the violence occurring within Yugoslavia. As the JNA used force briefly in Slovenia, and more extensively in Croatia in support of the Croatian-Serbs, the question of the classification of this use of force became an issue. The general stance taken by the EC and the CSCE in July was to call on “all parties” to limit the violence - taking the view that it was ultimately an internal matter.<sup>144</sup> However, in late August, following further JNA activity in Croatia and with events in the USSR freeing-up the hand of the western States, an EPC statement called upon the Federal Presidency to end the “illegal use of the forces under its command”. The nature of the illegality was unspecified, but there was an implication that the EPC regarded Croatia as a subject of international law against which force could not be used.<sup>145</sup> These ambiguities were extended in the EC's proposed Peace Conference and Arbitration Commission to deal with the Yugoslav situation - a distinctly international-style process for an apparently

<sup>142</sup> Bull. EC 7/8-1991, 1.4.15 - EPC Statement, published 2 August 1991

<sup>143</sup> Yugoslavia - SC Res. 713 (25 September 1991); Müllerson, R. 'International Law, Rights and Politics' (London and New York: Routledge, 1994), pp. 125-135; Musgrave, T.D. 'Self-Determination and National Minorities' (Oxford: Clarendon, 1997), pp. 200-207, 233-237; Weller, M. 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 AJIL 3, pp. 569-607, at pp. 577-581.

Somalia - SC Res. 733 (23 January 1992) and SC Res. 751 (24 April 1992) - above, text at nn. 44-46.

<sup>144</sup> Weller, *ibid.*, pp. 570-574.

Whilst the CSCE activities ran in parallel, and in co-operation with those of the EPC, they were partially hindered by the continued membership of Yugoslavia, which was therefore able to exploit “the principle of consensual decision making”, despite the ambiguity surrounding its representation. In addition, the USSR had fears of setting unwanted precedents given its own situation at the time, as did, to a lesser extent, a number of other member states - Burg, S.L. “The International Community and the Yugoslav Crisis”, in Esman, M.J. and Telhami, S. (Eds.) 'International Organizations and Ethnic Conflict' (Ithaca and London: Cornell UP, 1995), pp. 235-271, at pp. 240-241

<sup>145</sup> Hille, S. 'Mutual Recognition of Croatia and Serbia (+Montenegro)' (1995) 6 EJIL 4, pp. 598-611, at pp. 607-609; Malone, M.K. 'The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict' (1992) 6 Temple International and Comparative Journal 1, pp. 81-111, at pp. 100-109



domestic situation, one consequence of which was that the Republics focused their attention on achieving EC agreement, rather than internal accord. The proposal was also backed by threat of sanctions against Yugoslavia if it was not accepted by 1 September.<sup>146</sup>

Notwithstanding the ambiguities, the Yugoslav parties agreed to the process and the EC sponsored Hague Peace Conference on Yugoslavia opened on 7 September, with Lord Carrington as its Chair. In the wording of the original EPC statement, it was to bring together:

*[O]n the part of Yugoslavia, the Federal Presidency, the Federal Government and the Presidents of the Republics;*<sup>147</sup>

This spread of representatives served to deny neither the status of the federal government or State, but also accepted the realities of the opposition that was extant. As such, it was a not dissimilar process to that being used in Cambodia at around the same time, in that it sought to include all possible groups, without thereby making any specific comment as to their respective status.<sup>148</sup> The caveat to this is that the only non-State groups were those of the Republics, as opposed to of ‘peoples’, such as the Croatian-Serbs, the Bosnian-Croats, or the Kosovar-Albanians. In this way the status of the Republics was confirmed as the essential unit of analysis, in a manner that the clan groupings in Somalia never were - territory and political division prevailed over any other form of determinant. This emphasis was confirmed in the initial stages of the Conference when the sanctity of existing borders - international and internal - was emphasised as one of the essential principles of agreement.<sup>149</sup>

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<sup>146</sup> Bull. EC 7/8-1991, 1.4.25 - EPC Statement, 27 August 1991; Burg, *op cit.*, pp. 238-247; Weller, *ibid.*, pp. 574-577.

The legal status of the Hague Conference, and more particularly of the Badinter Commission will be returned to below in the context of self-determination in Chapter 5

<sup>147</sup> Bull. EC 7/8-1991, 1.4.25 - EPC Statement, published 28 August 1991.

See further, Bull. EC 9-1991, 1.4.2 - EPC Statement, published 3 September 1991:

*The Community and its Member States welcome the fact that all Yugoslav parties have accepted the goals and instruments for a solution to the crisis as contained in the [previous declaration]*

<sup>148</sup> Above, text at nn. 61-71. See further below, text at n. 163

<sup>149</sup> Keesings, Vol. 37, 38420-22

The Conference also entailed an Arbitration Commission, which came to be known by the name of its chair, M. Badinter, President of the French *Cour d'État*. The Commission was to receive submissions from “[t]he relevant authorities”, as to their “differences”.<sup>150</sup> No further clarification was given, but at least one aspect of the Commission’s work reflected a degree of flexibility as to the determination of “relevant authorities” - in its deliberations prior to its second and third decisions, it received documents from the ‘Assembly of the Serbian People of Bosnia-Herzegovina’.<sup>151</sup>

Despite the nature and complexity of the EC process, the outcome of it was largely pre-empted. The EPC response to the early stages of the Hague process included a tacit acceptance that the result of it would not include the continuance of the SFRY.

*The Community and its Member States have long recognized that a new situation exists in Yugoslavia. They consider it self-evident that this calls for new relationships and structures.*<sup>152</sup>

The meaning of this statement - a terminal verdict on the SFRY - was largely confirmed in subsequent EPC statements in October, which for the first time envisaged recognition of those Republics wishing it “at the end of a negotiating process conducted in good faith”. The process was also supported jointly by the USA and USSR.<sup>153</sup> The first action to back the view of the demise of the SFRY occurred in November when various arms of the Communities decided to “suspend” or “denounce” respective agreements with the SFRY. Also, for the first time an EPC statement referred to the federal leadership, which only really represented Serbia and Montenegro, as the “rump Presidency”.<sup>154</sup>

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<sup>150</sup> Bull. EC 7/8-1991, 1.4.25 - EPC Statement, published 28 August 1991. See generally: Pellet, A. ‘The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples’ (1992) 3 EJIL 1, pp. 178-181

<sup>151</sup> EC Arbitration Commission, Opinions Nos. 2 & 3 (7 December 1991) reprinted in 31 ILM 1497-1500

<sup>152</sup> Bull. EC 9-1991, 1.4.7 - EPC Statement, published 19 September 1991

<sup>153</sup> Bull. EC 10-1991, 1.4.7, 1.4.10, 1.4.15

<sup>154</sup> Bull. EC 11-1991, 1.3.20-24, 1.4.8

These moves were compounded in December by the conclusion of various trade agreements with four Republics individually - Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia - Bull. EC 12-1991, 1.3.19-20. The economic benefits were extended, and also applied to Montenegro in recognition of its increased co-operation with the Hague process, in January 1992 - Bull. EC 1/2-1992, 1.4.18-19

This proclamation of the failure of the Yugoslav State, however tacit, was made barely one year after the initial flaring of violence and attempt at secession had been made in the Krajina region of Croatia. Incredibly, in that same period of almost a year, Somalia had seen the final ouster of Siyad Barre's military regime, following roughly two-and-a-half years of civil war, and one in which "[t]he central government ceased to exist."<sup>155</sup> This assessment of Somali governmental failure has been seen in the effective separation of the two northern regions, and the devastation, anarchy and civil war in the south. In contrast, the conflict in the SFRY towards the end of 1991 was largely confined to the Serb areas of Croatia, and to some Serb regions in Bosnia-Herzegovina, with some limited resistance from the Kosovar-Albanians. Put simply: the extent of the actual failure of the Yugoslav State was considerably less than that of the Somali State.

In the light of the foregoing EC responses to the situation in Yugoslavia, as well as the growing pressures, especially from Germany, to recognise the Statehood of Croatia and Slovenia, the first decision of the Badinter Commission was hardly surprising. In answer to the question concerning the status of the SFRY and of those Republics asserting independence, put to it by Lord Carrington, it determined that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution".<sup>156</sup> This formal finding of the termination of a State without any successor States having been accepted by the same mechanism was entirely without precedent.<sup>157</sup> In addition, the resultant status of the area that had formerly been the SFRY remained unclear. It was a State "in the process of dissolution", but that concept was never developed. The

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<sup>155</sup> Above, n. 32

<sup>156</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) reprinted in 31 ILM 1494-1497

<sup>157</sup> The Commission sought to narrow the significance of this finding in its Eighth Opinion:  
*[T]he existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised.*

EC Arbitration Commission, Opinion No. 8 (4 July 1992) reprinted in 31 ILM 1521-1523 - Hannum, H. 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 TLCP 1, pp. 57-69, at pp. 63-65. The difficulty with this caveat is that it conceives of the failure of the federal authorities - the lack of government - as occurring after the new States have emerged, which does not then assist in an assessment of the role played by their attempted secessions in that failure. See further below, Chapters 5 & 6

reality on the ground was in accord with the growing international practice over the preceding month or so - to effectively treat the Republics as emergent States, but as not yet having fully achieved Statehood.<sup>158</sup> The result of this was that the SFRY was regarded as having lost its Statehood, although that was not formally acknowledged until July 1992.<sup>159</sup>

The Commission set as its parameters the “principles of public international law which serve to define the conditions on which an entity constitutes a state”. In so doing, it made no distinction between the criteria for emergence or disappearance as a State, which would appear to conflict with the prevailing orthodoxy.<sup>160</sup> Its reasoning for the finding was possibly more revolutionary than the decision itself. The basic interpretation of the key requirement of government was expressed as “an organized political authority”. However, it also referred to “the form of internal political organization and the constitutional provisions” as relevant facts in determining the government’s control over the territory and population. In the case of a “federal-type State”, its existence “implies that the federal organs represent the components of the Federation and wield effective power”. Hence, in addition to noting the various moves towards independence of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia, the Commission observed that the “composition and workings of the essential organs of the Federation... no longer meet the criteria of participation and representativeness inherent in a federal state”. Accordingly, it was the Commission’s determination that this failure of “representativeness” and functioning of the Federal authorities, that had in fact been a reality for roughly eight months, was sufficient to mark the definitive failure of the State, “rather than [it] simply being engulfed in civil war”.<sup>161</sup>

One further part of the Commission’s reasoning was that the “authorities of Federation and the Republics have shown themselves to be powerless to enforce respect” for the various cease-fire agreements. This consideration is remarkable in that

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<sup>158</sup> That process was to emerge in the early months of 1992 - see below, Chapters 5 & 6. However, the lack of clarity as to this initial determination was to cause significant confusion at later stages, especially with regard to the status of the FRY - see below, sections 6.3.5-6.3.6

<sup>159</sup> See below, text at n. 176

<sup>160</sup> See above, text at nn. 24 & 126

<sup>161</sup> Hannum, *op cit.*, pp. 63-65, quotation at p. 64

it attributes the failure equally to the Federal State, which it is asserting is therefore in dissolution, and to the Republics, which it is implicitly regarding as the emergent States. Thus, it would appear that a higher requirement of governmental control was being required of the pre-existing State than for the emergent States, which runs directly counter to all previous commentary and experience.<sup>162</sup>

Finally, the fact of the Commission's finding raises again the issue of the SFRY's consent to the process. Given the finding that the federal authorities were no longer an effective government - indeed that they were so manifestly not so that an unprecedented finding of State failure was made - it seems hard to conceive that they had been sufficiently so just three months earlier when the EC process was consented to by the Yugoslav parties. As such, could the federal authorities have 'consented' to the EC process sufficiently to bind the SFRY? It is true that the consent of the six Republican Presidents had also been obtained, but the EC had undoubtedly pressured all parties under the threat of sanctions. In addition, the consent had not been sought of other groups in the State - notably the Kosovar-Albanians and the Vojvodinian-Hungarians. As such, the formal governmental consent of the State is questionable, and likewise any claim to a 'peoples consent' along the lines of the Cambodian-SNC seems weakened by these omissions.<sup>163</sup> There accordingly remains a considerable question concerning the actual status of the Badinter Commission's Decisions.

*In a formal sense, the opinions of the Arbitration Commission were not binding on any of the States concerned. The Commission was not created in virtue of an international agreement between disputing parties, and had no treaty base. Rather, it was an executive creation of the EC and its Member States acting through the medium of the Conference on Yugoslavia.*<sup>164</sup>

However, the fact remains that the process and the first two sets of decisions were not objected to by any of the parties concerned<sup>165</sup>, although it might be argued that the

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<sup>162</sup> Above, text at n. 24

<sup>163</sup> Above, text at n. 148

<sup>164</sup> Craven, M.C.R. 'The European Community Arbitration Commission on Yugoslavia' (1995) LXVI BYIL, pp. 333-413, at p. 334

<sup>165</sup> Montenegro and Serbia did specifically file objections to the Commission's authority prior to its Eighth, Ninth, and Tenth Opinions. However, these objections referred specifically to the mandate given to the EC by the *Briuni* agreement. In so doing, they acknowledged its general authority, but

unrepresented parties lacked the means or forum to make such objection.<sup>166</sup> A certain degree of legitimacy for the process could also be derived from the first UN resolution on the Yugoslav situation, which expressed its:

*[F]ull support for the collective efforts for peace and dialogue in Yugoslavia undertaken under the auspices of the member States of the European Community.*<sup>167</sup>

Albeit that this remains a very general statement, itself of unclear legal meaning, and was made prior to the operation of the Badinter Commission. In addition, that same Resolution referred throughout to “Yugoslavia” and to the “Government of Yugoslavia”. As such, the arms embargo imposed by the Resolution under Chapter VII of the Charter applied to the whole of Yugoslavia. The same reference to “Yugoslavia” was repeated in the subsequent Resolutions through January 1992.<sup>168</sup> Whatever the precise status of the particular determination, as will be seen, the international consensus quickly came to reflect the European position as set forth in the decisions of the Badinter Commission.

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simply objected to it on the questions then put before it. The Commission determined that these objections were unfounded. However, in so doing it confirmed that it was based not on the Brioni agreement, but on the EPC statement of 27 August 1991 (Above, n. 146). The decision goes on to confirm that “[t]hese arrangements were accepted by the six Yugoslav Republics at the opening of the Conference”, but it makes no mention of the consent of the federal authorities, or of the SFRY. EC Arbitration Commission, Interlocutory Decision (Opinions No. 8, 9 and 10) (4 July 1992) reprinted in 31 ILM 1518-1521

<sup>166</sup> A whimsical comment on the relative weakness of many of the parties in the western-State dominated process can be seen in:

*[A]ny miserable little country can have a war. Bosnia can have a war. Only the serious players can afford serious warfare.*

- Holt, T. ‘Wish You Were Here’ (London: Orbit, 1998), p. 215

<sup>167</sup> SC Res. 713 (25 September 1991) - The debate only took place after a letter was elicited from the Belgrade authorities when it became clear that some members of the Security Council might raise objections under Article 2(7) - Weller, *op cit.*, pp. 577-581

<sup>168</sup> SC Res. 721 (27 November 1991) and SC Res. 724 (15 December 1991). SC Res. 727 (8 January 1992), whilst it continues to refer only to Yugoslavia, does so in terms that imply it more as a geographical region and than an international legal entity, although nowhere is this express. In addition, the resolution refers to paragraph 33 of the Further Report of the Secretary-General Pursuant to Security Council Resolution 721 (1991) (S/23363, 5 January 1992), which pointed out that the arms embargo “would continue to apply to all areas that have been part of Yugoslavia”, notwithstanding any decisions as to their future status.

The two subsequent Resolutions tended to refer to “all in Yugoslavia” or “the Yugoslav parties” - SC Res. 740 (7 February 1992) & SC Res. 743 (21 February 1992).

### 4.5.3 *Yugoslavia and State Failure*

Numerous explanations exist for why the European States moved in the direction they did with regard to Yugoslavia. The initial delays in considering the situation as anything other than internal involved a concern as to possible consequences for the ongoing situation in the USSR. There existed genuine concerns on the part of some of the EC Member States as to the risks of nationalist self-determination claims on behalf of parts of their own populations. Against this, there was strong pressure, particularly from Germany, but also from Austria and Denmark, for recognition of the emergent Republics in the belief that it would limit the Serb use of force. The internal EC decision-making was also occurring against the backdrop of the negotiation of the Maastricht agreement, which undoubtedly played a part in the eventual decision-making as to Yugoslavia.<sup>169</sup>

Whatever the process behind the EC action, the reality was that by the end of 1991 the consensus of international opinion was that “Yugoslavia was in evident dissolution.”<sup>170</sup> The reasoning, in terms of conventional international law is difficult. At the time of the finding, the Federal Presidency largely only represented Serbia and Montenegro and not the other four Republics. However, it did remain in existence, and did still function to an extent with regard to those two entities. As such, it is not truly a situation of “no, or no effective, government.”<sup>171</sup>

The moves made by the four Republics not covered by the Federal Presidency, whilst clearly indicative of a desire for autonomy, were not at that point so advanced as to prove “the permanent dissolution of the state”.<sup>172</sup> None of them had received international recognition. Only two of them, Croatia and Slovenia, had asserted their independence, and they had agreed to suspend them subject to wider federal negotiations. The positions of Macedonia and especially of Bosnia-Herzegovina remained at least equivocal at the time of the Badinter finding. Finally, the

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<sup>169</sup> Burg, *op cit.*, pp. 240-247 - at p. 247: “Britain and other member states opposed to recognition acquiesced in exchange for German concessions on the European monetary union under negotiation in the same period”.

<sup>170</sup> Burg, *ibid.*, p. 247

<sup>171</sup> Crawford, (1979), above n. 13

<sup>172</sup> Hall, above n. 15

Commission's own finding at least partially cast doubt upon their own 'governmental' control when it asserted that they, along with the Federal Government, were "powerless to enforce respect" for the various cease-fire agreements, which should have, under a conventional analysis, mitigated against their Statehood. Under similar analysis, the situation within the SFRY was not acknowledged as one of "the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable".<sup>173</sup>

However, the classification becomes easier when the terms of State failure are referred to. Although the failure, in terms of "institutional performance"<sup>174</sup>, was relatively mild, it took a form that seemed to indicate a likelihood of "break-up... into smaller nation-states"<sup>175</sup>. The possibility of break-up presented a means of ending the period of failure through the emergence of new States, and thereby of limiting the vacuum of Statehood. As such, the finding of failure was more easily made. The "lack of representativeness" of the then existing federal structures was sufficient for the SFRY to fail to meet the criterion of Statehood of possessing an "organized political authority". Some ambiguity of status and Statehood remained during the actual period of failure - while the SFRY was "in the process of dissolution". However, the period was relatively limited, and in July the failure came to an end when the Commission found "that the process of dissolution of the SFRY... is now complete and that the SFRY no longer exists."<sup>176</sup>

#### 4.6 Conclusions

Somali history across the 1990s, as across so much of the Twentieth Century, has been a tragic story. So too has been the experience of the peoples of Yugoslavia. Their stories have had many similarities, many differences, and many coincidences. But by the middle of the decade, what stood out above all else was that, in the Horn of

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<sup>173</sup> *ibid.*

<sup>174</sup> Widner, J.A. 'States and Statelessness in Late Twentieth-Century Africa' (1995) 124 *Dædalus* 3, pp. 129-153, at p. 131. Above, Chapter 1, text at n. 53

<sup>175</sup> Gordon, R. 'Saving Failed States: Sometimes A Neocolonialist Notion' (1997) 12 *AUJIL&P* 6, pp. 903-974, at p. 904. Above, Chapter 1, text at n. 55

<sup>176</sup> EC Arbitration Commission, Opinion No. 8 (4 July 1992) reprinted in 31 ILM 1521-1523



Northeast Africa, the suffering continued in the same State, whilst in the Balkan region of south-east Europe, the suffering existed in new States that had replaced the old one. The problem for international law, under the current study, is to account for this apparent inconsistency of treatment.

The focus of this chapter has been upon government as a criterion of Statehood for existing States. The application of the law to Somalia has followed broadly traditional lines - in the absence of “the erection of fresh states”, the previous State continues to exist legally. This is so notwithstanding what was arguably the “continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable...”<sup>177</sup> The approach, certainly the underlying view of the UN and the other international actors in Somalia, seems to have been that reconstitution will never be impossible, just very difficult, despite the scale of the problems witnessed in Somalia.

What was different in the situation in Yugoslavia? The anarchy in Yugoslavia in late 1991-early 1992, whilst undoubtedly tragic, was certainly not significantly worse than in Somalia - however one is to measure such human cost. Similarly, whilst the federal government undoubtedly failed to represent probably four of the six Republics, it did still exist in some form, and did represent the remaining two, which was considerably more effective than any of the Mogadishu factions in Somalia, at that time or subsequently. Finally, by late 1991, when the first finding was made that its failure had at least commenced, significant independence moves had been made by only two of the six Republics, and their status at the time was at least questionable. Their first declarations of independence had been made two months after Somaliland had made a similar declaration, and they were subsequently revoked as part of the talks at Brioni. The result was far from clear, but it seems fair to say that “the erection of fresh states” so as to render “reconstitution impossible or in a very high degree improbable” had no more occurred in Yugoslavia than had the “continuance of anarchy so prolonged” in Somalia. Or put another way, both States seemed equally far from normal functioning, and from reconstitution, albeit that the problems in each case took slightly different forms. Nevertheless, whilst Somalia remains on the international map, the Badinter

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<sup>177</sup> Hall, above n. 15

Commission determined that Yugoslavia, because of the lack of “representativeness” of the federal government, was “in the process of dissolution”.<sup>178</sup>

The apparent justification of this different application of the principles of international law regarding government as a criterion of Statehood seems to be in terms of the perceived outcome of the situation. In Yugoslavia, failure was acknowledged because the resultant vacuum of Statehood could be limited by the emergence of new States. In Somalia, no such prospect existed, nor did there seem to be any likelihood of reconstitution, as had been the case in Cambodia. As such, the traditional inertia of Statehood prevailed, despite the resultant disjunction between the legal view and the extant reality.

At this stage, such justification can only be provisional, and must necessarily be further considered in terms of the other aspects of Statehood involved in the processes. In addition, some account needs to be offered of the means by which the different determinations are reached. Both aspects will be pursued in the considerations of self-determination and recognition, before fuller conclusions are drawn at the end of the study.

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<sup>178</sup> Above, n. 156

## Chapter 5: Self-Determination

*Between the logic of the revolution and its philosophy, there is this difference - that its logic could conclude with war, while its philosophy could only end in peace.<sup>1</sup>*

*Those concerned with promoting responsive governments, by and for the people, can no longer assume that breaking up larger entities provides movement in the desired direction.<sup>2</sup>*

### Abstract

The concept of self-determination is a complex one in international law. It sits across so many aspects of the subject, and is of unclear provenance - a human right, that seems not to accrue to individuals; a legal right claimed by groups that lack legal personality; it promotes Statehood by challenging States; it promotes democracy by allowing the minority to challenge the majority. It is also an area of international law about which there is considerable uncertainty, but which is nevertheless frequently invoked in legal analysis. Within the context of State failure, it is both a causative concept, and a consequent one. And it is in these two aspects that it will be considered, with regard to the Yugoslav and Somali experiences.

Following a general introduction to the development of the concept of self-determination, some attempt will be made to offer a contemporary account of it. This account will then be held-up against the events in Yugoslavia, and the extent to which the concept was used during the process, and to which it has been put in the subsequent analysis will be considered. This application will address both the demise of the SFRY and the emergence of the successor States. The purpose will not so much be to consider self-determination, than to consider what it tells us as to the law of State failure. Having made this study, it will remain to reflect back on the events in Somalia and Somaliland, which will serve as a foil to the conclusions arising from the experiences in Yugoslavia.

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<sup>1</sup> Hugo, V. 'Les Misérables' Vol. 1 (Ware: Wordsworth, 1994), p. 438

<sup>2</sup> Etzioni, A. 'The Evils of Self-Determination' (1992-93) 89 Foreign Policy, pp. 21-35, at p. 24

## 5.1 Introduction - Self-Determination<sup>3</sup>

*Self-determination has assiduously served the same state system it pretends to assail. In the process, principle has evolved into a manipulable, oft-employed slogan.*<sup>4</sup>

The history of the concept of self-determination has been an account of contradictions and conflicts between dichotomous groups on the one hand, and concepts on the other. By their nature, these conflicts are ever present; are continuous. During the French and American Revolutions - from which the first ideas of self-determination developed - the forces and peoples of republicanism sought to overthrow the institutions and concepts of imperialism, but very quickly the revolutionaries became the new imperialists against whom further conflicts began. This circularity illustrates the central problem of self-determination: Which self? In the contemporary world, the conflicting selves are existing (European?) States and the secessionist-nationalities within and across them; the existing sovereignties and their minorities.<sup>5</sup>

The conflicts at the heart of the concept of self-determination, as well as a source of uncertainty as to its rightful subjects, are also the roots of its conceptual weakness. Its basis and justification are focused upon a conceptual conundrum that seems irresolvable within the dialogue of international law. Self-determination is simultaneously a product and a justification of the current, State-centric, international order, and is a challenge to State sovereignties. It is an embodiment of a Hobbesian ideal of State as organising community, and of a Rousseauesque conception of the legitimacy only of genuine communities.<sup>6</sup>

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<sup>3</sup> General starting points are: Cassese, A. 'Self-determination of Peoples: A Legal Reappraisal' (Cambridge: CUP, 1995); Crawford, J. 'Creation of States in International Law' (Oxford: Clarendon, 1979), pp. 84-106; Higgins, R. 'Problems and Process: International Law and How We Use It' (Oxford: Clarendon, 1995), pp. 111-128; Musgrave, T.D. 'Self-Determination and National Minorities' (Oxford: Clarendon, 1997); Quane, H. 'The United Nations and the Evolving Right to Self-determination' (1998) 47 ICLQ 3, pp. 537-572; Tomuschat, C. (Ed.) 'Modern Law of Self-Determination' (Dordrecht, Boston, London: Martinus Nijhoff, 1993). More specific references are given throughout the text.

<sup>4</sup> Simpson, G.J. 'The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age' (1996) 32 Stanford JIL 2, pp. 255-286, at p. 259

<sup>5</sup> *ibid.*, pp. 261-264

<sup>6</sup> Koskeniemi, M. 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 ICLQ 2, pp. 241-269, at pp. 241-251; Simpson, *op cit.*, p. 258-260. See further below, n. 56

The nature of the concept of self-determination, and the complexity of it, means that to be able to assess the use made of it by the international community in the context of the break-up of the SFRY, it will be necessary first to engage in a relatively detailed survey of it. This will take the form of a general historical account of the development of self-determination, followed by a consideration of the main contemporary aspects of the debate surrounding it, largely in the context of internal self-determination and the possible right of democratic governance. This account will be predominantly descriptive, with the aspects of theoretical assessment being reserved until the Yugoslav situation is assessed. The application of the concepts to the events in the Balkans will address both the role played by theories of self-determination in the finding that the SFRY was “in the process of dissolution”<sup>7</sup> and in the emergence of the successor States. This application will then be compared to that in the Somali experience. The result will be an account of the contribution of self-determination in the context of State failure.

## 5.2 Development(s) of Self-Determination

*Self-determination... is a combination of various principles of international law including human rights, territorial sovereignty, the acquisition of sovereignty over territory, recognition, and the law that determines statehood. The extent to which these principles are applied sets the parameters of the right to self-determination.*<sup>8</sup>

### 5.2.1 Antecedents

The heritage of the principle of self-determination, or at least of its antecedents, goes back to the Nineteenth Century, and possibly earlier, most usually in the form of ‘national’ objections to domination and subjugation within empires.<sup>9</sup> The development of the more modern right did not begin until the aftermath of WW I,

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<sup>7</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) *reprinted in* 31 ILM 1494-1497 - See above, Chapter 4, text at n. 156

<sup>8</sup> Batistich, M. ‘The Right to Self-Determination and International Law’ (1995) 7 Auckland University Law Review 4, pp. 1013-1037, at p. 1023

<sup>9</sup> Etzioni, *op cit.*, p. 21; Musgrave, *op cit.*, pp. 2-14. Cassese traces the roots back to the American and French Revolutions of the late Eighteenth Century - *op cit.*, pp. 11-13. Allott traces esoteric roots back much further even than that - Allott, P. “Self-Determination - Absolute Right or Social Poetry?”, in Tomuschat, *op cit.*, pp. 177-210, at pp. 183-205

primarily through the thoughts and words of US President Woodrow Wilson, and to a lesser extent Soviet Premier Vladimir Ilyich Lenin. It was the principle upon which the Versailles Peace was supposedly based<sup>10</sup>, as well as being one of the underlying philosophies of the founders of the League of Nations.<sup>11</sup>

In practice, the inter-war period did not see the development of a general concept of self-determination. Its use was limited to the narrow context of the post-war European settlement after the collapse of a defeated empire, and even then, it was applied selectively.<sup>12</sup> Its status remained limited to that of a political ideal. In the Åaland Islands Case (1920), the League rejected a claim made by the islanders, then a part of the 'new' State of Finland, to be able to join with the Swedish State. In the words of the International Commission of Jurists appointed to advise the League:

*Positive international law does not recognise the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation.*<sup>13</sup>

<sup>10</sup> "Against centuries of international law's denial of juridical status to national groups, this was a pathbreaking moment, a tectonic shift of legal paradigms." - Orentlicher, D.F. 'Separation Anxiety: International Responses to Ethno-Separatist Claims' (1998) 23 Yale JIL 1, pp. 1-78, at p. 31

<sup>11</sup> Batistich, *op cit.*, at pp. 1015-1017; Cassese, *op cit.*, pp. 4-23; Musgrave, *op cit.*, pp. 15-31. See further: Hyde, C.C. 'International Law Chiefly As Applied by the United States' Vol. I (Boston: Little Brown, 1952), pp. 363-372; Whelan, A. 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 ICLQ 1, pp. 99-115 - arguing, according to a Hohfeldian analysis, that the inter-war principle of self-determination did not give rise to a claim-right, but to a power relation. It was not until the aftermath of WW II that a genuine claim-right of self-determination emerged.

<sup>12</sup> Cassese, *op cit.*, pp. 23-27; Hannum, H. 'Rethinking Self-Determination' (1993) 34 Virg. JIL 1, pp. 1-69, at pp. 2-11; Hill, M.A. 'What the Principle of Self-Determination Means Today' (1995) 1 ILSA Journal of International and Comparative Law 1, pp. 119-134, at pp. 120-123; Musgrave, *op cit.*, pp. 32-61

<sup>13</sup> Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åaland Islands Question (1920) League of Nations Official Journal, Special Supp. 3, at p. 5. Cassese, *op cit.*, pp. 27-31; Hannum, *op cit.*, p. 9; Nanda, V.P. 'Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era' (1997) 3 ILSA Journal of International and Comparative Law 2, pp. 443-453, at p. 447. See also: Berman, N. 'Sovereignty in Abeyance: Self-determination and International Law' (1988) 7 Wisconsin International Law Journal 1, pp. 51-105, at pp. 72-76. The Rapporteurs appointed subsequently to assess the claim made an even firmer assertion as to the limitation, quoted in Cassese, *op cit.*, p. 123:

*To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.*

Despite the ultimate rejection of the Åland Islanders' claim, the case remains important in the sense that it illustrated a new perception of such issues. Whereas previously they would have been regarded as municipal matters, the fact that the debate took place at all within the League tacitly evidences a then novel characterisation of such claims as 'international'.<sup>14</sup>

### 5.2.2 Classical/Colonial Self-Determination

Modern self-determination took a major developmental step with its inclusion in the UN Charter.<sup>15</sup> It appears twice in the text, in Articles 1(2) and 55, although arguably in both contexts it refers to a right of States rather than of peoples. Perhaps more accurately, a right of peoples organised as States.<sup>16</sup> It is akin to a restatement of sovereign equality. Additionally, Articles 73 and 76, dealing with non-self-governing and trust territories respectively, were relevant although they did not use the term explicitly. Whilst they cannot be accepted as referring to a legal right for such peoples, it is apparent that the intention was to regard self-determination as a goal to be pursued. Nevertheless, the ambiguities and the extent of the debates seem to indicate some acceptance that the principle was to be a flexible one and that it would develop over time.<sup>17</sup>

The Charter statements were generally taken to represent something less than an enforceable legal principle, and referred only to Trust (Mandate), non-self-governing,

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<sup>14</sup> Cassese, *ibid.*; Kirgis, F.L.Jnr. 'Editorial Comment - The Degrees of Self-Determination in the United Nations Era' (1994) 88 AJIL 2, pp. 304-310, at pp. 304-307.

Orentlicher draws out from the generality of the two reports the earliest foundations of the modern doctrine of self-determination in an acceptance of some right to secession during times of "profound transition" or when States fail to "assure basic rights of national groups within their territory", *op cit.*, pp. 35-38, quotations at p. 38 - see further below.

<sup>15</sup> For general accounts of the process of the inclusion of self-determination in the Charter, see Cassese, *op cit.*, pp. 37-43; Musgrave, *op cit.*, pp. 62-66.

<sup>16</sup> Higgins, *op cit.*, pp. 111-114; Kelsen, H. 'The Law of the United Nations: A Critical Analysis of Its Fundamental Problems' (London: Stevens, 1951), pp. 50-53; but *cf.* Hannum, *op cit.*, p. 11. Note that Kelsen also observes that the principle "does not mean that friendly relations among states depend on democratic form of government... This would not be compatible with the principle of 'sovereign equality' of the Members, nor with the principle of non-intervention in domestic affairs...", at p. 52.

<sup>17</sup> Quane, *op cit.*, pp. 539-547

and other non-sovereign territories.<sup>18</sup> Hence, references to “a principle roughly described as self-determination”<sup>19</sup>. More cogently:

*A fundamental difficulty with the argument that the Charter has created a right of self-determination in subject peoples is that it speaks itself only of a ‘principle’ and not of a right.*<sup>20</sup>

This initial mention in the Charter was developed over succeeding years: indirectly in the Universal Declaration on Human Rights, 1948<sup>21</sup>, and then expressly in, for example, General Assembly Resolution 421 recognising “the right of peoples and nations to self-determination”<sup>22</sup> and General Assembly Resolution 637A asserting that “the States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations”<sup>23</sup>. This apparent general development of a right for non-State entities quickly became narrowed. The key text is the Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960<sup>24</sup>, which stated:

*2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;*

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<sup>18</sup> See for example: Brierly, J.L. ‘The Law of Nations: An Introduction to the International Law of Peace’ 6 Edn., Waldock, Sir H. (Ed.) (Oxford: Clarendon, 1963), pp. 173-194; Oppenheim, L. ‘International Law: A Treatise’. Vol. I “Peace” 7 Edn., Lauterpacht, H. (Ed.) (London, New York, Toronto: Longmans, 1948), pp. 173-218. However, neither text refers specifically to ‘self-determination’.

<sup>19</sup> Hyde, *op cit.*, p. 378

<sup>20</sup> O’Connell, D.P. ‘International Law’ Vol. I (London: Stevens, 1965), p. 337

<sup>21</sup> (1948) GA Res. 217A. It has been argued that it, in particular Art 21(3), is an early expression of the right of internal self-determination as the right to democratic governance - Nafziger, J.A.R.

‘Self-Determination and Humanitarian Intervention in a Community of Power’ (1991) 20 *Denver Journal of International Law and Policy* 1, pp. 9-39, at pp. 13-14. Whilst undoubtedly a fair point, this is merely the continuation of a much older tradition, dating back into the Eighteenth and Nineteenth Centuries - Hannum, *op cit.*, pp. 2-4. On Internal Self-Determination, see further below, section 5.2.4

<sup>22</sup> (1950) GA Res. 421 - Quoted in Orentlicher, *op cit.*, p. 41

<sup>23</sup> (1952) GA Res. 637A - Quoted in Brownlie, I. ‘Principles of Public International Law’ 5 Edn. (Oxford: Clarendon, 1998), p. 600; and, in Jennings, Sir R. and Watts, Sir A. (Eds.) ‘Oppenheim’s International Law’ 9 Edn., Vol. 1 “Peace” (London and New York: Longman, 1996), at p. 712. But note that even this Resolution contained references to non-self governing and trust territories -

Musgrave, *op cit.*, p. 69

<sup>24</sup> (1960) GA Res. 1514, following (1958) GA Res. 1314



The text expressly focused the right to apply to non-State entities in a colonial situation - specifically, peoples in non-self-governing and trust territories. The extent of the right was, however, limited by State sovereignty:

*6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.*

This paragraph can be interpreted as preventing the right from applying beyond the colonial context to, for example, national minorities in existing States. In addition, it served to define “peoples” in the colonial context by territory rather than by national characteristics. The right could only accrue to the entire population of a colonial territory<sup>25</sup>, or possibly to the entire population of a pre-colonial entity that included all of one or more colonial territories.<sup>26</sup>

Since the resolution represented the extension of a right, its legal status in 1960 is at least questionable.<sup>27</sup> As a General Assembly Resolution, it is not *prima facie* legally binding. This view is supported by, *inter alia*: the need for a vote (89-0-9); the fact of the abstentions, including those of all of the colonial powers; and, general statements made at the time referred to ‘rights’, rather than ‘legal rights’, and to the ‘moral force’ of the resolution.<sup>28</sup> However, its importance has developed over time, such that “it has become the definitive statement of the General Assembly with regard to colonial situations”.<sup>29</sup>

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<sup>25</sup> For example, Cassese, *op cit.*, pp. 72-74

<sup>26</sup> An example of this latter possibility might be the joining of British Somaliland and Italian Somaliland into the single State of Somalia, but as has already been observed, this did not account for the Somali populations in Djibouti, Ethiopia and the NFD of Kenya - see above, section 3.2

<sup>27</sup> For example, Starke, J.G. ‘An Introduction to International Law’ 5 Edn. (London: Butterworths, 1963), pp. 116-117:

...if the right of self-determination be now part of customary international law, it may be not enough to speak of it as such, but some detailed definition of its extent and limits is necessary. Prior to 1958, it could be said that customary international law conferred no right upon dependent peoples or entities to statehood, although exceptionally some such right *ad hoc* might be given by treaty, or arise under the decision of an international organisation.

<sup>28</sup> Quane, *op cit.*, pp. 548-551

<sup>29</sup> Musgrave, *op cit.*, p. 70

The means by which self-determination was to be achieved were set out in a second resolution, of 1960<sup>30</sup>:

*Principle VI - A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:*

- (a) Emergence as a sovereign independent State;*
- (b) Free association with an independent State<sup>31</sup>; or*
- (c) Integration with an independent State<sup>32</sup>.*

Again, this general formula has come to represent the standard account of the means by which the right is to be secured.

The right was restated in the two major human rights treaties of 1966 - the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which had originally been adopted by the Human Rights Commission between 1950-1952<sup>33</sup>. Shared Article 1 of the Conventions provides:

*1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*

...

*3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

This clear statement within the two treaties served to solidify the legal right, despite the fact of its growing ambiguity.<sup>34</sup> Whilst it was not stated expressly within the text, the *travaux préparatoires* of the two instruments made it clear that the intention was

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<sup>30</sup> (1960) GA Res. 1541. Remarkably, this second Declaration, adopted the day after Resolution 1514, does not actually mention either the right to self-determination or the previous day's Declaration - Hannum, *op cit.*, p. 13. Its subject was Article 73(e) of the Charter.

<sup>31</sup> For example, Mariana Islands with the USA; Niue with New Zealand

<sup>32</sup> For example, Ifni within Morocco

<sup>33</sup> Starke, *op cit.*, p. 115

<sup>34</sup> "[T]he covenants contain the most definitive legally binding statement of the contemporary right of self-determination." - Hannum, *op cit.*, p. 18. This, however, seems to disregard the importance of the 1970 Declaration and subsequent practice. Indeed, it seems to contradict Hannum's own views on those very elements formative of the customary law, which is of course no less "binding" than treaty law. On the 1970 Declaration, see further below, text at nn. 52-56

that the *lex lata* referred only to the colonial context.<sup>35</sup> This restrictive interpretation of the right is confirmed by a majority of subsequent practice and pronouncements.<sup>36</sup>

Included within this interpretation are the definition of the subject “peoples” in terms of territory, and the sanctity of the borders of that territory - *uti possidetis juris*.<sup>37</sup> For example<sup>38</sup>: Charter of the Organization of African Unity (1963), Art 3<sup>39</sup>; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, 1965<sup>40</sup>; Definition of Aggression, 1974<sup>41</sup>; Helsinki Final Act (1975)<sup>42</sup>; Protocol I (1977) additional to the Geneva Convention on the Protection of War Victims (1949), Art 1(4)<sup>43</sup>; African Charter on Human and Peoples’ Rights (1981), Art 20; and, Charter of

<sup>35</sup> For example, O’Connell, *op cit.*, p. 338, then referring to the draft conventions:

*A distinction, nowhere explicit or even implicit in the documentation, has been suggested between minorities living within the metropolitan boundaries, and peoples of non-self-governing territories. The latter would be subject to the principle of self-determination, the former would not*

*Cf.*, Cassese, *op cit.*, pp. 47-52 and Crawford, J. “Some Conclusions”, in Crawford, J. (Ed.) ‘The Rights of Peoples’ (Oxford: Clarendon, 1988), pp. 159-175, at p. 169 *et seq.*; Quane, *op cit.*, p. 559

<sup>36</sup> Blay, S. ‘Self-Determination. A Reassessment in the Post-Communist Era’ (1994) 22 *Denver Journal of International Law and Policy* 2-3, pp. 275-315, at pp. 278-283; Cassese, *op cit.*, pp. 59-65; Epps, V. ‘The New Dynamics of Self-Determination’ (1997) 3 *ILSA Journal of International and Comparative Law* 2, pp. 433-442, at p. 437; Hannum, *op cit.*, pp. 17-28. Quane, *op cit.*, pp. 554-555. But *cf.* those who have argued for a wider interpretation of the right to any peoples subject to “alien subjugation, domination and exploitation” (the usual wording in pronouncements of the right), e.g. Koskenniemi, *op cit.*, pp. 247-248; McCorquodale, R. ‘Self-Determination: A Human Rights Approach’ (1994) 43 *ICLQ* 4, pp. 857-885, at pp. 859-863

<sup>37</sup> Quane, *op cit.*, pp. 555-557, 558-562. The concept of *uti possidetis juris* had originally arisen in the context of South American decolonisation. By this principle, the (colonial) territories seeking self-determination could only make any such claim within the existing colonial borders - no issues of redrawing of any borders could form a part of the claims. The validity and applicability of this aspect of the principle has been reaffirmed recently by the ICJ: Case Concerning the Frontier Dispute (Burkina-Faso/Republic of Mali) 1986 *ICJ Reports* 554, and Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) 1991 *ICJ Reports* 53 - Epps, *op cit.*, pp. 435-436. See further below, text at nn. 147-150

<sup>38</sup> Blay, *op cit.*, pp. 278-283; Higgins, *op cit.*, pp. 114-117; Jennings and Watts, *op cit.*, pp. 282-295, 712-715; Nanda, *op cit.*, p. 449; Simpson, *op cit.*, pp. 264-274

<sup>39</sup> For general accounts of self-determination within the OAU context, and specifically in the Horn, see: Mayall, J. “Self-Determination and the OAU”, and Healy, S. “The Changing Idiom of Self-Determination in the Horn of Africa”, both in Lewis, I.M. (Ed.) ‘Nationalism and Self-Determination in the Horn of Africa’ (Ithaca: London, 1983), at pp. 77-92 and at pp. 93-109, respectively.

<sup>40</sup> (1965) GA Res. 2131

<sup>41</sup> (1974) GA Res. 3314

<sup>42</sup> Conference on Security and Co-operation in Europe: Final Act (1 August 1975) reprinted in 14 ILM 1292 - Hannum, *op cit.*, pp. 28-29; Juviler, P. ‘Contested Ground: Rights to Self-Determination and the Experience of the Former Soviet Union’ (1993) 3 *TLCP* 1, pp. 71-88, at pp. 78-79

<sup>43</sup> Rosas, A. “Internal Self-Determination”, in Tomuschat, *op cit.*, pp. 225-252, at pp. 226-227

Paris (1990)<sup>44</sup>. The ICJ has on a number of occasions confirmed this traditional view: Namibia Case (1971)<sup>45</sup>; Western Sahara Case (1975)<sup>46</sup>; Frontier Dispute Case (1986)<sup>47</sup>; and, Arbitral Award of 1989 Case (1991)<sup>48</sup>.

Accordingly, the classical right of self-determination can be summarised as a right accruing to peoples organised as States, or to colonial peoples defined territorially. In the latter case, it is a right to separate Statehood, association with another State, or incorporation into a State. The right is always subject to the limitations of *uti possidetis juris* and State sovereignty. Another aspect of the classical statement of the right is the almost universally held view that it did not entail a right of secession. Yet, even on this point, the international community had scope for flexibility given the responses to Pakistan (from India) and Bangladesh (from Pakistan), which were to become UN Member States in 1947 and 1971 respectively. This notwithstanding, the overwhelming consensus was summarised by Secretary-General Thant, in a frequently quoted passage:

*As far as the question of secession... is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept a principle of secession of a part of its Member State.*<sup>49</sup>

It is worth noting that the 'classic' right of colonial territories to self-determination is not always mechanically applied. Two examples of exceptions, which have nonetheless been classified as colonial situations, are Gibraltar and the Falkland Islands/Malvinas. In both cases, it is arguable that the UN's stance demonstrates a

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<sup>44</sup> Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe (21 November 1990) reprinted in 30 ILM 190

<sup>45</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) 1971 ICJ Reports 16. At para 52, the Court stated:

*[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principles of self-determination applicable to all of them.*

<sup>46</sup> Western Sahara (Advisory Opinion) 1975 ICJ Reports 12. At para 162, the Court recognised: *[T]he principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end.*

<sup>47</sup> (Burkina-Faso v. Mali) 1986 ICJ Reports 554

<sup>48</sup> Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) 1991 ICJ Reports

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<sup>49</sup> 'Secretary-General's Press Conferences' UN Monthly Chronicle, Feb 1970, p. 36

willingness to occasionally “interpret the principle... in the light of wider considerations such as the need to maintain the peace and the existence of territorial claims”.<sup>50</sup> There also remain stark examples where the principle has been disregarded completely - India’s annexation of the Goa, Damao and Din, and Indonesia’s annexation of West Irian and East Timor.<sup>51</sup>

### 5.2.3 Modern/Post-Colonial Self-Determination

The relatively consistent development of the right of self-determination, as it has been described, took what was possibly its first divergent step with the adoption by the General Assembly of the Declaration on Friendly Relations (1970)<sup>52</sup>. This restated the principle in the usual terms, with reference to “all peoples”, to the ways in which the right could be achieved, and to the need to protect the integrity of existing States. However, the penultimate paragraph of the section included a formula not previously used in statements of the right:

*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, creed or colour.* [Emphasis added]

At first sight this appears to be a relatively standard statement of the protection of State integrity. But “[t]he logical reading of the Declaration is that a state must possess a government representing the whole people for it to be entitled to protection of its integrity against secession”.<sup>53</sup> Further, although the meaning of “peoples” is still

<sup>50</sup> Quane, *op cit*, p. 553 *et seq.* It is in the alternative arguable that these two situations are simply examples of the difficulties inherent within the concept of self-determination and are thus as yet unresolved cases - Cassese, *op cit.*, pp. 76, 86-88, 206-214

<sup>51</sup> Cassese, *op cit.*, pp. 79-86, 223-230, which includes citations to various specific writings on these cases. It should be noted however that recent developments have occurred to redress the situation in East Timor.

<sup>52</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970) GA Res. 2625(XXV)

<sup>53</sup> Nanda, *op cit*, p. 449. See further, for example: Hill, *op cit.*, pp. 123-129

based upon “territory”, it is qualified by “race, creed, or colour”, thereby referring to other objective characteristics.<sup>54</sup>

The Resolution was adopted without a vote, and was widely regarded as a significant step in the codification and progressive development of customary international law in a number of important areas. In terms of the right of self-determination for States and colonial peoples, it was merely a further codification of the law that had been developing generally over the preceding twenty-five years, and particularly in the previous decade. In terms of the extension represented by the paragraph quoted, it can at most be classified as progressive development of the law.<sup>55</sup> In this connexion, two major strains of the debate emerge: that the right extended only to an ‘internal’ aspect, whether to the entire population, or to minorities within it; or, that the right was extended beyond the colonial context, to include all examples of alien subjugation, or possibly even further.<sup>56</sup>

#### 5.2.4 *Internal Self-Determination*

Internal self-determination “concerns the right of peoples within a State to choose their political status, the extent of their political participation and the form of their government...”, and may be contrasted with the external right which “...concerns directly the territory of a State - its division, enlargement or change - and the State’s consequent international (“external”) relations with other States”.<sup>57</sup> Aspects of the right of self-determination internal to the State include numerous categorisations,

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<sup>54</sup> Quane, *op cit.*, pp. 562-563

<sup>55</sup> Cassese, *op cit.*, pp. 120-121. Quane regards it even now as contributing to an ongoing progressive development, *op cit.*, pp. 563-564. In contrast, Hannum asserts that it “may be considered to state existing international law”, *op cit.*, p. 14. Thornberry regards the entire resolution now as “a strong contender for customary law status.” - Thornberry, P. ‘International Law and the Rights of Minorities’ (Oxford: Clarendon, 1991), p. 20

<sup>56</sup> Koskeniemi proposes a similar division, between ‘abnormal’ situations, usually of State failure, which entail calls for separate Statehood, and ‘normal’ situations which concern the protection of minority rights within existing States - *op cit.*, pp. 251-257. He builds this dichotomy on a prior classification of two contradictory and irresolvable philosophical perspectives, respectively the Rousseauesque conception of authentic communities representing the genuine common will, and the Hobbesian ideal of the State as an organising mechanism according to a more general communal will - pp. 249-251

<sup>57</sup> McCorquodale, *op cit.*, at p. 864 and p. 863 respectively

including the right to democratic governance, minority rights, and general human rights. The internal right is one that is possessed by all States - in essence it is the original Charter right - but may also be possessed by elements within a State. As such, it encompasses a State's right to freedom from external interference, and is a possible solution to the claims of groups within States who seek self-determination.<sup>58</sup>

The basic content of the internal right can be derived from the standard formulations of the general right to self-determination, viz. the right to "freely determine their political status and freely pursue their economic, social and cultural development"<sup>59</sup>. "Self-determination has never simply meant independence. It has meant the free choice of peoples" as an ongoing right.<sup>60</sup> The 1970 Declaration on Friendly Relations extended this aspect, such that the territorial integrity and political unity of a State was only protected if the State was "...possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". This then refers to the distinct aspect of the right, possessed by racial or religious groups within a State when the government does not represent them. It is a right only to equal representation in government, as opposed to equal rights, but it is not limited to colonial contexts.<sup>61</sup>

The development of a specific focus on internal self-determination is a reflection both of the conception that the external right destabilises the international order in all but the most extreme cases<sup>62</sup>, and of the emphasis upon individual human rights as the legitimate basis of international order<sup>63</sup>. The history of so-called 'nationalist self-

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<sup>58</sup> Rosas, *op cit.*, pp. 231-232

<sup>59</sup> Art 1(1) of ICCPR and ICESCR (1966). Art 21(3) of the Universal Declaration of Human Rights (1948) expresses the same basic idea - "The will of the people shall be the basis for the authority of government", which is further clarified by *inter alia*, Arts 19, 21, 25 of the ICCPR - Franck, T. 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 1, pp. 46-91, at pp. 56-77; Hannum, *op cit.*, pp. 57-63 Nafziger, *op cit.*, pp. 12-15

<sup>60</sup> Higgins, *op cit.*, pp. 117-121, at p. 119

<sup>61</sup> Cassese, *op cit.*, pp. 112-118

<sup>62</sup> Etzioni, *op cit.*, p. 28 *et seq.*, at p. 21:

*[W]ith rare exceptions self-determination movements now undermine the potential for democratic development in nondemocratic countries and threaten the foundations of democracy in democratic ones.*

<sup>63</sup> McCorquodale, *op cit.*, 870-883

determination struggles' is a violent and destructive one. It is a search for representation, which has become conflated with nationalist ideas.<sup>64</sup> It is essentially a claim made by individuals to have a voice in their own government - the pursuit of a communitarian polity.<sup>65</sup> When viewed only in the external sense, self-determination can be argued to be more destructive of group rights than protective of them. The fragmentation of existing polities, based upon the divisions within them, is simply fragmentation through ethnic tyranny. Internal self-determination, in contrast, is a defence of cultural pluralism.<sup>66</sup>

*In a truly democratic state, there is no reason for one culture to try to suppress others, as long as the others seek self-expression rather than cultural dominance or territorial separatism... It is impossible to sustain the notion that every ethnic group can find its expression in a full blown nation-state... the process of ethnic separation and the breakdown of existing states will never be exhausted.*<sup>67</sup>

Internal self-determination overlaps with two specific areas of international law or, from another perspective, is divided into two parts - the right to democratic governance, and minority rights. The former will be dealt with separately below, but at least some of the basic sources from which this supposed right is derived are undoubtedly also sources for the basic assertion of the right to internal self-determination. These assertions build upon the formulation of self-determination, for example, in the 1966 Human Rights Covenants.<sup>68</sup> Specifically within a European context, the Helsinki Final Act, 1975, concluded under the auspices of the CSCE, at Principle VIII, states:

*By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.*

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<sup>64</sup> Etzioni, *op cit.*, pp. 21-24

<sup>65</sup> Anaya, S.J. 'A Contemporary Definition of the International Norm of Self-Determination' (1993) 3 TLCP 1, pp. 131-164, at pp. 137-140. On Communitarianism generally, see for example: Brown, C. 'International Relations Theory: New Normative Approaches' (New York, London, Toronto: Harvester Wheatsheaf, 1992), pp. 52-81. Thornberry even uses the term "communitarian self-determination" - Thornberry, P. "The Democratic Aspect of Self-Determination", in Tomuschat, *op cit.*, pp. 101-138, at p. 133

<sup>66</sup> Anaya (1993), *op cit.*, pp. 145-161; Etzioni, *op cit.*, pp. 24-34

<sup>67</sup> Etzioni, *ibid.*, p. 27

<sup>68</sup> Above, text at n. 33



The relationship between minority rights and internal self-determination is similarly blurred. Beyond the right of States to self-determination, and of colonial peoples to the (external) right, minorities within States are the next likely claimants. It is such claims that go to the heart of the difficulties with the right.

*[S]elf-determination and minority rights are locked in a relationship which is part of the architecture of the nation State, since whenever a State is forged, the result is the creation of minorities.<sup>69</sup>*

On this view, minority groups within States retain a right of self-determination, usually expressed as short of secession, as against the government of the State. This is the extension of the human rights and minorities regimes within the UN, based around Art 21(3) of the Universal Declaration and Art 27 of the ICCPR. The law of minority rights has recently developed as a discrete area, most clearly evidenced in the General Assembly's Declaration on Minority Rights (1992)<sup>70</sup>.

The interplay between minority rights and self-determination is far from clear. The independent development of minority rights law may lead to the conclusion that minorities are adequately protected and therefore do not need to benefit from a right of (internal) self-determination, or that human rights approaches are better able to afford protection to such groups.<sup>71</sup> This view may also be expressed in terms of the separate development being a result of the lack of a right to self-determination being possessed by such minority groups, and perhaps most emotively by indigenous national minorities.<sup>72</sup> Whether such non-independence rights accruing to sub-State groups is

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<sup>69</sup> Thornberry (1991), *op cit.*, p. 13

<sup>70</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (18 December 1992) GA Res. 47/135, reprinted in (1994) 52 International Commission of Jurists Review, pp. 86-89

<sup>71</sup> Anaya, S.J. 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' (1990) 75 Iowa Law Review, pp. 837-844, at pp. 841-844; Hannum, *op cit.*, pp. 57-63

<sup>72</sup> For example: Higgins, *op cit.*, pp. 121-126.

There exists an extensive literature on the subject of indigenous peoples and self-determination, which is beyond the scope of this study. See for example: Alfredsson, G. "The Right of Self-Determination and Indigenous Peoples" and Sanders, D. "Self-Determination and Indigenous Peoples", in Tomuschat, *op cit.*, at pp. 41-54 and pp. 55-8; Daes, E-I.A. 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' (1993) 3 TLCP 1, pp. 1-11; L  m, M.C. 'Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination', 25 Cornell ILJ 3, (1992), pp. 603-22; Sambo, D. 'Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?' (1993) 3 TLCP 1, pp. 13-47

classified as (internal) self-determination, or as some other collection of rights, it only serves a role in situations short of full State crisis.

The autonomous existence of an internal right of self-determination, distinct from the external right is itself ambiguous. The wording of the 1970 Declaration actually links the internal right with the external one. It is arguable that if a racial or religious group within the State is denied representation in government, they may pursue the external right. However, given the construction of the clause, and its drafting history, this is to be regarded as a very strict exception, only arising after gross and systematic denial of fundamental rights, and when all other peaceful means of settlement have been exhausted.<sup>73</sup> As such, this construction is similar to more general interpretations of the right to self-determination. It may also be illustrative of the falsity of the distinction between internal and external self-determination. And to complete the circle of classifications, it has been argued that, rather than the internal right being less damaging to the sovereignty of States, it is actually more so than the external right. The reasoning is that the external right is predicated on the primacy of States, whereas the internal right is predicated on legitimating external, whether unilateral or organisational, interference within the domestic affairs of 'sovereign' States.<sup>74</sup>

The extent to which the right to internal self-determination actually encompasses a right to secession is argued to be very limited. At the time of its adoption, the 1970 Declaration, at best, represented progressive development, and it is submitted that State practice has done very little to bring the right within *lex lata*. The only area where any arguable crystallisation has taken place is within the context of racial groups being persecuted by their State's government to an excessive degree - the examples of Southern Rhodesia and South Africa support this.<sup>75</sup> However, what it does do is accord some form of international legal status to non-State groups. In the very limited circumstances of a liberation movement opposing colonial rule, foreign

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<sup>73</sup> Cassese, *ibid.*, pp. 118-120

<sup>74</sup> Rosas, *op cit.*, pp. 225-252, at p. 227. Internal self-determination is "a collective human right enjoyed by the population of a State against the 'sovereign' State".

On 'non-interference in domestic affairs', see further for example - Cassese, *op cit.*, pp. 174-176

<sup>75</sup> Cassese, *op cit.*, pp. 120-124

occupation, or a(n extreme) racist regime, a provisional legal personality is held distinct from classical conceptions of belligerency<sup>76</sup>. Whilst it is a legal capacity in itself, given its nature, emergence as a State is likely to need to be conferred or at least confirmed externally, through recognition.<sup>77</sup> However, the significance of this development should not be exaggerated.

*Peoples can be said to have wedged open the door to the sovereign States' sacred domain but they have not advanced beyond the threshold.*<sup>78</sup>

### 5.2.5 Democratic Governance

The focus of internal self-determination has crossed a traditional divide in international law - that between a State's internal and external affairs. The development is a consequence of the growing emphasis in international law thinking in recent years on human rights. Another aspect of this process has been a reconsideration of the issue of 'government' within States. Previously, that area which was within the exclusive preserve of States has now become the focus of what might be termed 'human rights scrutiny', according to which certain standards of legitimacy are propounded. In other words, that there is a "right to democratic governance".<sup>79</sup> The supposed right has links with the meaning of government as a criterion of Statehood; with self-determination; and, with human rights. Its precise relationship with these concepts remains unclear, but what is of primary importance is that it exerts an influence on those wider contexts.

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<sup>76</sup> For example: Brownlie, *op cit.*, pp. 63-64; Jennings and Watts, *op cit.*, pp. 161-169

<sup>77</sup> This is a possible example of constitutive recognition. See further below, Chapter 6

<sup>78</sup> Cassese, *op cit.*, pp. 165-169, quotation at p. 168

<sup>79</sup> The two seminal works on this topic are: Fox, G.H. 'The Right to Political Participation in International law' (1992) 17 Yale JIL 2, pp. 539-607; and, Franck, *op cit.* However, links can be traced back many years, for example: Devine, D.J. 'The Requirements of Statehood Re-examined' (1971) 34 MLR 4, pp. 410-417, who argues for a fourth element of Statehood as "good government", loosely derived from Fawcett, J.E.S. 'The Law of Nations' 2 Edn. (Harmondsworth: Penguin, 1971), but with a meaning akin to democracy. Devine's main example of practice to support this claim is the General Assembly's treatment of Southern Rhodesia - pp. 412-413.

On the principle of democracy itself in this context, see for example: Fox, G.H. and Nolte, G. 'Intolerant Democracies' (1995) 36 Harv. ILJ 1, pp. 1-70 and Koskeniemi, M. *et al.* 'Responses to "Intolerant Democracies"' (1996) 37 Harv. ILJ 1, pp. 231-242; and, Franck, T. 'Fairness in International Law and Institutions' (Oxford: Clarendon, 1995), pp. 83-139

The asserted right is based upon the general principle of self-determination<sup>80</sup>, and has developed as part of a bundle of participatory rights within the broader human rights context<sup>81</sup>. The foundation of the asserted right is the interpretation of State sovereignty as peoples sovereignty as opposed to sovereign's sovereignty.<sup>82</sup> It can be derived from numerous international documents that describe self-determination generally<sup>83</sup>, and democratic entitlement more specifically.<sup>84</sup> "The result is a net of participating entitlements."<sup>85</sup> This is coupled with the growing international and regional practice of election monitoring, in for example Nicaragua (1989-90), Haiti (1990), and Cambodia

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<sup>80</sup> Franck (1992), *op cit.*, pp. 52-56

<sup>81</sup> Fox, *op cit.*, pp. 544-570. Fox argues that the right has developed within the context of the concept of free and fair elections. This then provides a possible ground upon which UN accreditation decisions could be based following UN monitoring of elections.

<sup>82</sup> Reisman, W.M. 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 4, pp. 866-876, at p. 869. See above, Chapter 4, n. 52

This recalls ideas in the classical period of international law, for example: Pufendorf, S. '*De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo*' (Two Books on the Duty of Man and Citizen According to Natural Law, 1682) Moore, F.G. (Trans.) (New York: OUP, 1927), pp. 103-105; Pufendorf, S. '*De Jure Naturae et Gentium Libri Octo*' (Eight Books on the Law of Nature and of Nations, 1688) Oldfather, C.H. (Trans.) (Oxford: Clarendon, 1934), pp. 958, 1000-1003; Vattel, E.de '*Le Droit des Gens ou Principes de la Loi Naturelle*' (The Law of Nations or the Principles of Natural Law, 1758) Fenwick, C.G. (Trans.) (Washington: Carnegie Institution, 1916), for example p. 11, p. 20, etc.

<sup>83</sup> Including: The UN Charter (1945); GA Res. 1514 (14 December 1960) (Declaration on the Granting of Independence to Colonial Territories and Peoples); GA Res. 2625 (24 October 1970) (Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations); and, International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966)

<sup>84</sup> Crawford, J. 'Democracy and International Law' (1993) 64 BYIL, pp. 113-133, at pp. 113-117; Franck (1992), *op cit.*, pp. 56-77.

International provisions include: GA Res. 217A (10 December 1948) (Universal Declaration of Human Rights) Art 21; ICCPR Art 25; GA Res. 45/150 (21 February 1991) and GA Res. 46/137 (17 December 1991) (on Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections).

Regional provisions include: Charter of the Organization of American States (1948) Art 5; First Protocol to the European Convention on Human Rights (1952) Art 3; American Convention on Human Rights (1969) reprinted in 9 ILM 673 Art 23; African Charter on Human and Peoples' Rights (1981) Art 13; CSCE Copenhagen Document (29 June 1990) reprinted in 29 ILM 1305 at p. 1309 - "[T]he will of the people, freely and fairly expressed through periodic and genuine elections, is the basis for authority and legitimacy of all government"; CSCE Charter of Paris (21 November 1990) reprinted in 30 ILM 190 at p. 194 - Accords to individuals the right "to participate in free and fair elections"; and CSCE Moscow Document (3 October 1991) reprinted in 30 ILM 1670

<sup>85</sup> Franck (1992), *op cit.*, p. 79

(1991-92).<sup>86</sup> However, the overall result of this study remains equivocal. In the words of Franck, perhaps its most representative advocate:

*Both textually and in practice, the international system is moving toward a clearly designed democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance. The task is to perfect what has been so wondrously begun...*<sup>87</sup>

In treating this topic in the wider context of self-determination, and in the context of resultant emergent States, considerable care must be taken. As ever, the task of the international lawyer remains that of determining the applicable law, as distinct from the wishes of other international lawyers.<sup>88</sup> Accordingly, it is informative to recall Franck's own conclusion - that the norm may be in the process of formation, but if it is, it has not yet crystallised into a fully-fledged rule of international law.<sup>89</sup> Thus, the only legal influence it is likely to exert is within a wider decision-making context, *viz.* as a standard against which the level of representativeness of a people or minority within a State is present or not, and similarly for any emergent entities. The debate surrounding this supposed right has introduced the concept of democracy onto the self-determination and Statehood agendas, albeit of uncertain status. Yet it has nevertheless come to play an important role in the international decision-making process, particularly with regard to the SFRY.

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<sup>86</sup> *ibid.*, pp. 56-77, 87-90. Franck notes that the three CSCE documents in particular are deliberately norm creating, using the language of *opinio juris*, and including the aspects of election monitoring. See further: Müllerson, R. 'International Law, Rights and Politics' (London and New York: Routledge, 1994), pp. 62-63; Musgrave, *op cit.*, pp. 99-100.

<sup>87</sup> *op cit.*, p. 91. For a general argument against the existence of the proposed right, within the context of self-determination, see: Salmon, J. "Internal Aspects of the Right of Self-Determination", in Tomuschat, *op cit.*, pp. 253-282.

<sup>88</sup> It is useful here to recall Brownlie's stern warning against the dangers of the "forward thinking" literature - Brownlie, I. "The Rights of Peoples in modern International Law", in Crawford (1988), *op cit.*, pp. 1-16 at pp. 14-15.

<sup>89</sup> In a recent survey of the situation of the proposed right, this view is endorsed when the conclusion is reached that democratic legitimacy remains as a factor in recognition decision-making only - Murphy, S. 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 ICLQ 3, pp. 545-581, at pp. 579-581.

### 5.2.6 Theories of Self-Determination

*...[S]elf-determination... describes an area or a source of problems, and not a set of ready-made rules with determined consequences for a particular type of "abnormal" situation. To say that self-determination "applies" is to seek to regulate conflict by reference to rules and principles that have no intrinsic connection with the law of sovereign equality, with its strong presumption on non-interference and territorial integrity.<sup>90</sup>*

Traditional justifications of self-determination have based the claim on forms of historic title, whether it is in terms of a territory or a people. As such, they remain grounded in the traditional conception of absolutist independent Statehood. However, self-determination claims can also be viewed within the broad category of human rights law; as part of the area of international law that deals with "rights deemed to inhere in human beings individually as well as collectively". So, self-determination "undoubtedly embraces non-state groups... as well as groups defined by statehood boundaries...", but is most fundamentally an individual's right, based upon a communitarian approach to political philosophy.<sup>91</sup> This then is the root of the difficulties with the concept of self-determination. It has traditionally been categorised in terms of a conflict between an individual's rights and a State's rights. The definitional problem has been taken in terms of 'peoples' meaning a sub-State group or a State group, which is the dichotomy at the heart of the Western liberal tradition - the individual and the State. It is a characterisation based upon mutually exclusive spheres of authority, but the reality is much more complex. It is a reality made up of 'peoples' organised in "multiple overlapping spheres of community, authority, and interdependency" which are obscured by the perceptual grid of Statehood categories in international law thinking.<sup>92</sup>

Once this perception of a continuum between peoples and State categories has been achieved, so the link between self-determination and independence can be weakened. As the range of categories of organisation of peoples widens, so does the range of possible outcomes of self-determination. In this conception, the solution of

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<sup>90</sup> Koskenniemi, *op cit.*, p. 266

<sup>91</sup> Anaya (1993), *op cit.*, pp. 131-143, quotations at p. 136 and 137

<sup>92</sup> Anaya (1993), *ibid.*, p. 140; Anaya (1990), *op cit.*; McCorquodale, *op cit.*, pp. 866-875; Simpson, *op cit.*, pp. 261-264

independence is merely the most likely one to be applied when the group seeking to self-determine happens to be a colonised Statal entity. Alternative solutions will arise in alternative conditions.<sup>93</sup>

*Self-determination may be understood as a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics. The institutions and degree of autonomy, necessarily, will vary as the circumstances of each case vary. And in determining the required conditions for a claimant group, decision-makers must weigh in the human rights of others. While not precluded, independent statehood will be justified only in rare instances.*<sup>94</sup>

The range of solutions to, or interpretations of, the right to self-determination requires a means of determination.<sup>95</sup> Kirgis proposes an apparently simple assessment based upon the inverse relationship between the degree of ‘unrepresentativeness’ of government and the acceptable level of destabilisation of the international community. This is built upon a human rights account of the right of self-determination, such that the degree of denial of rights legitimates the extent of destabilisation, which will necessarily impact on the rights of others. Only in the cases of the most extreme denial of representation will the greatest level of destabilisation, viz. secession, become acceptable.<sup>96</sup> A more or less practical account, rooted in the conventional human rights

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<sup>93</sup> Anaya (1993), *ibid.*, pp. 143-144

<sup>94</sup> Anaya (1990), *op cit.*, p. 842

<sup>95</sup> *per Kirgis, op cit.*, p. 307, the range includes:

- Freedom from colonial rule (many examples in Africa and S. America);
- Freely chosen dependence (Puerto Rico);
- To dissolve a State (Czechoslovakia; USSR);
- To secede (Bangladesh; Eritrea);
- To reform a State (Germany);
- Limited autonomy short of secession;
- Recognition of minority rights (ICCPR, Art 27; Declaration on Minority Rights); and,
- Internal Self-determination, and of democratic governance (Haiti).

An alternative range is proposed in Rosas, A. “Internal Self-determination”, in Tomuschat, *op cit.*, pp. 225-252, at p. 230

<sup>96</sup> Kirgis, *op cit.*, pp. 308-310, at p. 310: “To summarize: The right to self-determination may be seen as a variable right, depending on a combination of factors. The two most important of these seem to be the degree of destabilization in any given claim, taking into account all the circumstances surrounding it, and the degree to which the responding government represents the people belonging to the territory. If a government is quite unrepresentative, the international community may recognize even a seriously destabilizing self-determination claim as legitimate.”

An earlier version of a similar idea can be found in Hannum, *op cit.*, pp. 47-49

justification of self-determination, is McCorquodale's basic limiting principle on the right: Since self-determination only exists to protect human rights, it will only be applicable insofar as this end will be achieved, in particular the general interest of international society in maintaining stability.<sup>97</sup>

An alternative view of the failures of international law to address the problem of secession and self-determination is to regard them as failures of the wider liberal-democratic political philosophies upon which the legal system is based. As such, a genuine account of secession, and therefore of self-determination will require:

*[T]he orthodox categories of international law, which for the most part only recognize fully sovereign states and individuals within them, must be expanded to acknowledge new forms of political association, exhibiting a range of types and degrees of self-determination.*<sup>98</sup>

Taken a stage further, Berman suggests that, in dealing with 'rights' of non-State groups, we are dealing with matters outside (or at the limits of) the discipline of international law. As such, the operation of self-determination can only take place as a discourse between the two extremes of law and sovereignty (of natural law and positivism). What is the norm for a self-determination claim to arise is atypical for general international law - it is the archetype of a 'hard case'.<sup>99</sup> Self-determination represents an "exceptional competence" for international jurisdiction to fill the vacuum created by the inability of sovereignty-based international law to resolve the questions presented. Self-determination is only in focus during these periods of crisis for sovereignty - when sovereignty is in abeyance. The *post hoc* experiences of secession and recognition are

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<sup>97</sup> McCorquodale, *op cit.*, pp. 875-883.

A process like that of Kirgis and Hannum, but based on an idea akin to McCorquodale's balancing of human rights, is offered in: Joseph, S. 'Resolving Conflicting Claims of Territorial Sovereignty & External Self-Determination, Part 1: A Proposed Formula' (1999) 3 International Journal of Human Rights 1, pp. 40-61 & 'Resolving Conflicting Claims of Territorial Sovereignty & External Self-Determination, Part 2' (1999) 3 International Journal of Human Rights 3, pp. 49-68. The approach seeks to provide a formula to balance the various human rights and interests involved, based upon the factors of the type of territory (colony, Republic, etc.), the 'secession franchise' (the people), and the likely outcome of the clash between external self-determination and territorial integrity. This last aspect seems to highlight the circularity in the approach, and to drive the debate back towards a meta-legal, political assessment. The formula-table nevertheless provides a useful analytical tool for that process.

<sup>98</sup> Buchanan, A. 'Self-determination and the Right to Secede' (1992) 45 Journal of International Affairs 2, pp. 347-365, pp. 347-352, quotation at p. 351

<sup>99</sup> Berman, *op cit.*, pp. 52, 56-60



therefore irrelevant to the debate of self-determination - they represent the first vestiges of the return of sovereignty after the self-determination situation.<sup>100</sup> An alternative interpretation along similar lines is the characterisation of self-determination, like all international law, as “fundamentally reactive”, as explaining substantive issues *ex post facto* rather than dealing with the actual events in question and contributing to the resolution process as it occurs.<sup>101</sup> According to such views, self-determination represents a textual discourse used to fill the vacuum of exceptional circumstance which conventional international law cannot resolve, with the purpose of seeking to limit the extent of that vacuum.<sup>102</sup>

Berman’s view can be re-cast into the two categories of ‘normal’ situations, which are dealt with within States, by protection of human and minority rights, and ‘abnormal’ situations, during crises of sovereignty such as State failures, which allow calls for separation and the emergence of new sovereign entities. The real issue then arises when more recent views argue that the very existence of a self-determination claim renders the situation sufficiently abnormal to set aside the normal rules of sovereignty - what Koskeniemi classifies as the post-modern challenge.<sup>103</sup> It is post-modern in the sense that it is typified, in Eastern Europe and Sub-Saharan Africa, by attempts to transcend the (modern) legal person-State relationship and move to ‘pre-modern’ historical, ethnic or religious identities, which combine to create overlapping and competing communities. This is so notwithstanding the possibility of malignant tendencies emphasising one identification as paramount so as to undermine the justification of all others - which is essentially all that Statism and nationalism are, and is an example of the experience that the right of self-determination is seeking to overcome. Examples of the competing communities will incorporate issues such as: level of analysis (Are Croats

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<sup>100</sup> *ibid.*, pp. 68-84

<sup>101</sup> Eisner, M. ‘A Procedural Model For the Resolution of Secessionist Disputes’ (1992) 33 Harv. ILJ 2, pp. 407-425, at pp. 415-418. The author continues by describing an alternative approach based upon a procedural account of the UN in an adjudicatory role, essentially based upon internal political processes - pp. 418-425. Whilst not explicitly stated, this represents a *de lege ferenda* account, which might be regarded as a practical example of the theoretical stance proposed by Berman, *viz.* self-determination as an adjudicatory discourse for resolution of disputes beyond the realms of traditional international law concepts.

<sup>102</sup> Berman, *op cit.*, pp. 103-105

<sup>103</sup> Koskeniemi, *op cit.*, pp. 251-257

a minority in a Serb-dominated Yugoslavia, or a majority in a Croatia with its own Serb minority?); different definitions of nationality (based on language, cultural history, ethnicity, religion, etc.); territory (the delimitation of an area of territory is both the source of the problem - SFRY, and a solution - Croatia, Slovenia, etc.); and, subjective will (genuine expression or artificially created false consciousness; and how is the group, or 'electorate' to be determined<sup>104</sup>?). This very post-modernism renders traditional international law as incapable of resolving these issues. As such, its role is reduced to that of *ex post facto* account of the outcomes, as opposed to defining solutions to extant situations - akin to Berman's conclusion, referred to above. The role of the law becomes that of creating the political structures capable of mediating the competing loyalties and identifications.<sup>105</sup> And this multi-levelled dialectic of self-determination embodies all of the traditional elements of the doctrinal debate for which the theoretical explanation was being sought.<sup>106</sup>

### 5.2.7 *Meanings of Self-Determination?*

*Whether self-determination is a principle or a right once generated heated controversy. Although that jurisprudential controversy has been resolved in favour of establishing self-determination as a right, the normative ambiguity of the right is almost endless.*<sup>107</sup>

It is not easy to summarise the self-determination context in which the events of the early 1990s took place. The fairly standard point of departure is the classic colonial right.<sup>108</sup> Beyond that, a possible right existed for peoples within a State that was not "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."<sup>109</sup> The meaning and extent of this right was unclear. It seemed by the wording of the 1970 Declaration only to cover racial, or

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<sup>104</sup> Orentlicher, *op cit.*, pp. 58-60

<sup>105</sup> Koskenniemi, *op cit.*, pp. 257-269. Or, self-determination provides "a *set of political principles*" to legitimate alterations within States - Cassese, *op cit.*, p. 273

<sup>106</sup> Simpson, *op cit.*, pp. 274-285

<sup>107</sup> Nafziger, *op cit.*, p. 17; "Considerable confusion surrounds the legal principle of self-determination." - Quane, *op cit.*, p. 571; "[T]he international law of self-determination itself has become hopelessly confused and anachronistic." - Simpson, *ibid.*, p. 257

<sup>108</sup> "[S]elf-determination has meant at least decolonization since 1945." - Hannum, *op cit.*, p. 32.

Above, text at nn. 48-51

<sup>109</sup> Above, text at nn. 52-56

possibly religious, groups. In addition, in all but the most extreme cases, it was only likely to encompass a right to internal self-determination - to equal representation in government.<sup>110</sup> However, this right was seen alongside the various rights within States possessed by minorities<sup>111</sup>, and the proposed right to democratic governance<sup>112</sup>. Although, as regards the latter, it was likely that it was, and is, not yet a fully fledged right, but may nevertheless have exerted an influence over decision-making processes.<sup>113</sup>

The uncertainties that remain within the modern right of self-determination are very real, but they do not exist in isolation. Rather, the conceptual difficulties go to the heart of the dilemmas of international law, and particularly of human rights law - of the interplay between State sovereignty and individual rights.<sup>114</sup> This presents two, not necessarily mutually exclusive, frameworks within which to view possible claims to self-determination. The first approach emphasises the fundamental aim of the right - for “cultural groupings... to exist and develop according to their distinctive characteristics”.<sup>115</sup> Accordingly, determinations as to the applicability of the right, and as to its meaning - internal or external - seen alongside other means, including the broad bundle of human, minority, and participatory rights, can be measured against the level of achievement of this aim for the group making the claim, and all other groups in the form of the generality of international society.<sup>116</sup>

The second approach conceives of self-determination as outside of the limits of international law, or as a vocabulary for *ex post facto* description of abnormal situations. As such, the role of international law becomes simply that of setting forth the context within which the abnormality is limited, and normality is re-established.<sup>117</sup> The result of both approaches is a return to the historic political agendas that originally fostered the principle, which has since evolved into a right. These are agendas of nationalism, of

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<sup>110</sup> Above, text at nn. 57-67

<sup>111</sup> Above, text at nn. 68-72

<sup>112</sup> Above, text at nn. 73-86

<sup>113</sup> Above, text at nn. 87-89.

<sup>114</sup> Above, text at nn. 90-92

<sup>115</sup> Anaya (1990), above, text at n. 94

<sup>116</sup> Above, text at nn. 93-97

<sup>117</sup> Above, text at nn. 98-105

political affiliation and loyalty, of autonomy and identity - the very essence of the *jus gentium*.<sup>118</sup>

### 5.3 Self-Determination and the Yugoslav Experience

#### 5.3.1 Introduction - The Federal State

It will be recalled that the SFRY was a federal State comprising a number of entities, some of which had been sovereign or autonomous before joining the federation, as well as others that were newly created. A diverse mix of nationalities was present across the State. The federal structure comprised the six Republics, in addition to the two Autonomous Provinces within the Serbian Republic. This linkage between nationalities and Republics was a complex relationship, in that no Republic was entirely ethnically homogeneous. A number of nationalities that were a majority in one Republic also formed significant minorities in other Republics (primarily Serbs and Croats); significant minorities in a number of Republics were of the same nationality as neighbouring States (primarily Hungarians and Albanians, the latter forming a significant majority of the population in the Serbian Autonomous Province of Kosovo); and, the Muslim population was accepted as a nationality, thereby creating religion as a further aspect of difference (primarily in Bosnia-Herzegovina).<sup>119</sup>

The delicate nationality mix had prompted careful arrangements within the federal structures. In his 'Report on the Final Draft of the SFRY Constitution' in 1974, Chairman of the Constitutional Commission, Mijalko Todorovič saw the document as embodying "full equality of the nations and nationalisms". In addition, that:

*The new constitution is the result of free agreement on terms of equality among the Republics and Provinces, a unanimously accepted synthesis of the common interests of our nations and nationalities.*<sup>120</sup>

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<sup>118</sup> Above, text at nn. 4-11, 106

<sup>119</sup> See Appendix A.

The role played by religion in the conflicts was a complex one. In addition to the Muslim populations, the two other main religions were Catholic (notably Croat) and Eastern Orthodox (notably Serb). See above, Chapter 3, text at nn. 77-78

<sup>120</sup> Durovič, D. (Ed. in Chief) 'The Constitution of the Socialist Federal Republic of Yugoslavia', Trans. Pavičič, M. (Ljubljana: Dopolna Delavska Univerza, 1974), p. 40, 49 respectively

The wording “nations and nationalities” is central to the difficulty of these sections. Generally, nation - *narod* in Serbo-Croat - referred to one of the peoples of the Yugoslav State, whilst nationality - *narodnost* - was a displaced people of another nation. An example of the latter would be Kosovar-Albanians because of the existence of the State of Albania.<sup>121</sup> The term ‘nation’ was not, however, used synonymously with the term ‘Republic’. For example, Article 1 of the Constitution provides:

*The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntarily united nations and their Socialist Republics, and the Socialist Autonomous Provinces...*

[Emphasis added]

‘Republics’ denoted some form of political structure beyond, or possibly unconnected with, nation or nationality. This distinction is crucial since the first paragraph of the operative part of the 1974 Constitution begins: “The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession...”<sup>122</sup> In considering the events of 1990-1992, it was frequently asserted that this referred to a constitutional right of self-determination possessed by the Republics.<sup>123</sup> However, the weight of evidence appears to be against this view. In addition to the terminological distinction, the usage is arguably only political and rhetorical. The ‘right’ is very imprecisely expressed, and is only mentioned once within the entire document, which was one of the most comprehensive constitutions in the world. Also, any such legal right would have sat uncomfortably with other provisions in the constitution, such as Article 203, which precluded any Republic exercising a constitutional right that would threaten the existence of the federal State.<sup>124</sup>

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<sup>121</sup> Youngs, T. and Dodd, T. ‘Kosovo’ House of Commons Research Paper 98/73 (7 July 1998), p. 10. A possible further source of interpretative difficulty is the fact that the Serbo-Croat word *narod* denotes both the English word ‘nation’ (*demos*) and the word ‘people’ (*ethnos*) - for example: Lilić, S. in Nagan, W.P., *et al.* ‘Yugoslavia: A Case Study of International Consequences of Independence Movements (includes discussion)’ (1993) Proc. ASIL, pp. 205-228, at p. 213

<sup>122</sup> ‘Introductory Part - Basic Principles’, *op cit.*, p. 53

<sup>123</sup> For example: Batistich, *op cit.*, pp. 1028-1032; Eide, A. “In Search of Constructive Alternatives to Secession”, in Tomuschat, *op cit.*, pp. 139-176, at pp. 153-55; Šarčević, P. in Nagan, *op cit.*, p. 215. Similar provisions had been contained in previous Constitutions of the USSR, but have been referred to as “Leninist chimera[s]” - Blay, *op cit.*, p. 284

<sup>124</sup> Bagwell, B. ‘Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics’ (1991) 21 Georgia Journal of International and Comparative Law 3, pp. 489-523; Cassese, *op cit.*, pp. 268-272; Iglar, R.F. ‘The Constitutional Crisis in Yugoslavia and the International Law of

This lack of internal clarification of the possible existence of a right of self-determination, and the units that would be entitled to it, left many matters unresolved. Accordingly, the events surrounding the failure of the SFRY, and the emergence of various other States, must be considered in terms of general international law, and the external determinations that played such a significant role in those events.

### 5.3.2 *Break-up - The Units of Analysis*

The first moves towards separation from within the federation were seen in Slovenia, with the adoption by its Assembly of a constitutional amendment including the declaration that it was “an independent, sovereign and autonomous state”, on 27 September 1989. The amendment also clarified that, what it referred to as, the Republic’s existing right of self-determination included a right of secession from the Yugoslav federation.<sup>125</sup> This process gained momentum following the result of the election in April 1990, which saw Milan Kučan elected President, on a mandate broadly supporting a looser confederal Yugoslavia, but with the possibility of eventual Slovene secession.<sup>126</sup> Similar outcomes were seen in the elections in Bosnia-Herzegovina, Croatia and Macedonia, whilst in Montenegro and Serbia the incumbent Communists retained control.<sup>127</sup> With four of the six Republics then supporting democracy and change, the balance of power within the federation had significantly, and it was to prove definitively, shifted towards a general independence perspective, expressed along Republican lines.<sup>128</sup>

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Self-Determination: Slovenia’s and Croatia’s Right to Secede’ (1992) 15 Boston College International and Comparative Law Review 1, pp. 213-239, at, pp. 215-221; Kapetanovic, G. ‘The Emergence of New States: A Trend Towards Destabilization?’ (1992) Proc. CCIL, pp. 59-66; Rich, R. ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’ (1993) 4 EJIL 1, pp. 36-65, at pp. 38-40; Stojanovic, S. ‘The Destruction of Yugoslavia. (The Former Yugoslavia: Implications for International Law and Policy)’ (1995) 19 Fordham ILJ 2, pp. 337-362, at p. 358; Vejvoda, I. “Yugoslavia 1945-91 - from Decentralisation Without Democracy to Dissolution”, in Dyker, D.A. and Vejvoda, I. (Eds.) ‘Yugoslavia and After: A Study in Fragmentation, Despair and Rebirth’ (London and New York: Longman, 1996), pp. 9-27, at pp. 17-20

<sup>125</sup> Keesings, Vol. 35, 36899-900

<sup>126</sup> Lytle, P.F. “Electoral Transitions in Yugoslavia”, in Shain, Y. and Linz, J.J. ‘Between States: Interim Governments and Democratic Traditions’ (Cambridge: CUP, 1995), pp. 237-254, at pp. 241-243

<sup>127</sup> *ibid.*, pp. 243-249

<sup>128</sup> See above, section 4.5.1

The paralysis of the Federal State Presidency had seen effective control pass to the meetings of the Presidents of the six Republics in the early months of 1991. The degree of destabilisation and unrest was such that the six agreed to hold referenda on the future of the SFRY individually within each Republic, as opposed to a single referendum across the whole State. The decision was largely forced by the fact that a referendum on independence had already been held in Slovenia.<sup>129</sup> The referenda held in the Republics of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia all voted for some form of independence. These, coupled with the collapse of the central structures, resulted in moves being made by each of them towards independence. Constitutional amendments and structural changes, with frequent references to the rights of the respective Republics to self-determination, culminated in the first full declarations of independence, adopted by the Croat and Slovene Assemblies on 25 June 1991.<sup>130</sup>

Running directly counter to these Republican secessionist moves were the primarily Serbian attempts to hold the federation together, both politically, and by use of the JNA. Much of the impetus for this was derived from Slobodan Milošević's emphasis of Serb nationalism across the entire federation, although expressed in terms of the preservation of the sovereignty and integrity of the Yugoslav State. In partial support of these moves, the minority Serb populations within Bosnia-Herzegovina and Croatia sought to join with Serbia and remain within a federal State. These were responses to the claims of self-determination being made by the Republics within which they existed, although those Republican claims were being opposed by Serbia. Yet the justification offered by the minority Serb populations in support of their claims was their own parallel right of self-determination, which they sought to exercise not through "[e]mergence as a sovereign independent State" themselves, but through "integration with an independent State"<sup>131</sup>, being a federal entity containing the Republics of Serbia and Montenegro, as well as the Serb populations within the other Republics. The clearest example of this inconsistency of theory occurred in Croatia where, following a 'referendum in all Serb areas', the 'Serbian Autonomous Region of Krajina' declared independence in October

<sup>129</sup> Keesings, Vol. 35, 37131; Vol. 36, 37172-73, 37463-64; Vol. 37, 38080-81, 38163-64

<sup>130</sup> Keesings, Vol. 36, 37621-22, 37789-90, 37923-24; Vol. 37, 37973-74, 38019, 38203-04, 38274-75.

For details of the respective referenda, see above, Chapter 4, n. 138

<sup>131</sup> (1960) GA Res. 1541. See above, text at n. 30

1990. In so doing, it did not oppose Croatia's right of self-determination, but simply claimed its own similar right. Ultimately this led to the proclamation of Republika Srpska Krajina (RSK), covering all Serb regions in Croatia, and paralleled by Republika Srpska Herceg-Bosna (RSHB) in Bosnia-Herzegovina. Both entities, supported by Serbia, claimed to be exercising their right to self-determination, in the same manner as that being claimed by the various Republics. However, in both cases the attempted independencies resulted in conflict with their respective Republics.<sup>132</sup>

The final twist in these contradictory self-determination arguments was the denial by Serbia of similar claims to self-determination being made by the Albanian population in Kosovo and the Hungarian population in Vojvodina, both of which held Autonomous Province status. As early as 1988, moves were made under Milošević's leadership to withdraw the trappings of Republic-like status that had been gained by the two Provinces in the 1974 Constitution. Such moves included dissolution of the regional assemblies, and other organs of regional governmental control.<sup>133</sup> Against these moves, the parallel Kosovar parliament adopted a "Resolution on Independence and Sovereignty of Kosova" in September 1991, following a covert referendum in the Province, which had voted 99.8% in favour of independence from an 87% turnout. Independence was declared by the parliament on 19 October, and appeal was made to the EC for recognition, but which proved to be unsuccessful.<sup>134</sup>

An external perspective on these first moves, prior to the break-up of the federal State, illustrates two major strands of movement. For the four Republics leaning towards independence - Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia - their emphasis was on external self-determination, as exercised by clear administrative and political, albeit sub-Statel, units. The main source of legitimacy for their claim was the

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<sup>132</sup> Keesings, Vol. 36, 37666, 37789-90; Vol. 37, 38019, 38108-09, 38163-64, 38203-04, 38373-76, 38420-22, 38512-13, 38684-85; Vol. 38, 38832-33

<sup>133</sup> Keesings, Vol. 34, 35795A, 36372A; Vol. 35, 36514-15; Vol. 36, 37621-22, 37725-26. Youngs and Dodd, *op cit.*, pp. 11-13; Zametica, J. 'The Yugoslav Conflict' (1992) 270 Adelphi Paper, at pp. 25-32. Even the name 'Kosovo', which has become the standard one in use in the World media, derives from the Serb name for the region - *Kosovo-Metohija* - as opposed to the Kosovar-Albanian name - *Kosova* - for example: Youngs and Dodd, p. 7

<sup>134</sup> *ibid.*, p. 13



process of democracy - both democratic elections and referenda - which appealed to the claimed right to democratic governance. Their difficulty was the denial of similar rights for nationality/minority groups within and across the Republics - the groups traditionally regarded as the focus of self-determination, albeit in a manner that international law has never succeeded in clarifying. In contrast, the remaining two Republics - Montenegro and Serbia - placed their emphasis on the rights of nationality groups, primarily the Serbs<sup>135</sup>, across Republican borders. Whilst perhaps having greater resonance with the traditional conceptions of the right of self-determination, and not directly challenging the existence of the State, the claims presented a number of difficulties: they seemed to prejudice other nationalities, especially Kosovar-Albanians, Hungarians, and Bosnian-Muslims; the extent of the claims were uncertain, in that borders were not sacrosanct, although no mention of changes to the international borders was ever made; and, whilst there was an extent of democratic legitimacy behind the calls, it was partially contradicted by the political moves in the two Autonomous Provinces. These then were the conflicting justifications and reasoning that confronted the States that became involved in the process as the Yugoslav conflict was internationalised.

### 5.3.3 *International Involvement - The EC, the CSCE and M. Badinter*

The international response to the Yugoslav crisis was based largely around the EC and CSCE. During the early phases of the involvement, the emphasis was very much upon the continuation of the single State.<sup>136</sup> This view accorded largely with conventional approaches to self-determination. A single State - the SFRY - existed, and any claims of groups within it, if they had a right to self-determination, could be exercised internally. More particularly, the normal duties were owed by the State to respect

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<sup>135</sup> There remains a long-standing question as to whether the inhabitants of the 'Black Mountain' are Serbs or not. The region's history is heavily Serb dominated, but it has experienced periods free from Serb dominance. In the 1991 census, 62% declared themselves Montenegrans, as against just 9% Serbs - Zametica, *op cit.*, pp. 32-34. See above, Chapter 4, n. 133

<sup>136</sup> For example, on 15 March 1991 the European Parliament adopted a resolution which expressed the hope that:

*[T]he negotiations currently in progress within the collective State presidency of the republics of Yugoslavia would produce a constitution which by respecting the rights of all the peoples of Yugoslavia, would enable the State of Yugoslavia to continue.*

- Bull. EC 3-1991, 1.3.82

human and minority rights. The sabre-rattling of the pro-independence Republics on this view could be regarded as “action which would dismember or impair, totally or in part, the territorial integrity or political unity” of the State.<sup>137</sup> During this early phase, whilst it was true that considerable internal unrest existed, there was no real case for saying that the SFRY lacked “a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>138</sup> The consequence was a broad support for the, primarily Montenegrin and Serb, calls for the unity of the federal State, and the condemnation of both those acting against this, and of all those failing to respect human rights and minority rights.<sup>139</sup>

As the conflicts escalated, this stance of the European States became increasingly difficult to maintain. Their support of the federal State and opposition to fragmentation ran counter to the then perceived position that it was the Serbs that were the primary aggressors, and that their view of a single federal State was one dominated by Serbia.<sup>140</sup> As such, the opposition to fragmentation became gradually weakened, but the difficulty for the European States was the manner in which they could become involved in this internal process.<sup>141</sup> Their initial involvement was in the form of general statements and offers of assistance in the process. However, as the violence and fragmentation increased, primarily around RSK and RSHB, so too did the level of involvement. The extent of the conflict perhaps legitimated a greater concern, expressed through recognition of the possibility of destabilisation of the wider region, although the EC, unlike the UN, was not vested with any special

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<sup>137</sup> Declaration on Friendly Relations, 1970 - above, text at n. 52, and see further below, text at n. 198

<sup>138</sup> *ibid.*

<sup>139</sup> The Serb suppression of primarily Kosovan autonomy was long criticised in the European context. For example, variously: Bull EC 1/2-1990, 1.2.116; 7/8-1990, 1.4.120; 10-1990, 1.4.71; 1/2-1991, 1.3.119

<sup>140</sup> For example, on 16 May 1991 the European Parliament adopted a resolution, in response to increased JNA activities in support of Serbs, primarily in Croatia, and further restrictions in Kosovo.

*Whilst reiterating the preference of the European Community and the international community in general for the maintenance of a federal Yugoslavia, it insisted that this could not and should not be seen as a willingness to countenance the suppression of democracy and human rights.*

- Bull. EC 5-1991, 1.3.96. See further: Hannum, H. ‘Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?’ (1993) 3 TLCP 1, pp. 57-69, at pp. 58-60

<sup>141</sup> Weller, M. ‘The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia’ (1992) 86 AJIL 3, pp. 569-607, at pp. 570-574

authority to make such a determination.<sup>142</sup> In addition, the extent of the internal separation as between the Republics encouraged the use of international-style processes - the Hague Peace Conference and the Badinter Arbitration Commission. In this way, the Republics came to be treated in an 'inter-State' manner, which in turn meant they increasingly acted in such manner.<sup>143</sup> The consequence of this latter shift was a concomitant shift in the perception of the self-determination issue and the expectations of the Yugoslav parties. The expression of the right by the Republics offered a delimited solution, free from the uncertainties of a nationality based right. It could also be coupled with democratic processes, which both had a legitimating effect, and were likely to produce governmental structures that the European States were familiar with. The significant problem of minority rights and human rights could then be dealt with through the conventional, Statal mechanisms for their protection.<sup>144</sup>

The means through which this stance was expressed was arguably the outcome of the first decision by the Badinter Arbitration Commission. The finding that the SFRY was "in the process of dissolution" was apparently grounded upon the lack of a government, which has already been seen to be without precedent in international law.<sup>145</sup> However, once determined, it also brought into play the extra legitimating element of external self-determination - no government must mean no "government representing the whole people belonging to the territory without distinction as to race, creed or colour".<sup>146</sup> The Yugoslav situation was just another example, albeit a very rare one, of an instance where this form of right could arise.

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<sup>142</sup> For example, the EPC statement published 2 August 1991:

*They express the Twelve's strong interest in a peaceful solution to Yugoslavia's problems, not only for the sake of Yugoslavia itself and its constituent peoples, but for Europe as a whole.*

- Bull. EC 7/8-1991, 1.4.15, previously cited above, Chapter 4, text at n. 142

<sup>143</sup> See above, section 4.5.2

<sup>144</sup> Burg, S.L. "The International Community and the Yugoslav Crisis", in Esman, M.J. and Telhami, S. (Eds.) 'International Organizations and Ethnic Conflict' (Ithaca and London: Cornell UP, 1995), pp. 235-271, at pp. 245-247

<sup>145</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) reprinted in 31 ILM 1494-1497 - above, Chapter 4, text at nn. 156-162

<sup>146</sup> Declaration on Friendly Relations, 1970 - above, text at n. 52

The emphasis of the European States' approach based upon self-determination for the Republics allowed the introduction of another tool to limit the destabilisation. The Badinter Commission's Third Opinion found that the 'self-determination' principle of *uti possidetis juris*<sup>147</sup> was applicable to the break-up. This finding was in part based on the decision in The Frontier Dispute Case. The Commission referred in particular to the passage:

*[T]he principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles...*<sup>148</sup>

It is arguable that the application of this rule to the Yugoslav situation was in fact a misreading of the relevant international law, since the Frontier Dispute Case was specifically limited to the colonial context. The Special Agreement, which had referred the case to the Chamber of the Court, was expressly based on "respect for the principle of the intangibility of frontiers inherited from colonization". In its decision, the Chamber had observed that *uti possidetis juris* was "a firmly established principle of international law where decolonisation is concerned."<sup>149</sup> Although it has been asserted that the Commission was in fact applying a historically fluid principle to a new set of circumstances, and might therefore be described as contributing to the formation of a new aspect of the customary right<sup>150</sup>, this was at no point expressly stated. The use made by the Commission of the principle was as if it were applying a

<sup>147</sup> The principle fixes boundaries, as at the time of independence, as a given for future interaction. - Jennings and Watts, *op cit.*, pp. 669-670, 715. See above, n. 37.

See generally: Ratner, S.R. 'Drawing A Better Line: Uti Possidetis and the Borders of New States' (1996) 90 AJIL 4, pp. 590-624; Shaw, M.N. 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) LXVII BYIL, pp. 75-154; Shaw, M.N. 'Peoples, Territorialism and Boundaries' (1997) 8 EJIL 3, pp. 478-507

<sup>148</sup> (*Burkina-Faso v. Mali*) 1986 ICJ Reports 554 at p. 565; Cassese, *op cit.*, pp. 190-193; Pellet, A. 'The Opinions of the Badinter Arbitration Committee, A Second Breath for the Self-Determination of Peoples' (1992) 3 EJIL 1, pp. 178-181, p. 180; Weller, *op cit.*, pp. 589-592

<sup>149</sup> Frontier Dispute Case, *op cit.*, p. 557 and p. 565 respectively. Hannum, *op cit.*, pp. 66-67; Musgrave, *op cit.*, pp. 233-237

<sup>150</sup> Craven, M.C.R. 'What's In A Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood' (1995) 16 Austl. YBIL, pp. 199-239, at p. 231 *et seq.*:

*Its application in Yugoslavia, outside the context of decolonisation, and in order to identify the presumptive units of future statehood where the Federation has disintegrated, may therefore be seen as further extension of the principle... which has been consistently endorsed by members of the international community.*

rule that was already part of the corpus of general international law, not limited to the colonial context, which was not specifically mentioned in the Opinion.<sup>151</sup>

The Commission also made express reference to the second and fourth paragraphs of Article 5 of the 1974 Constitution:

*The territory of the Socialist Federal Republic of Yugoslavia is a single unified whole and consists of the territories of the Socialist Republics...*

*Boundaries between the Republics may only be altered on the basis of mutual agreement...*

The vagaries and inconclusivity of the 1974 Constitution in the context of the break-up has already been referred to, and such terms are largely standard Constitutional renderings rather than expressive of matters of international law. In addition, the Commission did not refer to the ostensible right to self-determination in the Constitution, nor to the detail of the status either of the Autonomous Provinces or to the Yugoslav “nations and nationalities”.<sup>152</sup> The only reference was in response to the question of whether the Serbian population of Bosnia-Herzegovina possessed a right of self-determination. The Commission responded, in its Second Opinion, that they were entitled to the full protection of the rights accorded to minorities and ethnic groups under international law, but had no right of secession. In this way, the prior reasoning of self-determination as applicable to Republics as opposed to nationalities, which then entailed the application of the principle of *uti possidetis juris*, served to further limit the fragmentation. It was also an approach legitimated by democracy. As such, the ethnic tensions that remained, were not to be dealt with through external self-determination, but through other means.<sup>153</sup>

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<sup>151</sup> Frowein, J.A. “Self-determination as a Limit to Obligations under International Law”, in Tomuschat, *op cit.*, pp. 211-223, at pp. 216-217; Hannum ‘Rethinking’, *op cit.*, pp. 54-55; Nanda, *op cit.*, p. 450-452; Quane, *op cit.*, p. 570; Ratner, *op cit.*, pp. 613-614. But *cf.* Shaw, *op cit.*, pp. 106-119. “[T]he application of *uti possidetis* in non-colonial situations is not yet enshrined in international law.” - Joseph ‘Part 1’, *op cit.*, p. 53

<sup>152</sup> Musgrave, *op cit.*, pp. 211-233 and above, text at nn. 120-124

<sup>153</sup> EC Arbitration Commission, Opinion No. 2 (7 December 1991) reprinted in 31 ILM 1497-1499. Hannum ‘Old Wine’, *op cit.*, pp. 65-66; Hille, S. ‘Mutual Recognition of Croatia and Serbia (+Montenegro)’ (1995) 6 EJIL 4, pp. 598-611, at pp. 604-607

### 5.3.4 *State Failure and Internationalisation*

The Badinter Commission's, and thereby the EC's, determination that the SFRY was without a government was the trigger that allowed the right of external self-determination to come into play. The right arose only because the SFRY was "in the process of dissolution". The requirement of State failure, on the grounds of lack of government, as the pre-condition of the acceptance of a right to external self-determination, served to limit the amount by which the international community was extending the range of that right. External self-determination, as a right of non-State groups, only arose in colonial situations; arguably in cases of the most extreme racial persecution within a State; and now, during State failure. Whilst this is a further extension of the right of external self-determination accruing to non-State groups, it is a very limited one, in that it is only likely to arise in situations of failure, when the possibility of the emergence of new States is sufficiently evident. Albeit that such analysis was absent from the given reasoning of the Badinter Commission and the EC States.

The difficulty inherent in this approach is the reasoning upon which the finding of State failure was made. It will be recalled that the basic finding of the Badinter Commission in its First Opinion was that the SFRY lacked an "organized political authority" in the form required for a "federal-type State", because the central organs no longer met "the criteria of participation and representativeness inherent in a federal state".<sup>154</sup> Part of the reasoning behind this finding was the moves towards independence of the various Republics - their exercise of external self-determination. In a later Opinion, concerned with questions of State succession, the Commission found that Croatia and Slovenia had acquired Statehood, albeit unrecognised, on 8 October 1991 - roughly seven weeks prior to the finding that the SFRY had begun its "process of dissolution".<sup>155</sup>

External self-determination was available to the Republics because of the failure of the federal State; the federal State was said to be failing because the Republics were

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<sup>154</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) reprinted in 31 ILM 1494-1497 - above, Chapter 4, text at nn. 156-162

<sup>155</sup> EC Arbitration Commission, Opinion No. 11 (16 July 1993) reprinted in 32 ILM 1587-1589

seeking, and achieving, (external) self-determination. However, the process by which these decisions were made contained a further element in its circularity. The determinations that the SFRY was failing and that the Republics held a right of external self-determination, were both products of the EC intervention into the process, in the form of the Badinter Commission, yet the authority of that body to make any determinations in the Yugoslav context is at least questionable.<sup>156</sup> The claimed authority was not derived from the federal authorities - the representatives of the State - although they had consented to the process, but was based upon the consent of the six Republics.<sup>157</sup> However, again, at the time this authority was claimed to have been given, the Republics were merely internal administrative units of the SFRY, which was itself still legally in existence, at least in the view of the Commission itself, as expressed at a later date.<sup>158</sup> A similar circularity emerges: the decision that external self-determination was available to the Republics relied on the failure of the federal State; the federal State was said to be failing because the Republics were seeking self-determination; these determinations about the federal State were made based on the 'autonomous' authority of the Republics.

The 'law' it sought to apply further compounded the legal ambiguity as to the status of the Commission. Having been portrayed as the legal arm of the Conference, it was regarded as an *ad hoc* legal tribunal, and this is largely the manner in which its determinations have been regarded, and yet its decisions went beyond the mere application of legal rules.

*It did not, however, draw back, in the arguments which it developed, from opening doors and offering suggestions, nor from opening new horizons... Rejecting both a formal application of the law, which would have frozen the situation by polarizing positions, and led to the application of adventurous visions, deprived of a grip on reality, the Committee chose a middle path: without 'showing-off', it adopted a*

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<sup>156</sup> It has been described as "the legal pretext for intervention in the internal affairs of Yugoslavia" - Stojanovic, *op cit.*, p. 359

<sup>157</sup> EC Arbitration Commission, Interlocutory Decision (Opinions No. 8, 9 and 10) (4 July 1992) reprinted in 31 ILM 1518-1521

<sup>158</sup> With reference to the date of its First Opinion, the Commission observed that: "the SFRY was at that time still an international legal entity but the desire for independence had been expressed...." - EC Arbitration Commission, Opinion No. 8 (4 July 1992) reprinted in 31 ILM 1521-1523

*line which might inspire the decisions which only politicians are able to take.*<sup>159</sup>

The primary impact of the Commission was in its First Opinion, which amounted to a tacit withdrawal of recognition, or at least a signal of intent to so withdraw, before any successor States had come into existence. As such, it ran directly counter to the traditional approach of perpetuating the inertia of State continuity.

*Traditionally, scholars have sought to explain the 'continuity' of the State in face of changes in its condition, and have tended to ignore the more fundamental question of when the State itself may cease to exist. This, in part, has been moved by the perception that the existence of the State is a meta-legal phenomenon embracing historical and political facts which the law can only presuppose.*<sup>160</sup>

Unprecedented, questionable in legal basis, and applying doubtful law, or possibly not law at all - the decision was nevertheless to determine the definitive failure of the SFRY. Whatever is written on the matter, the fact remains that the State has failed, and had been replaced by other States. In the Commission's own words: "the former national territory and population of the SFRY are now entirely under the sovereign authority of new states".<sup>161</sup> Put another way, "the permanent dissolution of the state [wa]s proved by the erection of fresh states"<sup>162</sup> Given this reality, it remains to consider the meaning behind this application of the 'right of self-determination', and its contribution to international law's treatment of State failure.

### 5.3.5 Post-Communist Self-Determination

The crux of the Badinter approach to the Yugoslav situation was the finding that the SFRY was "in the process of dissolution". Once this finding was made, no real extension of existing ideas of secession or self-determination were required. The matter simply became one of the emergence of new sovereign States in an area

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<sup>159</sup> Pellet, *op cit.*, p. 181. It should be noted that Pellet drafted the texts of several of the Opinions of the Commission.

<sup>160</sup> Craven, M.C.R. 'The European Community Arbitration Commission on Yugoslavia' (1995) LXVI BYIL, pp. 333-413, at p. 359

<sup>161</sup> EC Arbitration Commission, Opinion No. 8 (4 July 1992) *reprinted in* 31 ILM 1521-1523 - See generally, Craven 'Arbitration Commission', *op cit.*, pp. 355-380, 411-412

<sup>162</sup> Hall, W.E. 'A Treatise on International Law' 8 Edn. (Ed.) Higgins, A.P. (Oxford: Clarendon, 1924), p. 22. Above, Chapter 4, text at n. 15



previously occupied by the failed State - the failure was both confirmed, and completed, by “the breakup of [the SFRY] into smaller nation-states”<sup>163</sup>. The basis of the finding that the federal structures had ceased to be sufficiently representative was the respective expressions of the desire for independence on the part of four of the Republics. As such, there was an implication in the Commission’s finding that the situation was in fact one of voluntary dissolution of the federal State, which finding soon gained weight from its resonance with the then ongoing events within the USSR.<sup>164</sup>

The break-up of the USSR essentially began in August 1991, when the three Baltic Republics of Estonia, Latvia and Lithuania had declared their independence. The manner in which they had come within the USSR, and the Soviet government’s eventual acquiescence in their independence, rendered their situation somewhat different to the remaining Republics.<sup>165</sup> However, within the remaining twelve, the momentum for independence was present, and culminated in December by the adoption between eleven of them of an agreement to dissolve the USSR.<sup>166</sup> The obvious difference with the Yugoslav situation was the fact of the consensus of the

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<sup>163</sup> Gordon, R. ‘Saving Failed States: Sometimes A Neocolonialist Notion’ (1997) 12 AUJIL&P 6, pp. 903-974, at p. 904. Above, Chapter 1, text at n. 55

<sup>164</sup> For example, Hannum ‘Old Wine’, *op cit.*, pp. 58-63

<sup>165</sup> For example: Blay, *op cit.*, pp. 292-312; Cassese, *op cit.*, pp. 258-264. See further below, section 6.3.7

For a discussion of pre-August 1991 situation of the Baltic States in the context of self-determination, see: Grazin, I. ‘International Recognition of National Rights: The Baltic States’ Case’ (1991) 66 Notre Dame Law Review, pp. 1385-1419

<sup>166</sup> Alma-Ata Declaration (21 December 1991) reprinted in 31 ILM 148-149 - “With the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist.” The Republic not party to the agreement was Georgia, due to the level of internal unrest it was experiencing during the period. However, representatives of the Republic of Georgia did attend the meetings as observers and in all practical senses the Republic accorded with the views of the eleven. The Alma-Ata document had been preceded by an agreement between Russia, Belarus and the Ukraine, which perceived themselves to be the ‘senior’ Republics. The Minsk Declaration and Agreement (8 December 1991) reprinted in 31 ILM 142-146 first established an entity called the CIS. The first paragraph of the preamble to the Agreement declares “...that the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists”, and the phrase “former Union of Soviet Socialist Republics” is used throughout the text.

See for example: Blay, *op cit.*, pp. 283-292; Rich, *op cit.*, pp. 44-47; Scharf, M.P. ‘Musical Chairs: The Dissolution of States and Membership in the United Nations’ (1995) 28 Cornell ILJ 1, p. 29-69, pp. 43-52

Soviet Republics. They all agreed to the dissolution, in a clear manner. In addition, theirs was an autonomous, internal decision. As such, the decision itself was essentially beyond the reach of international law.

*The process of independence by the twelve Republics... occurred outside the realm of law, both international and municipal. It was a de facto process precipitated by the political crisis at the centre of the Soviet Union and the correlative increase in the strength of centrifugal forces.*<sup>167</sup>

It is arguable that the process in Yugoslavia was similarly beyond the reach of international law. Instead, it was “a revolutionary process that has taken place beyond the regulation of the existing body of laws”.<sup>168</sup> As such, the exercise of self-determination by the Yugoslav Republics was outside the limits of international law. Thus, the role played by the Badinter Commission was in limiting the situation of abnormality, and in re-establishing a context in which international law could operate. On such a view, self-determination simply provided an *ex post facto* vocabulary to explain the events that had taken place.<sup>169</sup> This then is a possible reason for the Badinter Commission’s lack of express reference to the principle (legal or otherwise) of self-determination in its Opinions.<sup>170</sup>

The approach taken by the Commission served to limit as far as possible the extent of the vacuum of international law resulting from a finding of State failure.<sup>171</sup> The manner in which this was achieved was in the replacement of the SFRY’s Statehood by that of the Republics - the next most State-like entities. However, this determination, whilst arguably itself a meta-legal one, was not isolated from international law. It was implicitly grounded in a conception of external self-determination, but in a manner not previously seen, in that it applied to the units of a

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<sup>167</sup> Cassese, *op cit.*, p. 266, and see generally pp. 264-272

<sup>168</sup> *ibid.*, p. 270

<sup>169</sup> Berman, Buchanan, Eisner, Koskenniemi, Simpson - above, text at nn. 98-105, 117

<sup>170</sup> Hannum ‘Rethinking’, *op cit.*, pp. 49-57, and at p. 35: “[T]he reactions of states and international organizations to the disintegration of Yugoslavia and the Soviet Union has done little to advance our understanding.” Under a more conventional analysis: “The main failure of the EC was that it refused to confront the fundamental question in Yugoslavia: the scope and limits of self-determination.” - Zametica, *op cit.*, p. 62

<sup>171</sup> Berman, *op cit.*, pp. 103-105 - above, text at n. 102

federal State. In addition, as a further legitimating factor, the means through which Statehood was re-established was also on the basis of democratic governance, and entailed regulations for the protection of minorities, and the observance of human rights.<sup>172</sup>

Once the Commission's role is seen in terms of the limiting of the legal vacuum, and the re-establishment of Statehood, albeit of different States, the detail of its decisions is then explainable through the vocabulary of self-determination. Self-determination was applied to the ethnically mixed Republics of Croatia and Bosnia-Herzegovina, but not to the ethnically homogenous units of Republika Srbška Krajina and Republika Srbška Herceg-Bosna. It was applied to the artificially created Republic of Macedonia, but not to the historic entity of Kosovo. This delimitation was in part determined by the actual events occurring, and by the prior nature of the federal State structures.<sup>173</sup> The Badinter Commission's role was in confirming this division, and in applying the 'self-determination principle' of *uti possidetis juris* to the process. The legal reasoning behind this application has already been criticised<sup>174</sup>, but given the assertion that the Commission was in fact operating beyond the realm of international law, and was accordingly applying political principles in the context of the factual realities of State failure, the relevance of such analysis is diminished. Rather, it possibly evidences the

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<sup>172</sup> These ideas were inherent in the means through which the EC dealt with successor States of both the Yugoslav and Soviet break-ups - Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union & Declaration on Yugoslavia (16 December 1991) reprinted in (1991) LXII BYIL 559.

See further below, section 6.3.5

<sup>173</sup> The units emerging from the USSR were of a similar nature. Entities that had been artificially created relatively recently to suit the aims of the ruling regime were able to emerge as States - most obviously the Soviet Central Asian Republics of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. There existed a reasonable Russian minority population in many of the Republics that expressed the wish to remain part of a Soviet state in contrast/opposition to the respective majority populations. Whilst in other Republics, distinct regions existed which sought their own autonomy - the two most obvious examples being Chechnya within the Russian Federation and Nagorno-Karabagh within Azerbaijan. Of course, the distinction again was that the decision to divide along Republican lines was made by the Republics themselves, although it was apparent that this approach had broad international approval. See generally, for example: Juviler, *op cit.*, pp. 80-86; Tamzarian, A. 'Nagorno-Karabagh's Right to Political Independence Under International Law: An Application of the Principles of Self-Determination' (1994) 24 Southwestern University Law Review 1, pp. 183-212

<sup>174</sup> Above, text at nn. 147-151

extent to which the political determinations were nevertheless informed by and reliant upon legal principles.

Nevertheless, the determinations are unlikely to be without impact, despite their arising from a meta-legal context. In terms of the *ex post facto* analysis of the events in self-determination terms, the potential recipients of the right, in situations of State failure, are limited to previously existing administrative units. Thus, the recipient ‘peoples’ are defined purely territorially, with no specific reference to other objective characteristics, such as ethnicity, language, or history. This follows from the aim of the application as limiting the vacuum of international law, and re-establishing Statehood as swiftly as possible - only the next-most State-like entities are likely to be accorded this status. Further subdivisions, however clearly defined - such as Kosovo and Vojvodina - will only find themselves covered by the subsequent application of minority and human rights provisions.<sup>175</sup>

This emphasis on the application of the external right to ‘peoples’ defined entirely in terms of territory - the former Republics - was in part tempered by the additional stipulations made by the EC. Strong emphasis was placed on the requirement of some expression of a genuine will of the people to achieve independence. This element has resonance with the original principles of self-determination, and with the suggested right to democratic governance. However, the extent of this consideration should not be overestimated. The people able to express the subjective will need necessarily to have been objectively defined in terms of territory before they can express their will.<sup>176</sup> In addition, their determinations will largely be irrelevant in that the inertia of the international community is to create new Statal entities, thereby almost forcing independence once the finding of State failure has been made. This is most evident in the treatment of Montenegro and Serbia, both of which, by apparently equally democratic processes, had expressed the will to remain with the SFRY.<sup>177</sup>

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<sup>175</sup> This assessment would then address the general problem of continual fragmentation - for example: Steinburg, J.B. “International Involvement in the Yugoslav Conflict”, in Damrosch, L.F. (Ed.) ‘Enforcing Restraint: Collective Intervention in Internal Conflicts’ (New York: Council on Foreign Relations, 1993), pp. 27-75, at pp. 65-68

<sup>176</sup> For example: Orentlicher, *op cit.*, pp. 58-60

<sup>177</sup> Stojanovic, *op cit.*, p. 358. See further below, section 6.3.5

Once the basic findings of external self-determination had been made, the further requirements of minority and human rights observance were brought to the fore, particularly in the EC recognition process, which will be dealt with more fully in the next Chapter. However, on a human rights assessment of self-determination, this could be interpreted as the limited application of the external right, only insofar as the level of destabilisation could be justified, coupled with the (subsequent) use of general international law mechanisms to best serve the interests of cultural groupings.<sup>178</sup> Alternatively, this emphasis might be seen as an application of the internal right of self-determination to the peoples within and across the Republics.<sup>179</sup>

Whatever the emphasis on internal matters, the primary fact was the application of the principle of *uti possidetis juris* to the Republics, which was part of the general endeavour of the international community to limit the Statehood-instability caused by the failure. Yet, it is arguable that by having no specific reference to the definition of the ‘peoples’ in terms of ethnicity or nationalism, this determination actively contributed to the instability and conflict in the region, and extended the need for minority protection. In a sense, it has served to create, or at least to fan the flames of, the irredentist claims, primarily of the Serbs, in a manner reminiscent of post-colonial experiences. It also, by suddenly giving these internal borders the status of international frontiers, pushed them far beyond the purpose for which they were created.

*The ethnic mix in Yugoslavia... was such that many communities, especially the widely dispersed Serbs, found themselves on the wrong side of the new borders. What made the borders acceptable was the fact that they did not have the character of state borders, and indicated merely the extent of purely administrative competence of the different Republics.*<sup>180</sup>

In addition to these internal consequences of this application of *uti possidetis juris*, it is arguable that a further external impact might also arise. The attribution of the right of external self-determination to the former federal units within the SFRY, and the Badinter Commission’s emphasis on the governmental requirements of a “federal-type

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<sup>178</sup> Anaya, Kirgis, McCorquodale, and Rosas - above, text at nn. 93-97, 115-116

<sup>179</sup> Above, text at nn. 57-67 and n. 110

<sup>180</sup> Zametica, *op cit.*, p. 9

state”<sup>181</sup>, might serve to discourage the granting of such internal autonomy and thereby to creating stronger cases for external self-determination. The argument is that, by granting internal self-determination in the form of greater internal autonomy, potential external self-determination units would thereby be created. The only limiting factor would be the nature of the additional requirement sufficient to render external self-determination applicable.<sup>182</sup> Such possible requirements might be a basic lack of democratic participation<sup>183</sup>, or a (consistent) denial of minority and human rights<sup>184</sup>; or might require the most serious cases of gross violations of human rights<sup>185</sup>. However, under the present analysis, the determining requirement would only be that of a finding of State failure, which would itself only be acknowledged when sufficiently ‘State-like’ entities were present.<sup>186</sup>

### 5.3.6 Conclusion

*In the end, the international community was only too ready to adopt ad hoc arrangements. After all, Yugoslavia had demonstrated that all the sacred cows of international conduct could be slaughtered with relative impunity on the altar of flexibility: self-determination, non-violability of frontiers, and non-use of force. None of these principles was upheld with any great consistency by the international community, nor was there any systemic attempt to reconcile them with each other....*<sup>187</sup>

From the foregoing consideration, it can be seen that international community, through the decisions of the Badinter Commission, utilised the concepts of self-

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<sup>181</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) *reprinted in* 31 ILM 1494-1497 - above, text at n. 154

<sup>182</sup> Drew, C. ‘Independence Through Devolution - Scotland, Self-Determination and the Badinter Paradox’ (1996) *Juridical Review* 2, pp. 161-164. The author highlights this apparent paradox by reference to the recent devolution of Scotland within the UK.

<sup>183</sup> Teric, E.L. ‘The Legality of Croatia’s Right to Self-Determination’ (1992) 6 *Temple International and Comparative Law Journal* 2, pp. 403-427, at pp. 416-427

<sup>184</sup> Iglar, *op cit.*, pp. 226-239; Kimmich, O. ‘A “Federal” Right to Self-Determination?’, in Tomuschat, *op cit.*, pp. 83-100, at pp. 87-94

<sup>185</sup> Müllerson, *op cit.*, pp. 67-73, 91 - this account of self-determination as applied in the Soviet and Yugoslav contexts accords very closely with the theoretical approach set forth by Kirgis. See above, n. 96

<sup>186</sup> See below, text at n. 201

<sup>187</sup> Zametica, *op cit.*, p. 74

determination in order to preserve the stability of Statehood and limit the extent of the so-called vacuum of international law. An *ex post facto* assessment of the manner in which this was done reveals an application of external self-determination leading to independence only in the case of State failure, against which there is a strong presumptive inertia. Only when this inertia is overcome will the most State-like units be the recipients of the 'right', and will thereby achieve Statehood. But, the finding of failure will itself only be made when enough sufficiently-State-like entities exist to achieve the aim of re-establishing the State-centric international legal order.<sup>188</sup> This meta-legal process legitimated the independence of the various emergent States. It also included a context of further measures aimed at minimising the consequent difficulties in the affected region, whilst also impacting on wider international legal principles, especially those of democratic entitlement, and protection of human and minority rights.<sup>189</sup>

#### 5.4 And the Somali Context?

The significant distinction in outcome of the situations in Somalia and Yugoslavia has already been noted in the Conclusion to the previous Chapter. Therein, the distinction between the two was seen to revolve around the determination of loss of government leading to State failure. In the foregoing analysis, the importance of the concept of self-determination has been seen in the context of Yugoslavia. It remains to make some comparison with the similar circumstances in Somalia.

What is at first apparent in the two contexts is the difference in number of claims to self-determination, whether expressly invoked or not. In Yugoslavia, the initial claims

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<sup>188</sup> The degree to which this use of the self-determination approach actually serves the end of stability for the international Statat order is, of course, questionable. For example:

*What is missing from the various actions with respect to Yugoslavia is a clear identification of the application of the principle of self-determination in ethnically complex territories. The reliance on existing boundaries, ambiguous as that is, is redolent of the reliance on colonial administrative boundaries in decolonisation... So long as it remains an undefined political doctrine, the idea of self-determination looks to be an inherently destabilizing notion.*

- Warbrick, C. 'Current Developments: Public International Law - Recognition of States' (1992) 41 ICLQ 2, pp. 473-482, at p. 480

<sup>189</sup> Cassese, *op cit.*, p. 273 *et seq.*; Musgrave, *op cit.*, pp. 113-124; Orentlicher, *op cit.* pp. 65-71

came from four of the six Republics, although to varying extents, which were then responded to and followed by some non-Republic groups, primarily the RSK and RSBH, as well as by Kosovo. In contrast, in Somalia, the only entity that made any external assertion as to its political organisation was the self-proclaimed Republic of Somaliland. However, the situation of the Darod-Northeast in particular arguably developed in a way that is not entirely without relevance to the self-determination issue.

#### 5.4.1 *Somaliland*

British-Somaliland had become part of the single Somali State in 1960, upon gaining independence. Prior to that it had existed since 1887 as a British colony, before which its identity was clan based, like that of virtually all of the peoples in the Horn of Africa.<sup>190</sup> Its political and administrative development had occurred under the British model, in contrast to Italian-Somaliland. Its population was largely ethnically homogenous - the vast majority being Isaq, but with a small, historic Darod and Dir presence. Nevertheless, the British administration in Somaliland announced early in 1960 that its independence would be timed to coincide with that of the Italian administered south to allow the two entities to merge as a single whole.

The two colonies actually gained their independence separately - British-Somaliland on 26 June, and Italian-Somaliland on 30 June 1960. When the Italian Trusteeship Agreement expired at midnight on 30 June, Adan Abdullah, the President of the Legislative Assembly (of the south) acting as Provisional President of the Republic, declared the independence of Somalia. However, the process before this time had not followed the intended pattern. On 27 June, the Legislative Assembly of the “State of Somaliland” had passed the Union of Somaliland and Somalia Law, which was to have been signed by the representative of the south, but which did not actually occur. Instead, on 30 June, the Southern Legislative Assembly, on the last day of its protectorate status, passed the *Atto di Unione* (Act of the Union), which was

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<sup>190</sup> The treaty-making capacity of the Nineteenth Century clans, and of the status of those treaties is discussed in, for example: Carroll, A.J. and Rajagopal, B. ‘The Case For The Independent Statehood of Somaliland’ (1993) 8 AUJIL&P, pp. 653-681, at pp. 657-659



significantly different from the northern document. Nevertheless, it set forth the capacity of the President of the Assembly to act as the Provisional President, under which Adan Abdullah had declared the independence of Somalia.

Although both Acts were retrospectively repealed by a new Act of Union, passed by the single National Assembly in January 1961, the legal validity remains unclear since this was an act of a body which was itself a 'product' of a doubtful process. The position was not strengthened by the referendum on the constitution held in July 1961. Whilst the overall vote saw a good turnout, and the result was heavily in favour of the new constitution, in the north only one-in-six people turned out to vote, and the result was against the new constitution. Nevertheless, the overall outcome was clear, and the new constitution was promulgated. The single State of Somalia was confirmed, and was in practice regarded as existing from 1960 onwards, both domestically and internationally.<sup>191</sup>

Whatever the constitutional position, resentment with 'rule from the south' remained a feature of life in the north of Somalia. Despite Siyad Barre's attempts to overcome clan differences within Somali society, such dissatisfaction remained. These sentiments were finally distilled into the formation of the SNM in the early 1980s, with the express aim of providing opposition to the central governmental control. Years of largely external resistance and rebel activity by the SNM were altered by the Somali-Ethiopian agreement of 1988. With its expulsion from Ethiopia, the SNM felt forced to launch its 'last ditch' assault on the government forces in the Northwest. The response from Mogadishu was a devastating assault on the region, not limited to the SNM.<sup>192</sup> These events were one of the triggers to the events that eventually led to the overthrow of the military regime in January 1991.<sup>193</sup>

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<sup>191</sup> Referendum: Total - 1,760,840 "yes", 182,911 "no"; of which, in the north - 49,527 "yes", 54,284 "no". Keesings, Vol. 12, 17422A, 17524A; Vol. 13, 18169D; Bradbury, M. 'Somaliland Country Report' (London: Catholic Institute for International Relations, 1997), pp. 18-19; Carroll and Rajagopal, *op cit.*, pp. 655-661; Drysdale, J. 'Somaliland: The Anatomy of Secession' (Brighton: Global Stats, 1992), pp. 10-12. See further, above, Chapter 3, text at n. 38

<sup>192</sup> Above, sections 3.3 & 4.2.3

<sup>193</sup> Drysdale, *op cit.*, pp. 19-23; Sahnoun, M. 'Somalia: The Missed Opportunities' (Washington, DC: United States Institute for Peace, 1994), pp. 5-6

The early period of contraction of the Mogadishu authority saw the Northwest experience its own form of unrest. However, the SNM relatively swiftly regained stability, if not control, largely through the shared sentiment of the population - they had together suffered, in their view, years of repression from the south, as well as hardship caused by the Ethiopian possession of their historic grazing lands. This period of lack of central administration saw the re-emergence of the traditional clan structures - notably the *Guurti*. It was from the Great *Guurti* in May that the final call for independence came, which was reluctantly accepted by then SNM Chairman Ali 'Tour'. The declaration by the SNM on 18 May 1991 claimed to repeal the Union Law of 1960, and declared the independence of the Republic of Somaliland.<sup>194</sup>

The entity that first claimed independence was one suffering its own internal turmoil. The SNM was characterised by the various factions within it, which had only really been united in opposition to Siyad Barre's military rule, and included representatives of the minority Somaliland clans. Actual SNM control was minimal in the face of resurgent clan structures, represented by the *Guurti*, which formed the basic political landscape of the country. In addition, there remained various militias, or *mudjadeen* - well armed and widespread from the years of rebel conflict, and historically clan linked, but semi-independent from the *Guurti*-structures. As the 'government' sought to gain control through bringing the various *mudjadeen* under central authority, tensions grew. By January 1992, the instability and dissatisfaction was such that violence flared in the town of Burao between several of the Isaq forces. Although it burned itself out relatively quickly, there was an estimated death toll of 360, including possibly 50 civilians. As the sides fought to a standstill, the situation was resolved primarily by the intervention of local *Guurti*. Over the next twelve months, such conflict and clan mediation became the norm. Despite its trappings of western-style government, the SNM was unable to secure effective control, or to establish its authority internally or externally. Nevertheless, for the whole of 1991-1993, Somaliland remained in practice autonomous from the south, and this autonomy

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<sup>194</sup> Above, section 4.2.3

largely insulated it from the devastation and intervention occurring there. It also continued to seek external recognition, but without success.<sup>195</sup>

#### 5.4.2 Fragmentation

The events in Somaliland were largely mirrored in the neighbouring Darod region of northeast Somalia. The region was similarly ethnically homogenous, dominated by the Darod-Majerteen, with a number of other Darod sub-clans. The SSDF, which was almost exclusively Majerteen, swiftly dealt with what little conflict there was in the region, and then gradually drifted into the periphery - it too had been formed to oppose Siyad Barre's regime.<sup>196</sup> In its place, the traditional clan structures, through the various *Isimada* - much like their Isaq equivalents, the *Guurti* - re-established themselves as the primary societal organising units. Again, relative stability was achieved, more so than in Somaliland, and in stark contrast to the Mogadishu regions, from which the Darod-northeast became increasingly autonomous.<sup>197</sup>

Despite this considerable fragmentation of Somalia - at least its entire northern half - into two effectively autonomous and self-ruling units, the international community has persisted in regarding the single State of Somalia; in regarding it as not having failed; and, in pursuing its aims at reconstruction through the single, primary focus of Mogadishu. Whilst the developments in the Darod-northeast were largely ignored, the declaration of Somaliland was undoubtedly regarded as "action which would dismember or impair, totally or in part, the territorial integrity or political unity" of the State, just as the actions of Croatia and Slovenia had originally been.<sup>198</sup> However, whilst the international community, through the Badinter Commission and the EC,

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<sup>195</sup> Bradbury, *op cit.*, pp. 19-21; Drysdale, *op cit.*, pp. 24-27, 35; Gilkes, P.S. 'Two Wasted Years: The Republic of Somaliland, 1991-1993' (London: Save the Children Fund, 1993), pp. 3-36, 41-47; Lewis, I.M. 'Understanding Somalia: Guide to Culture, History and Social Institutions' 2 Edn. (London: HAAN, 1993), pp. 28-29, 74-77; Lewis, I. and Mayall, J. "Somalia", in Mayall, J. (Ed.) 'The New Interventionism, 1991-1994: United Nations Experience in Cambodia, former Yugoslavia and Somalia' (Cambridge: CUP, 1996), pp. 94-124, at p. 107

<sup>196</sup> The SSDF had been formed around the same time as the SNM, and both had prompted similar treatment from the south, albeit less pronounced in the northeast - for example: Lewis, *op cit.*, pp. 67-68; Lewis and Mayall, *op cit.*, p. 104

<sup>197</sup> See above, sections 4.2.3 & 4.3.4

<sup>198</sup> Declaration on Friendly Relations, 1970 - above, text at nn. 52 and 137

gradually shifted in this perspective with regard to the Yugoslav Republics, a similar shift did not occur for Somaliland, or for the Darod-northeast.

In the Yugoslav situation, external self-determination was accorded to the six Republics because the SFRY was “in the process of dissolution”, and that dissolution was a direct result of the moves made by at least four of the Republics to achieve greater autonomy - to exercise internal or external self-determination. This result was interpreted through the lack of representativeness of the federal government. The process also involved their treatment, at a relatively early stage, as State-like entities, in preference to dealing with the ‘rump presidency’, which arguably contributed to the process of their exercise of external self-determination.<sup>199</sup> In the Somali context, the lack of any remaining government led to dealings with the various factions, but only really those involved in the conflict in the south. Given their distinctly factional nature, they were not treated as State-like entities, but merely as political factions in the process. In addition, what dealings there were with both the Darod-northeast and with Somaliland were focused on the SSDF and the SNM respectively, despite the reality of the effective control of the respective clan structures. These clan structures, unfamiliar as they were to both the general international community, and to the workings of the UN, might also have contributed to the perception of them as not sufficiently State-like to be treated in a State-like manner.<sup>200</sup> Whilst this consideration should not be overstated, it does remain a point of speculation as to what difference it might have made had the Republic of Somalia that was formed in 1960 been a Federation, whether of two or more constituent units. However, it is submitted that the Badinter Commission’s emphasis of the “federal-type” structure of the Yugoslav government was purely a mechanism within a meta-legal process, rather than a precise legal determination. As such, it was a means to an end rather than an ultimately determinative factor.<sup>201</sup>

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<sup>199</sup> Above, text at nn. 156-158

<sup>200</sup> Above, Chapter 4, text at nn. 25-26, 114

<sup>201</sup> Of course, whether such an assessment is accurate or not, it will not necessarily make any difference to the reliance placed on the Commission’s finding in future self-determination cases. See above, text at nn. 181-186

### 5.4.3 *No Self-Determination in Somalia?*

The application of self-determination in Somalia was markedly different from that in Yugoslavia. On domestic legal terms, the claims of the Yugoslav Republics based upon the 1974 Constitution seem largely unfounded, and certainly no stronger than the uncertainties of the 1960 Union of the two Somali States, although it is submitted that neither serves as a valid basis for the invocation of self-determination.<sup>202</sup> Any basis in the authenticity of the national groupings in either case seems unlikely. The use made of self-determination in the Yugoslav context applied only to the Republics - the previously defined political units - and not to nationalities specifically. This was evident in the denial of claims made by the Serb minorities in Croatia and Bosnia-Herzegovina, and to the Kosovar-Albanians in particular. What national, or ethnic, basis there was was in the reasonably strong national identity of each of the Republics, with the very notable exception of Bosnia-Herzegovina. All issues of ethnic identity were focused through reference to the relevant minority and human rights provisions.<sup>203</sup> In Somalia, the international response was entirely predicated on the regard for a single Somali people, despite the strong claim of the autonomy of the six clans. Whilst definition is never easy, the distinct history and very strong identity of the major clans is undeniable, and its importance in the culture and societal organisation across the region is unquestionable. Within the two northern regions, a large degree of clan homogeneity was present, and within the clan-based societal structures that developed after the fall of the central administration, account was also taken of the small minority populations. Nevertheless, the nationality base of self-determination seems to have played no role in the international community's treatment of either situation.

A key element used to bolster the self-determinations in the Yugoslav context was democratic legitimacy. The Republican Presidents had emerged following democratic elections, and more importantly, referenda were required before emergence as independent States. However, this apparent patina of legitimacy was at least partially undermined by the situations in Montenegro and Serbia, as well as the denial of

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<sup>202</sup> Above, text at nn. 120-124, 191

<sup>203</sup> Above, text at nn. 132-135, 144, 152-153, 178-179, and see Appendix A

legitimacy of the referenda held in RSK and RSBH, and in Kosovo.<sup>204</sup> However, this was a democratic legitimacy based upon units that had been predetermined within a federal State, by a dictatorial regime, for the purpose of holding the federation together - they were artificial creations, themselves arguably without historic or democratic legitimacy - but which were essentially unalterable due to the negative application of the principle of *uti possidetis juris*.<sup>205</sup> In Somalia, whilst the developments in Somaliland and the Darod-northeast were not backed by referenda, they did develop through exercise of traditional clan structures, which were themselves a re-emergence after colonial oppression followed by European-style Statehood, which was itself ill-suited to nomadic cultures. Without a detailed sociological analysis, it is difficult to establish whether the respective structures of clan elders are in fact representative in a manner that western-democracy is taken to be. That said, arguably, utilisation of such traditional structures instead of untraditional processes like referenda, of which Somalilanders had bad memories after their experience of 1961, might itself be a form of self-determination. However, such issues go beyond the necessary considerations herein, for whatever their status, the question was not even raised in the international responses to the Somali situation. This was so, notwithstanding the fact that these structures emerged within units that had an authenticity based upon history dating back hundreds, if not thousands of years in their clan structure and use of the territory.<sup>206</sup>

The key distinguishing feature between the application of self-determination to the Yugoslav Republics, and not in Somalia, remains the issue of the loss of government. And that loss in the Yugoslav context was based upon the lack of representativeness of the federal structures, which both justified, and was justified by, the application of self-determination. It was a meta-legal determination reached in order to limit the extent of the vacuum of international law. It achieved this by bringing to an end the failure of the previous State by replacing it with new ones, in the form of the six

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<sup>204</sup> Above, text at nn. 129-134, 172, 176-177 - see further below, Chapter 6

<sup>205</sup> Above, text at nn. 147-153, 173. The idea of a negative application of *uti possidetis juris* is taken from the conclusions drawn in: Ratner, *op cit.*, pp. 616-623

<sup>206</sup> Above, section 3.2.1

Republics, as the next most State-like entities.<sup>207</sup> Once this finding was accepted in the Yugoslav context, it served to explain the process used and decisions reached.<sup>208</sup>

The denial of the application of self-determination in the Somali context can also be explained in like manner. Given that the application was made purely to limit the vacuum of international law created by a finding of State failure, such a finding would only be acceptable if such a limitation could be achieved. Thus, the entire area of the former State must be replaceable by new States - in Yugoslavia this was so, across the six Republics, even though it necessitated an inconsistent application of self-determination in preferring the referendum results in four to those in the remaining two. However, in Somalia, the units that might have effectively self-determined - have become new States - only covered about half of the territory, and less than half of the population. They offered no means of contributing to the solution of the abject failure of the southern half of Somalia. Thus, the absolute failure of the government of Somalia could not be seen to indicate State failure, when the lack of “representativeness” of the government of the SFRY was.<sup>209</sup>

Whatever the merits of this assessment, the fact of the international community’s denial of the identity of Somaliland is unquestionable. The situation remained and remains one of seeking to re-establish the State of Somalia, in a sense, no matter what that might cost.

*Many of today’s ‘reconstruction’ and ‘rehabilitation’ programmes are designed to do little more than to repair, piecemeal, the ruins of the former system; UN agencies and NGOs rarely consider to what extent their programmes may replicate the profoundly flawed and dysfunctional expansion of the old unsustainable, largely artificial, and aid dependent Somali state.*<sup>210</sup>

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<sup>207</sup> Above, text at nn. 171-172

<sup>208</sup> Above, text at nn. 173-185

<sup>209</sup> Above, section 4.5.2

<sup>210</sup> Bradbury, *op cit.*, p. 39, quoting Bryden, M. ‘Somaliland and Peace in the Horn of Africa: A Situation Report and Analysis’ (UNDP Emergencies Unit for Ethiopia, 1995)

## 5.5 Conclusions

Self-determination remains an elusive concept within international law. Whilst a degree of certainty about its application and meaning exists in the colonial context, doubt remains beyond that. The purpose of the foregoing consideration has not been an attempt to resolve these dilemmas, but has instead sought to provide an account of the role played by the concept of self-determination in the context of State failure. In the treatment of the SFRY, self-determination can be said to have provided an *ex post facto* legitimisation of the finding that the State was “in the process of dissolution”, although that finding was itself based upon the exercise of the right of self-determination. As such, the circular reasoning evidences the meta-legal process used to limit the international legal vacuum, and to facilitate the emergence of the next most State-like entities to replace the State that could therefore be said to have failed. The process, whilst not strictly one of law, nevertheless relied on legal ideas, and as such, the finding of self-determination that was made, was so done on the very limited grounds of a lack of government - meaning lack of a “government representing the whole people belonging to the territory without distinction as to race, creed or colour”<sup>211</sup> - which could therefore overcome the inertia of State continuity.

In Somalia, a similar use was not made of the concept of self-determination because its application would not have limited the potential vacuum of international law, or would only have partially done so. Instead, the vacuum was avoided by an application of the traditional approach of perpetuating the inertia of State continuity - by not finding that the State had failed.<sup>212</sup> This equally meta-legal finding was arguably compounded by the fact that Somaliland and the Darod-northeast were insufficiently State-like to be dealt with by an international-style process. Both entities were organised through traditional clan structures, and both contained within them inherent territorial questions, due to the nomadic nature of the people. This contrasted strongly with the six Republics of the SFRY, which were dealt with in a State-like manner from an early point in the Yugoslav process, which in turn, arguably contributed to their suitability to exercise external self-determination.<sup>213</sup>

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<sup>211</sup> Declaration on Friendly Relations, 1970 - above, text at nn. 52 and 146

<sup>212</sup> Above, text at n. 160 and section 4.4

<sup>213</sup> Above, text at nn. 156-157



Whatever the explanations, the reality remains the difference in treatment of Somalia and Yugoslavia - one was found to have failed, the other was not; the constituent elements of one remained within it, legally at least, whilst those of the other emerged as States. It is the process of this final aspect of State failure that remains to be considered - the tool of recognition in the emergence of the successor States. Once done, it will be possible to offer a coherent account of the underlying approach that international law offers to deal with State failure.

## Chapter 6: Recognition

*Equality is not in regarding different things similarly, equality is in regarding different things differently.<sup>1</sup>*

*[T]he recognition of states in most cases... is not a purely legal act but is first and foremost a politically motivated decision, especially if the situation is rather murky.<sup>2</sup>*

### Abstract

Recognition is a means by which the 'final stamp' of Statehood is conferred on emergent entities by the international community. It has both legal and political dimensions, and can relate to both States and governments. For many years, the detail of the interplay between the legal and political content of such acts has been the subject of considerable debate. Similar debate has focused around the precise effect they can be said to have upon the object to which they are directed.

The recognition determinations will provide a point of closure for the two cases under consideration. The aim will not be to provide a rigorous account of the doctrine of recognition, but to consider role it played in the experiences of Somalia and Yugoslavia, specifically with regard to State failure in these two cases.

Following a general account of the concept of recognition, its application in the Yugoslav context will be considered in some detail. Particular reference will be paid to the EC process, which largely dictated the primary international responses. In so doing, comparisons will be made with the treatment of events in the USSR, which were ongoing at the same time. Also, the specific aspect of UN Membership will be looked at since it represents an increasingly significant aspect of this area. These experiences will then be compared with those of Somalia, before any final conclusions are drawn.

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<sup>1</sup> Said by Bernard Mickey Wrangle - Robbins, T. 'Still Life With Woodpecker' (New York, Toronto, London: Bantam, 1990), p. 97

<sup>2</sup> Müllerson, R. 'International Law, Rights and Politics' (London and New York: Routledge, 1994), p. 128

## 6.1 Introduction - Recognition of States<sup>3</sup>

Recognition is a means by which a State can express its view as to the legal status of a factual situation, vis-à-vis itself. It is a device that may be employed for a variety of purposes, including territorial claims, changes to title, grant or withdrawal of nationality, and so forth. However, the dominant use of the concept has been with regard to Statehood. Specifically, to the legal existence of States, to non-constitutional changes in the government of States, and situations of belligerency and insurgency within States.<sup>4</sup>

Consideration of the recognition of States will necessarily reflect wider issues within the topic; specifically, the conceptual debates at its heart - primarily, that between law and politics, and between the constitutive and declaratory views. These debates are the source of the conceptual uncertainty that continues to surround this topic - the political act with legal consequences, or the legal act with political consequences, that either creates or confirms Statehood.

Recognition of Statehood represents a duality of acceptance and consequence. It signifies a particular factual situation, and it creates or confirms the consequent legal implications of existence as a State within the community of States.

*[R]ecognition of a new state may be defined as a unilateral act by which one or more states declare, or tacitly admit, that they consider a political unit which exists in fact and considers itself to be a state, as a state having the rights and duties which flow from statehood (...).*<sup>5</sup>

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<sup>3</sup> General starting points are: Brownlie, I. 'Principles of Public International Law' 5 Edn. (Oxford: Clarendon, 1998), pp. 85-104; Chen, T-C. 'The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States' Green, L.C. (Ed.) (London: Stevens, 1951); Crawford, J. 'The Creation of States in International Law' (Oxford: Clarendon. 1979), pp. 10-25, 120-128; Jennings, Sir R. and, Watts, Sir A. (Eds.) 'Oppenheim's International Law' 9 Edn., Vol. 1 "Peace" (London: Longman, 1992), pp. 126-203; Lauterpacht, H. 'Recognition in International Law' (Cambridge: CUP, 1947); Marek, K. 'Identity and Continuity of States in Public International Law' 2 Edn. (Geneva: Librairie Droz. 1968), pp. 130-161. More specific references are given throughout the text.

<sup>4</sup> On Recognition as a general category, see for example: Brownlie, *op cit.*, pp. 85-89; Malanczuk, P. 'Akehurst's Modern Introduction to International Law' 7 Revd. Edn. (London and New York: Routledge, 1997), p. 60; Schwarzenberger, G. and Brown, E.D. 'A Manual of Public International Law' 6 Edn. (Milton: Professional Book, 1976), pp. 54-56

<sup>5</sup> Mugerwa, N. "Subjects of International Law", in Sørensen, M. (Ed.) 'Manual of International Law' (London, Melbourne, Toronto: Macmillan, 1968), pp. 247-310, at p. 267. Or, "[R]ecognition of a state

Recognition of Statehood needs to be distinguished from that of governments. The two aspects are closely linked, not least because one of the prerequisites for Statehood is an effective government.<sup>6</sup> The difference lies in what is actually being indicated by the recognition.

*The recognition of a state acknowledges that the entity fulfils the criteria of statehood. The recognition of a government implies that the regime in question is in effective control of a state.*<sup>7</sup>

This distinction in theory is perhaps more complex in practice, given the necessary inter-linking of the two concepts of State and government.<sup>8</sup> The requirement of effective government for Statehood to be present means that recognition of a State should imply recognition of a government as well - "the recognition of a new State is implicitly a recognition of its government".<sup>9</sup> However, recognition of a new government need not imply any change in Statehood. The distinction is to be located in the timing. Yet even this proposition is not absolute:

*The basic difference is that recognition of a government necessarily has the consequence of accepting the statehood of the entity 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.*<sup>10</sup>

Although some difficulty with this must remain in terms of the governmental criterion of Statehood, presumably the implication is a distinction between the necessity of the existence of governmental structures - a constitution, legislative body, administrative processes, and so forth - and an actually incumbent regime. However, what does

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signifies acceptance of its position within the international community and the possession by it of the full range of rights and obligations which are the normal attributes of statehood" - Jennings and Watts, *op cit.*, p. 158

<sup>6</sup> See above, section 2.3.3

<sup>7</sup> Malanczuk, *op cit.*, p. 82

<sup>8</sup> On the difficulty, but importance, of distinguishing between States and governments, and on the paucity of literature on this subject, see Crawford (1979), *op cit.*, pp. 27-29

<sup>9</sup> Mugerwa, *op cit.*, p. 270. "[T]he existence of an effective and independent government is the essence of statehood, and, significantly, recognition of states may take the form of recognition of a government." - Brownlie, *op cit.*, p. 91; or, "[I]t is impossible to recognize a state without recognizing its government currently in power because an effective government is one of the conditions of statehood and, consequently, of recognition." - Müllerson, *op cit.*, p. 129

<sup>10</sup> Malanczuk, *op cit.*, p. 82

remain clear is that, once a State is in existence, a change in its government will not normally involve any change in its Statehood.

*The continuity of states is not affected by the change of governments. It is therefore necessary to consider separately the recognition of governments from the recognition of states.*<sup>11</sup>

As such, throughout the remainder of this text, use of the term ‘recognition’ without qualification will refer to recognition of Statehood.<sup>12</sup>

A second necessary distinction is that between recognition and the establishment or termination of diplomatic relations.

*Recognition of another state does not lead to any obligation to establish full diplomatic relations or any other specific links with that state. This remains a matter of political discretion. Nor does the termination of diplomatic relations automatically lead to de-recognition.*<sup>13</sup>

What does exist as a link between these two is that the establishment of diplomatic relations assumes, or implies, the recognition of Statehood. Recognition of Statehood is a *sine qua non* of (full) diplomatic relations.<sup>14</sup>

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<sup>11</sup> Mugerwa, *op cit.*, p. 270. Above, section 4.1

<sup>12</sup> An extensive literature exists on the topic of the recognition of governments. See for example: Davidson, S. ‘Recognition of Foreign Governments in New Zealand’ (1991) 40 ICLQ 1, pp. 162-70; Kingsbury, B. ‘Judicial Determination of Foreign “Government” Status. (United Kingdom)’ (1993) 109 LQR, pp. 377-82; Talmon, S. ‘Recognition of Governments: An Analysis of the New British Policy and Practice’ (1992) 63 BYIL, pp. 231-97; Warbrick, C. ‘Recognition of Governments. (United Kingdom)’ (1993) 56 MLR 1, pp. 92-97.

The change in UK policy in 1979/80 concerning the recognition of governments is illustrative of the clear distinction from recognition of Statehood. On that policy, see for example: Davidson, J.S. ‘Beyond Recognition? (British Recognition of Governments)’ (1981) 32 Northern Ireland Legal Quarterly 1, pp. 22-30; Symmons, C.R. ‘United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose by Another Name?’ (1981) Public Law, pp. 249-62; Warbrick, C. ‘The New British Policy of Recognition of Governments’ (1981) 30 ICLQ 3, pp. 568-592

<sup>13</sup> Malanczuk, *op cit.*, p. 86

<sup>14</sup> Brownlie, *op cit.*, p. 90. “Recognition is prerequisite to, or a consequence of, the establishment of full and normal diplomatic relations with a new state, but it should not be identified with such relations.” - Mugerwa, *op cit.*, p. 267

## 6.2 Traditional Treatment of Recognition

The topic of recognition has caused much disagreement, and uncertainty, amongst jurists for as long as it has been discussed. The subject matter of these studies remains a single one - the meaning of the concept - but has become expressed through debates focusing on specific aspects of recognition. It will be useful to follow these basic divisions for convenience in referring to writings on the subject, although it is submitted that there remains a single conceptual uncertainty at the core of all of this work. With this in mind, no attempt will be made to draw specific conclusions as to the outcome of the individual debates.

As a signification of the acquisition of legal personality on the international stage, recognition is of central importance in international law, domestic and international politics, and municipal law. Accordingly, there exists considerable disagreement as to whether the act is a legal or a political one.

*[A] tension is thereby created between the conviction of lawyers, over a wide philosophical spectrum, that recognition is, despite its political overtones, essentially a legal act in the international sphere, and that of politicians that they are, or should be, free to determine (once an entity possesses the requisite qualifications) the question of recognition on political grounds.<sup>15</sup>*

Some argue that there exist two quite distinct acts of recognition - one political, and therefore discretionary, and one legal, and therefore rule conditioned.<sup>16</sup> Others argue that the political element dominates:

*Recognition then, or the withholding of recognition, of a new state, or of the situation in which a state disintegrates or disappears, is an act of policy. Though it is in the interest of international order that states recognize each other, and in fact the withholding of recognition is rare, it remains a matter of discretion.<sup>17</sup>*

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<sup>15</sup> Crawford (1979), *op cit.*, p. 16. See also: Jennings and Watts, *op cit.*, pp. 127-128; Malanczuk, *op cit.*, p. 82

<sup>16</sup> For example: Kelsen, H. 'Recognition in International Law: Theoretical Observations' (1941) 35 AJIL 4, pp. 605-618, at pp. 605-609. Also, impliedly, for example: Crawford (1979), *op cit.*, pp. 120-121

<sup>17</sup> Fawcett, J.E.S. 'The Law of Nations' 2 Edn. (Harmondsworth: Penguin, 1971), p. 55. Or, "The recognition of a new state or government is a political, diplomatic function, not a judicial one having specific legal effects. It is determined by reasons of expediency and high state policy." - Brown, P.M. 'The Legal Effects of Recognition' (1950) 44 AJIL 4, pp. 617-640, at p. 639

Still others, that the legal element predominates: “[R]ecognition is something more than a purely political act... [I]t is a legal act and... has certain legal effects...”<sup>18</sup>

Any real conclusion as to this aspect is dependent on another of the debates within the meaning of recognition - that which Crawford has described as “The Great Debate” - between the constitutive and declaratory theories of recognition.<sup>19</sup> Put simply, the constitutive theory argues that the legal existence of Statehood is actually created by the act(s) of recognition<sup>20</sup>, whilst the declaratory theory asserts that the legality of Statehood occurs independently of any recognition, which is then just a confirmation of this pre-existing (legal) fact.<sup>21</sup>

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<sup>18</sup> Mugerwa, *op cit*, pp 266-267

<sup>19</sup> (1979), *op cit*, p 16 Crawford provides a useful account of the history and (then) current status of the debate, ultimately concluding in favour of a primarily declaratory view - pp 16-25 See also Lauterpacht, *op cit*, pp 38-66

<sup>20</sup> Wheaton's is a classic Nineteenth Century positivist justification of the constitutive view, at least for external sovereignty - Wheaton, H 'Elements of International Law' 4 Edn, Dana, R H Jr (Ed) (Boston Little, Brown, 1866) Some other notable constitutive views include.

Jennings and Watts - “Recognition, while declaratory of an existing fact, is constitutive in its nature, at least so far as concerns relations with the recognising state. It marks the beginning of the effective enjoyment of the international rights and duties of the recognised community” - *op cit*, p 133

Kelsen - “It is a fundamental, though often overlooked, principle of jurisprudence that in the province of law there are no absolute, directly evident facts, facts ‘in themselves,’ but only facts established by the competent authority in a procedure prescribed by the legal order” Since States are the only competent authority to determine the ‘fact’ of Statehood, their act of recognition ‘creates’ the legal fact of Statehood - *op cit*, pp 605-609, quotation at p 606

Lauterpacht - “Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfilment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood.” - *op cit*, p 6

Schwarzenberger - “The normal method for a new State to acquire international personality is to obtain recognition from existing States” - *op cit*, p 58

<sup>21</sup> Some notable declaratory views include

Brierly - “A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state” - Brierly, J L ‘The Law of Nations An Introduction to the International Law of Peace’ 6 Edn, Waldock, Sir H (Ed) (Oxford Clarendon, 1963), p 139

Chen - “[A] State, if it exists in fact, must exist in law. A State may exist without positive relations with other States, but it is not without rights or without means of exercising them, although the enforcement of such rights may be highly inconvenient and unsatisfactory” - *op cit*, p 38

Crawford - “[T]he proper position is that in principle the denial of recognition to an entity which otherwise qualifies as a State cannot entitle the non-recognizing States to act as if the entity in question was not a State” - *op cit*, p 23

What is perhaps most obvious about this debate is that neither view is without its difficulties. The declaratory theory still leaves it for States to determine when the criteria of Statehood are satisfied, and arguably what those criteria are. In addition, without recognition, the enforceability of some rights and duties may not be possible, even if they are extant in theory. Similarly, the constitutive theory cannot meet the challenge that State practice frequently accords some level of rights and duties to unrecognised entities. It also fails to maintain the necessary objectivity of the legal category of Statehood. Both theories also fail to address all of the consequences of inconsistent State practice as regards a specific entity.<sup>22</sup>

The manifold problems have led to attempts to integrate the preferred elements of the two theories. Most famously, Lauterpacht's incorporation of a perceived duty to recognise, by which he sought to avoid some of the problems of the constitutive view that he was aware of. However, this proposition is generally rejected by jurists, through reference to State practice, as well as in theory.<sup>23</sup> The alternative has been to reject the importance of the debate, or even to classify the reduction of such a complex issue to such a limited dichotomy as absurd.<sup>24</sup> Thus:

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Fawcett - "[T]he new state... does not the less exist as such by the reason only that it has not been recognized by other states..." - *op cit.*, p. 49

Mugerwa - "It is generally admitted that an unrecognized state cannot be completely ignored. Its territory cannot be considered to be no-man's-land; there is no right to overfly without permission; ships flying its flag cannot be considered stateless, and so on." - *op cit.*, p. 269

Williams - "...civilised men organised in a definite territory under a sovereign government do not need to beg admission to international society; their State has *ipso facto*, by virtue of its mere existence, rights and duties, and, therefore, personality in the domain of International Law." - Williams, Sir J.F. 'Recognition' (1929) 15 GST, pp. 53-81, at p. 60

<sup>22</sup> Jennings and Watts, *op cit.*, pp. 128-143; Knop, K. 'The "Righting" of Recognition: Recognition of States in Eastern Europe and the Soviet Union' (1992) Proc. CCIL, pp. 36-58, pp. 38-41; Malanczuk, pp. 84-85; Mugerwa, pp. 275-277

<sup>23</sup> Lauterpacht, *op cit.*, pp. 7-37. See for example: Chen, *op cit.*, pp. 50-54; Mugerwa, *op cit.*, pp. 275-277, or Brownlie - "Recognition, as a public act of state, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally if they ignore the basic obligations of state relations." - *op cit.*, p. 90

<sup>24</sup> Brownlie - "Absurdly, the complexity one may expect of legal issues in state relations is compacted into a doctrinal dispute between declaratory and constitutivist views..." - *op cit.*, p. 86. An alternative view which diminishes the relevance of the debate is: "The problem is largely theoretical because state practice is inconclusive and may be rationalised either way." - Jennings and Watts, *op cit.*, p. 129



*[T]he two theories are of little assistance in explaining recognition or determining the position of non-recognized entities in practice, and that the practical differences between them are not very significant.*<sup>25</sup>

In a sense, a like conclusion can be drawn from the political-legal debate dealt with previously:

*The legal and political elements cannot be disentangled; when granting or withholding recognition, states are influenced more by political than by legal considerations, but their acts do have legal consequences.*<sup>26</sup>

Put another way, both debates are reminiscent of wider conceptual discussions about international law - specifically, its dichotomous nature.<sup>27</sup> These various issues and perspectives will be returned to when the application of recognition to the Somali and Yugoslav experiences is assessed.

Another debate about recognition concerns the suggested categories of *de facto* and *de jure*. As distinct from their normal meanings in law, the terms have been used to denote different 'degrees' of Statehood, and so the extent of recognition accorded. Whilst the latter might be regarded as 'full' recognition, and therefore as a superfluous epithet, the former denotes the Statehood as being in some way less than full. *De facto* recognition is regarded as an interim stage, perhaps as "provisional and liable to be withdrawn in cases where the recognized regime or authority succumbs or is

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<sup>25</sup> Malanczuk, *op cit.*, p. 84

<sup>26</sup> *ibid.*, p. 82

<sup>27</sup> Knop, *op cit.*, pp. 36-41

*The impossibility of arriving at a pure constitutive or a pure declaratory theory of recognition consigns to unanswerable the question whether the criteria for statehood are identical to the criteria for recognition of states or whether the two concepts, statehood and recognition, are separable. As a result, any discussion about the substance of recognition both is and is not also about the substance of statehood.*

- p. 36. The author acknowledges her debt in this analysis to Kennedy, especially: 'International Legal Structures' (Baden-Baden: Nomos Verlagsgesellschaft, 1987), especially at pp. 129-151. See further: Koskeniemi, M. 'From Apology to Utopia: The Structure of International Legal Argument' (Helsinki: Lakimiesliiton Kustannus, 1989), pp. 236-245

superseded by another.”<sup>28</sup> As such, if the distinction is a valid one, the subject matter of the present discussion should be regarded as *de jure* recognition only.<sup>29</sup>

Whilst any duty to recognise entities, even if they possess the basic criteria of Statehood, remains subject to debate, there does seem to exist a consensus in favour of a general duty not to recognise an entity that either does not satisfy the criteria of Statehood, or does so, but which originated in an illegal manner, usually through the use of force. Premature recognition, especially of an entity emerging from within an existing State “...is a denial of the sovereignty of the parent state”.<sup>30</sup> In cases of illegality, the principle of *ex injuria jus non oritur* - that illegal acts cannot give rise to legal rights - provides the basis for the duty not to recognise, most often expressed through collective non-recognition. This illustrates another facet of the *de facto-de jure* distinction. Where such entities, created through illegality, nevertheless exist, States may comply with the duty not to recognise them, but grant an acknowledgement of their effectiveness by means of *de facto* recognition. Whilst it is accepted that such *de facto* recognition does create some rights, at least *vis-à-vis* the recognising State, it is asserted that it is not generally constitutive of Statehood.<sup>31</sup>

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<sup>28</sup> Mugerwa, *op cit.*, p. 279 *et seq.* See also: Brierly, *op cit.*, pp. 146-147; Brownlie, *op cit.*, pp. 91-93; Jennings and Watts, *op cit.*, pp. 154-157; Lauterpacht, *op cit.*, pp. 329-348

<sup>29</sup> The category of *de facto* Statehood may also be considered. It may either be used to refer to entities which await recognition, but have not yet received it, i.e. emergent States - for example: Malone, M.K. ‘The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict’ (1992) 6 Temple International and Comparative Law Journal 1, pp. 81-111, at pp. 86-100, at p. 94: “[A] political community, meeting the indicia of statehood, constitutes a juridically cognizable entity even before existing States extend formal recognition. Consequently, international law draws no distinction between these *de facto* State entities and recognized States.” Or entities that have been refused recognition, but nonetheless bear some of the marks of Statehood, e.g. Taiwan. On Taiwan specifically, see for example: Rubin, A.P. ‘Recognition Versus Reality in International Law and Policy (Symposium: Bridging the Taiwan Strait-Problems and Prospects for China’s Reunification or Taiwan’s Independence)’ (1998) 32 New England Law Review 3, pp. 669-674; Wallace-Bruce, N.L. ‘Taiwan and Somalia: International Legal Curiosities’ (1997) 22 Queen’s Law Journal 2, pp. 453-485, at pp. 458-468, and see further above. Chapter 2, nn. 135-136

This category may be of relevance to the consideration of Macedonia prior to its general recognition and accession to UN membership in April 1993 - see below, text at nn. 52-53, 73-76, 84-85

<sup>30</sup> Lauterpacht, *op cit.*, p. 8

<sup>31</sup> Brownlie, *op cit.*, pp. 96-97; Crawford (1979), *op cit.*, pp. 120-128; Dugard, J. ‘Recognition and the United Nations’ (Cambridge: Grotius, 1987), pp. 81-163; Fawcett, *op cit.*, pp. 50-52; Jennings and Watts, *op cit.*, pp. 183-203; Lauterpacht, *op cit.*, pp. 7-12.

Further points of brief note are that there is no generally accepted limitation on the withdrawal of recognition, when a community that has been a State no longer fulfils the criteria of Statehood. Express withdrawals of recognition are rare, and are more usually only implied from the act of recognition of a replacement entity.<sup>32</sup> Finally, and perhaps most crucially, acts of recognition, and their effects, go to the heart of what it is to be a State, and usually relate to matters of the utmost delicacy. Accordingly, rules are at best ambiguous, such that each example needs to be considered in its own terms - “[r]ecognition is a matter of intention and may be express or implied”.<sup>33</sup>

Recognition, like self-determination, is more a source of debate, than a detailed framework for application, and these debates will be followed through during the consideration of the subject in relation to the Somali, and first, the Yugoslav experience.

### 6.3 Recognition and the Yugoslav Experience

The break-up of the SFRY has been considered in the two previous Chapters in terms of the lack of government as a criterion of Statehood, and in terms of self-determination. These two aspects have provided alternative explanatory foci for the process of its failure. ‘Recognition’ can serve a similar function with regard to the

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As regards the lack of criteria of Statehood - “If the regime recognized lacks the essentials of a state, to recognize it is to constitute it a subject of international law ” - Mugerwa, *op cit* , p. 278. This issue will be returned to in the context of Bosnia-Herzegovina and Croatia - see below, text at nn. 44-51, 63-72, 77-83.

As regards illegality of creation - “Even today, recognition can sometimes have a constitutive effect, although state practice is not always consistent. If the establishment of a state or government is a breach of international law, the state or government is often regarded as having no legal existence until it is recognized.” - Malanczuk, *op cit* , p. 83 *et seq* , the logical implication of which is that recognition can cure the illegality.

This category may be of relevance to the consideration of Baltic States between 1940 and 1991 - see below, text at nn. 116-120

<sup>32</sup> Jennings and Watts, *op cit* , pp 176-177; Kelsen, *op cit* , p 611, wherein he refers to the “*actus contrarius* of a declaration of recognition”, Lauterpacht, *op cit* , pp 350-352

This is so notwithstanding the provisions of the Montevideo Convention (1933) (See above, section 2.3.2) including Art 6, which asserts *inter alia* that “Recognition is unconditional and irrevocable”, and some older academic commentary to the contrary, for example: “Recognition ‘*de jure*’ of a new state, once formally accorded, is irrevocable ” - Brown, *op cit* , p 639

<sup>33</sup> Brownlie, *op cit* , p. 94. See also: Jennings and Watts, *op cit* , pp 169-175

results of these events - the emergence of States from that failure. The role played by recognition, and its particular impact, will vary across the different emergent States and so the analysis will similarly vary. However, as a general rule, the impact and importance of recognition will be greatest when the circumstances of the emergence of the State are more (legally and politically) uncertain. This was true between the various emergent States from the SFRY, and in the Yugoslav experience generally, as compared to that of the USSR.

### 6.3.1 *The EC Recognition Policy*

Following the Badinter Commission's finding that the SFRY was "in the process of dissolution", in November 1991<sup>34</sup>, the EC Member States adopted a common position with regard to the recognition of new States. The policy also covered the possible emergence of States from the USSR, which was itself going through a process of dissolution.<sup>35</sup> Two joint statements were issued by the Foreign Ministers on 16 December.<sup>36</sup> The Guidelines applied to "The Recognition of New States in Eastern Europe and in the Soviet Union", and were grounded in the provisions of the UN Charter, the Helsinki Final Act and the Charter of Paris<sup>37</sup>, with particular emphasis on the principles of democracy and self-determination. The Guidelines affirmed that the EC Member States were ready to:

*[R]ecognise, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.*

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<sup>34</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) reprinted in 31 ILM 1494-1497 - above, Chapter 4, text at n. 156

<sup>35</sup> Above, section 5.3.5

<sup>36</sup> Keesings, Vol. 37, 38684-85. Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union and Declaration on Yugoslavia (16 December 1991) reprinted in (1991) LXII BYIL 559-561. Hannum, H. 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 TLCP 1, pp. 57-69, at pp. 60-63; Radan, P. 'Secessionist Self-Determination: The Cases of Slovenia and Croatia' (1994) 48 Australian Journal of International Affairs 2, pp. 183-195, at pp. 191-193

<sup>37</sup> Conference on Security and Co-operation in Europe: Final Act (1 August 1975) reprinted in 14 ILM 1292 & CSCE Charter of Paris for a New Europe (21 November 1990) reprinted in 30 ILM 190

The “appropriate international obligations” included reference to the rule of law, democracy, human rights, minority rights, inviolability of frontiers, disarmament and non-proliferation, arbitration, and non-aggression. The separate “Declaration on Yugoslavia” invited “all the Yugoslav Republics” to apply for recognition by 23 December, to be considered in accordance with the Guidelines. By the due date, the Republics of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia had made applications.<sup>38</sup> Previously, in its Second Opinion, the Badinter Commission had essentially determined that the Serbian populations of Bosnia-Herzegovina and Croatia would not be eligible for recognition as States because they had not been Republics. The application made by Kosovo in response to the Guidelines was rejected on the same grounds. With its Third Opinion finding that the principle of *uti possidetis juris* applied to the Republics, the Commission made clear the limitation to be applied to any grant of self-determination and Statehood - that it would only apply to the next-most State-like units, effectively as they had existed under the 1974 Federal Constitution.<sup>39</sup>

The applications were to be assessed by the Badinter Commission before decisions as to recognition were made. This process of inviting applications, which would then be assessed by a ‘legal’ Commission was “virtually unprecedented in recognition practice”.<sup>40</sup> It was intended that the process would provide for legal objectivity, but this aim was partially compromised by the disagreements within the EC as to the best means of limiting the ongoing conflict. For a number of months, Germany, along with other Member States, had been arguing for swift recognition as a means of limiting perceived Serb expansionism.<sup>41</sup> As such, and despite these ongoing processes, German Chancellor Kohl issued a promise to Croatia and Slovenia that they would be recognised ‘by Christmas’, that is, before the EC process had been completed. Such recognition was actually accorded on 23 December, although diplomatic relations and

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<sup>38</sup> Keesings, Vol. 38, 38703-04

<sup>39</sup> EC Arbitration Commission, Opinions Nos. 2 & 3 (7 December 1991) reprinted in 31 ILM 1494-1500; Youngs, T. and Dodd, T. ‘Kosovo’ House of Commons Research Paper 98/73 (7 July 1998), p. 13 - above, section 5.3.3

<sup>40</sup> Rich, R. ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’ (1993) 4 EJIL 1, pp. 36-65, pp. 40-44, quotation at p. 44

<sup>41</sup> Above, Chapter 4, text at n. 169

formal links were not established until after the EC common position was adopted in January.<sup>42</sup>

The Badinter Commission had set forth its basic stance on matters of Statehood and recognition in its First Opinion, at paragraph one:

*a)...the existence or disappearance of the state is a question of fact;  
that the effects of recognition by other states are purely declaratory;  
b) that the state is commonly defined as a community which consists of  
a territory and a population subject to an organized political  
authority; that such a state is characterized by sovereignty;*<sup>43</sup>

Having gone on to effectively set the basic parameters on which of the Yugoslav parties could apply for such recognition in its Second and Third Opinion's, its task for the New Year was to address the very different claims made by Bosnia-Herzegovina, Croatia, Macedonia and Slovenia, purely in terms of the Guidelines.

### 6.3.2 *The Badinter Opinions of 11 January 1992*

#### Croatia and Slovenia

Croatia and Slovenia had been the first Republics to make claims to Statehood. Both had declared their independence on 25 June 1991, although these were suspended for a period of three months at the Brioni talks on 7 July. At the end of these three months, neither was prepared to further extend the period of suspension, such that their respective claims to Statehood can be dated to this point - 8 October 1991.

Whilst their pursuit of international recognition after this date was relatively subdued, both continued to act as independent entities, in terms of their negotiation stances, and in domestic matters, including the introduction of their own currencies.<sup>44</sup>

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<sup>42</sup> Keesings, Vol. 37, 38559-60; 38684-85; Guicherd, C. 'The Hour of Europe: Lessons from the Yugoslav Conflict' (1993) 17 FFWA 2, pp. 159-181, at pp. 166-167 - see further below, text at n. 59

<sup>43</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) reprinted in 31 ILM 1494-1497

<sup>44</sup> Keesings, Vol. 36, 37923-24; Vol. 37, 38019, 38203-04, 38274-75, 38373-76, 38512-13, 38684-85.

8 October was the date at which the Badinter Commission found both Croatia and Slovenia to have gained their independence in a later Opinion concerned with matters of State succession - EC Arbitration Commission, Opinion No. 11 (16 July 1993) reprinted in 32 ILM 1587-1589 - above, Chapter 5, text at n. 155, and below, text at n. 96

In Slovenia, the practical move towards effective independence had been a relatively peaceful one. On its initial declaration of independence in June, a small degree of military resistance had been offered by the JNA, but the talks at Brioni and the ‘more pressing’ events in Croatia saw a swift end to this. From then, the relatively ethnically homogeneous Slovenia was able to make practical advances towards its independent status, away from much of the conflict that was escalating elsewhere in the SFRY. In contrast, the moves towards Croatia’s independence had been matched by similar moves from the Serb dominated regions of the Republic, including Baranja, Krajina, Knin, Slavonia and Western Srem, which comprised approximately one third of the Republic’s total territory. These regions had made various moves towards separate and collective independence from Croatia, usually seeking to join with the other Serbian peoples in a federal Yugoslav State, whilst not thereby opposing Croatia’s right to secede from the SFRY. However, in response to Croatia’s application for recognition, all of the regions together declared their independence as Republika Srpska Krajina (RSK), supported by a referendum, with Milan Babic as President. The Republika was immediately recognised by Serbia. These moves had prompted continued conflict between Croatian forces, and the Serbs backed by the remnants of the JNA, supported by Serbia. Notwithstanding the EC’s determination that an entity such as RSK was not eligible for its own independence, the then ongoing situation at least confirmed the lack of effective control of the Croatian government over these areas.<sup>45</sup>

Despite these differences, the Badinter Commission found that both Croatia and Slovenia had satisfied the EC Guidelines sufficiently. The decision regarding Slovenia, which should have been the most straightforward, was in fact the longest and by far the most detailed of the four decisions. The Opinion goes so far as listing specific constitutional provisions and the particular Human or Minority Rights which they guarantee, as well as referring to the manner in which Slovenia had satisfied each of the Guidelines. It was the ideal model of the ‘legal’ approach the EC was ostensibly applying to the whole of the SFRY. In contrast, the decision regarding Croatia, which

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<sup>45</sup> Keesings, Vol. 36, 37621-22, 37666, 37789-90; Vol. 37, 38019, 38108-09, 38163-64, 38203-04, 38373-76, 38420-22, 38512-13, 38684-85

was initially far more equivocal, only contained the most general references to the appropriate guarantees, with the slight exception of one aspect over which specific assurances had been required from the Croatian government. In addition, the decision makes no mention of the situation with regard to RSK, or to the degree of effective control of the Croatian government. In fact, neither Opinion made any reference to the general criteria of Statehood, including government, beyond the appropriate referenda and declarations of independence, despite the wording used in the First Opinion.<sup>46</sup>

### Bosnia-Herzegovina

Whilst the fighting in Croatia was dominant at the time of the Badinter decisions, ethnic division within a Republic was most evident in Bosnia-Herzegovina. It was by far the least ethnically homogenous Republic - with roughly 40% Muslim-Slav, 32% Bosnian-Serb, 17% Bosnian-Croat, and a number of smaller nationalities.<sup>47</sup> The November 1990 election had been dominated by three main parties representing the three main ethnic communities, despite the pre-election limitations there had been on nation-based parties. The largest number of seats for a single party saw Muslim Alija Izetbegović as President, but with Jure Pelivan (Croat) as Prime Minister, and Momčilo Krajišnik (Serb) as President of the Parliament. Their respective mandates were: Muslim - general support for independence, but fearful of either Croatian or Serbian domination; Croat - general links with Croatia, but possible independence; Serb - remainder within a federal State, but with closer ties to Serbia. Whilst the initial situation was one of (superficial) co-operation between the nationalities, as it had

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<sup>46</sup> EC Arbitration Commission, Opinions No. 5 & 7 (11 January 1992) reprinted in 31 ILM 1503-1505, 1512-1517

Stojanovic has argued that, in recognising Croatia, and Bosnia-Herzegovina:

*[T]he European Union violated the Montevideo Convention of 1932, which conditions that recognition of a state on the existence of an effective central government, total territorial control by that government, and a clearly defined populace.*

- Stojanovic, S. 'The Destruction of Yugoslavia. (The Former Yugoslavia: Implications for International Law and Policy)' (1995) Fordham ILJ 2, pp. 337-362, at p. 359. Whilst this represents a relatively traditional approach, it is poorly expressed in that the Montevideo Convention cannot have bound the EC in its actions, as has already been discussed - above, section 2.3.2. But *cf* Türk, D. 'Remarks Concerning the Breakup of the Former Yugoslavia' (1993) 3 TLCP 1, pp. 49-56, at pp. 51-56, arguing that the historical legitimacy of Bosnia-Herzegovina and Croatia were sufficient to justify their recognitions, although not entirely dismissing the issue of governmental control.

<sup>47</sup> See below, Appendix A



always been under Tito, it was a temporary situation. The links between the Bosnian-Croats and -Serbs and Croatia and Serbia respectively meant that they were pulled strongly in opposing directions as the SFRY fragmented. The Muslims remained fearful of both of their neighbouring Republics, and also faced the ever-present disdain and anti-Islamist fears of the other Yugoslav peoples. The result was a Republic facing internal political instability that looked more like preparation for war.<sup>48</sup>

As Croatia and Slovenia had moved towards independence, President Izetbegović had sought to mirror them, fearing Serbian domination of the remnants of the federal State, but the domestic political instability had prevented any major moves until the EC invitation for applications for Recognition in December 1991. Accordingly, at the time of its request to the EC, Bosnia-Herzegovina had made little actual progress towards independence.<sup>49</sup>

In its Opinion of 11 January 1992, the Commission determined that Bosnia-Herzegovina did not satisfy the Guidelines at that time. The reason was the finding that the “the will of the peoples... to constitute... a sovereign and independent State... [could not] be held to have been fully established.” This was said to be open for review, possibly after “a referendum of all the citizens... without distinction, carried out under international supervision.”<sup>50</sup> The decision referred in general terms to some concerns over the sufficiency of guarantees of minority rights, but not that they failed to satisfy the Guidelines. No consideration was given to the lack of any practical evidence of actual independence, especially from Croatian and Serbian influence; nor was the governmental instability dealt with at all. Finally, the ethnic separation, which had been so apparent during the election process in 1990, and which had become further entrenched since then, was not addressed in the decision.<sup>51</sup> The only mention

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<sup>48</sup> Lytle, P.F. “Electoral Transitions in Yugoslavia”, in Shain, Y. and Linz, J.J. ‘Between States: Interim Governments and Democratic Traditions’ (Cambridge: CUP, 1995), pp. 237-254, at pp. 246-247; Zametica, J. ‘The Yugoslav Conflict’ (1992) 270 *Adelphi Paper*, pp. 36-40

<sup>49</sup> Keesings, Vol. 37, 38373-76

<sup>50</sup> EC Arbitration Commission, Opinion No. 4 (11 January 1992) reprinted in 31 ILM 1501-1503

<sup>51</sup> The possible issue of Bosnia-Herzegovina’s creation having involved widespread use of force and ‘apartheid’, not having been addressed at all in the EC process, was raised in The Genocide Case

made of the internal situation was in reference to two letters the Commission had received from the “Assembly of the Serbian People in Bosnia-Herzegovina” - Republika Srpska Herceg-Bosna (RSHB). The letters referred to the Republika’s opposition to the government of the Republic’s various moves towards independence. In the Commission’s decision, these letters only served to underline the need for a clear expression of the will for independence, as opposed to being evidence of a lack of governmental control, or even of the lack of coherence of the Republic itself. However, arguably, the determinative factor was the simple lack of a referendum, like those that had been held in each of the other five Republics.

### Macedonia

Following the elections in Macedonia in November-December 1990, President Kiro Gligorov pursued a policy of essentially shadowing the moves of the Republic’s larger neighbours. Whilst the electoral results had not been as clear as in some Republics, the broad mandate seemed to be for membership of a looser confederal Yugoslav State, but only one that contained Croatia and Slovenia. As these two Republics moved towards their effective independence, so then did Macedonia. In January 1991, its Assembly had declared the Republic’s sovereignty, including its right to self-determination and secession from the federal State. This position was built upon in succeeding months. In line with the federal decision in April, a referendum on independence was held in September, in which there was 95% support for a “sovereign and independent Macedonia with a right to enter a union of sovereign States of Yugoslavia”. Despite the large-scale boycott of the referendum by the Macedonian-Albanians, such that there was only a 75% total turnout, President Gligorov nevertheless went on to declare the independence of the Republic on 17 September. However, by that time, the entire Yugoslav situation was dominated by the then-underway EC process, such that little attention was paid to Macedonia’s moves prior to the EC recognition process in December.

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*(Bosnia and Herzegovina v. Yugoslavia) 1993 ICJ Reports 3* by Yugoslav *ad hoc* Judge Milenko Kreča, in his dissenting opinion - see: Grant, T.D. ‘Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)’ (1997) 33 *Stanford Journal of International Law* 2, pp. 305-341, at pp. 322-325

Macedonia's move towards independence had arguably been more from desperation than choice. Remainder within a Serb-dominated rump-State seemed unattractive, despite the almost total lack of apparent Serbian interest in Macedonia - its efforts being focused on Croatia and Bosnia-Herzegovina. Domestically, Macedonia had a roughly two-thirds Macedonian population, with perhaps a quarter of the population forming the sizeable Albanian minority. This possible internal split was largely overshadowed by the twin external problems of Bulgaria's historic claims over parts of its territory, and Greece's objections to its use of the historic Hellenic name, and territorial concerns.<sup>52</sup>

In its Opinion of 11 January 1992, the Commission determined that Macedonia had satisfied all of the Guidelines. The decision focused on the answers provided by the 'Minister of Foreign Affairs' to specific questions put to him by the Commission. These covered most of the general points within the Guidelines. However, particular emphasis was placed on the statements made confirming that Macedonia made no territorial claims against neighbouring States, and on their legally binding nature, which had been included as a point of emphasis in the Declaration on Yugoslavia. This was a condition largely aimed only at Macedonia in response to the fears expressed by Greece. The decision again made no reference to the general criteria of Statehood, nor in particular to Macedonia's relative artificiality of creation after WW II, and it simply noted that a referendum on independence had occurred, with no scrutiny as to the question put, nor to the large-scale boycott of it by the Albanian population.<sup>53</sup>

### 6.3.3 *The Badinter Process?*

The specific status of the Commission and the EC, and their involvement in the Yugoslav process, has already been commented upon.<sup>54</sup> Their functions tacitly

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<sup>52</sup> Keesings, Vol. 36, 37923-24; Vol. 37, 37973, 38203-04, 38274-75, 38373-76, 38420; Craven, M.C.R. 'What's In A Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood' (1995) 16 Austl. YBIL, pp. 199-239, pp. 201-207; Lytle, *op cit.*, pp. 245-246; Zametica, *op cit.*, pp. 34-36

<sup>53</sup> EC Arbitration Commission, Opinion No. 6 (11 January 1992) reprinted in 31 ILM 1507-1512; Keesings, Vol. 38, 38703-04

<sup>54</sup> Above, sections 4.5.2 & 5.3.3

involved the effective definition of the form that the Yugoslav fragmentation would take, as well as playing a pivotal role in the international community's acceptance of that fragmentation. Having already played such a part, the involvement in the process of the emergence of the successor States was inevitable. However, the nature of that role was, and is, largely unclear. This is especially true of the Badinter Commission itself. Its ostensible function was the provision of objective legal determinations for the wider political process. Some doubt as to the actual legal nature of its determinations has already been raised, but it remains to consider the matter of its four findings with regard to the possible recognition of the individual Republics.

Having found that the SFRY was “in the process of dissolution”, and that the only units appropriate to succeed to its Statehood were the Republics<sup>55</sup>, the role of the Badinter Commission was to provide a legal means of assessing the suitability of each of them. This was to be done entirely on the basis of the Guidelines of 16 December - no reference was made, either by the EC or the Commission itself, to the “principles of public international law which serve to define the conditions on which an entity constitutes a state”.<sup>56</sup> As such, no reference was made in any of the four Opinions to the general criteria of Statehood it had set forth in its First Opinion in the context of determining the SFRY's imminent demise.<sup>57</sup> Instead, the process, already having afforded considerable weight to the idea of self-determination, placed emphasis on the ‘democracy’ and ‘rights’ provisions in the UN Charter, Helsinki Final Act and the Charter of Paris, as set forth in the Guidelines.

The Commission's task was to ascertain whether the individual Republics had sufficiently complied with the conditions set out in the Guidelines, but it remains unclear precisely what role and status these Guidelines were perceived as having by the EC.

*Whether or not the EC and its Member States conceived of these guidelines as new and essential conditions of the acquisition of*

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<sup>55</sup> Above, section 5.3.3

<sup>56</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) *reprinted in* 31 ILM 1494-1497 - above, Chapter 4, text at n. 156

<sup>57</sup> See above, text at n. 43

*statehood is not entirely clear, there being no explicit statement as to their function or status.*<sup>58</sup>

In addition to the ambiguity of the conditions it was to apply, the precise role that the Commission's determinations were to play was also unclear. The Declaration on Yugoslavia, which initially invited the applications, provided that they would "be submitted... to the Arbitration Commission for advice". Accordingly, the actual decisions of the Commission did not recommend recognition in any case - they simply expressed a view as to the extent of compliance with the conditions set forth in the Guidelines. This aspect of the Commission's role was possibly a consequence of the fact that, however involved the process was, and however far advanced the process of European political integration, the actual decisions to recognise individual States remained a matter solely within the discretion of each individual Member State.<sup>59</sup>

The limited role that the Commission's decisions were to play - as advice only - and the restrictions on the material they were considering - the Guidelines only - means that reference will need to be had to the actual use made of the decisions within the recognition process of the Member States. However, before that is done, a broad assessment of the decisions themselves can be made.

Without doubt, the decision that best fits the model of objective application of legal criteria is that concerning Slovenia.<sup>60</sup> The Republic was perhaps the most stable of the six, having experienced only a brief period of resistance from the JNA to its attempted independence in June-July 1991. After that time, its effective autonomy from the other five Republics was relatively clear, although it fully participated in the EC process, and maintained dialogues with the other Republics, especially Croatia. None of this, however, was referred to in the Commission's decision. Instead, it made a comprehensive assessment of the actual and likely compliance of the Republic with each of the requirements in the Guidelines, including detailing specific constitutional

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<sup>58</sup> Craven, *op cit.*, p. 213

<sup>59</sup> Warbrick, C. 'Current Developments: Public International Law - Recognition of States' (1992) 41 ICLQ 2, pp. 473-482, at pp. 475-480; Warbrick, C. 'Current Developments: Public International Law - Recognition of States Part 2' (1993) 42 ICLQ 2, pp. 433-442, at p. 433

<sup>60</sup> EC Arbitration Commission, Opinion No. 7 (11 January 1992) reprinted in 31 ILM 1512-1517

provisions. In addition, the significant majority outcome of the independence referendum in December 1990 was referred to, although no mention was made of the level of turnout for it, which seems surprising given the emphasis placed on this requirement throughout the process, and given the detail of scrutiny of the rest of the decision.<sup>61</sup> Nevertheless, the Commission's Opinion regarding Slovenia does seem to best fit a model of objective legal determination, albeit with that one slight reservation.

It is with reference to the remaining three decisions that at least some doubt is cast on this general finding. In terms of the compliance with the Guidelines, the Macedonian decision lacks the detail of the Slovenian one, and relies solely on responses given by the Foreign Minister, which were at best bland, and at worst uninformative. This lack of scrutiny is all the more surprising given the reality of the significant Albanian minority population, and the relative lack of actual development of independence by the Republic. Instead, the main emphasis of the decision is on the issue of external territorial claims, in tacit acknowledgement of concerns that seemed only to be held by Greece, but about which Macedonia had always been extremely forthcoming in its assurances.<sup>62</sup> More remarkably, given the ongoing ethnic unrest and conflict in Croatia, the decision concerning its position refers in only the most general terms to the Guidelines, mentioning but one minor domestic legal provision. No further assessment at all is undertaken.<sup>63</sup> The decision regarding Bosnia-Herzegovina's compliance with the Guidelines, whilst not as cursory as that concerning Croatia, lacks even the detail of that regarding Macedonia, let alone Slovenia.<sup>64</sup>

As well as this inconsistency in the scrutiny of the compliance with the generality of the EC Guidelines, the other key issue in the decisions was the requirement of democracy. In the decision regarding Bosnia-Herzegovina this matter was determinative. The dissent expressed by the RSHB in its letters to the Commission,

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<sup>61</sup> The turnout had in fact been 93.5%, which would presumably have been sufficient - above, Chapter 4, n. 138

<sup>62</sup> EC Arbitration Commission, Opinion No. 6 (11 January 1992) reprinted in 31 ILM 1507-1512

<sup>63</sup> EC Arbitration Commission, Opinion No. 5 (11 January 1992) reprinted in 31 ILM 1503-1505

<sup>64</sup> EC Arbitration Commission, Opinion No. 4 (11 January 1992) reprinted in 31 ILM 1501-1503

coupled with the fact that no independence referendum had been held across the Republic, was sufficient for the Commission to find that the democracy requirement had not been satisfied. However, the decision indicated that this might be remedied purely by the holding of a referendum. Given the significance attached to this matter, it is remarkable that the decisions dealing with the Macedonian and Slovenian referenda did not address the issue of turnout at all. Whilst in Slovenia this would not have presented any form of problem, the Albanian boycott of the Macedonian ballot might be argued to have compromised the “representativeness” of the result. Most remarkably again, the Croatian decision simply notes the receipt of the government’s report regarding the referendum - no mention is made of the question put, of the turnout, or even of the result. In itself this seems a relatively weak application of the requirement of democracy, but all the more so given the attempted secession of the RSK, based upon its own referendum, and the ongoing violence that had resulted.

Before any assessment is made of the detail of these findings, it remains to consider the use made of the decisions in recognition practice of the EC Member States regarding the Republics, as well as to consider the situation of the remainder of Yugoslavia. In so doing, reference will be made to other international reactions, to the situation at the UN, as well as comparisons with the events arising out of the dissolution of the USSR.

#### 6.3.4 *Recognition*

On 15 January, the Presidency of the EC announced that “the Community and its Member States” would recognise Croatia and Slovenia “in conformity” with the declarations of 16 December and “in the light of the advice of the Arbitration Commission”.<sup>65</sup> This was followed by recognition from various other States in succeeding months, including from Russia in February, and the USA in April, and both States were admitted to membership of the UN on 22 May.<sup>66</sup>

In its announcement of 15 January, the Presidency of the EC went on to say that:

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<sup>65</sup> Bull. EC 1/2-1992, 1.5.10

<sup>66</sup> Keesings, Vol. 38, 38920; Zametica, *op cit.*, pp. 12-20

*With regard to the other two republics which have expressed the wish to become independent, there are still matters to be addressed before a similar step by the Community and its Member States can be taken.*<sup>67</sup>

The Commission's determination with regard to Bosnia-Herzegovina referred only to the lack of sufficient expression by all of the population of its desire for independence. As such, a referendum was held across the entire Republic at the end of February. The majority of the Serb population, roughly a third of the total<sup>68</sup>, boycotted it. Although there was a more than 99% vote in favour of independence, the Serb boycott meant that the turnout was around 63%. The outcome prompted President Izetbegović to declare the Republic's independence on 6 March. In the immediate aftermath of this declaration, the conflict seemed poised to escalate precipitously. EC sponsored talks in the succeeding days saw the leaders of the three main groups agree to a provisional plan to split the Republic into three autonomous units. The concord was quick to fail, and after Izetbegović denounced the plan, the RSHB formally declared its independence, on 27 March.<sup>69</sup>

Despite the boycott, the EC deemed the referendum sufficient satisfaction of the only remaining requirement according to the Badinter Commission's decision.<sup>70</sup> As such, in a statement on 6 April, the Presidency of the EC announced that "the Community and its Member States" had "decided to recognize as from 7 April 1992 the Republic of Bosnia-Herzegovina".<sup>71</sup> The decision was even more remarkable than that regarding Croatia, given the events following the referendum, and the significant escalation in the internal divisions. Nevertheless, it was followed by similar recognition from a number of States, including the USA, and Bosnia-Herzegovina was admitted to membership of the UN on 22 May, alongside Croatia and Slovenia.<sup>72</sup>

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<sup>67</sup> Above, n. 65

<sup>68</sup> Appendix A

<sup>69</sup> Keesings, Vol. 38, 38832-33

<sup>70</sup> Possibly recalling the Commission's lack of comment on a roughly similar level of boycott of the referendum in Macedonia - EC Arbitration Commission, Opinion No. 6 (11 January 1992) reprinted in 31 ILM 1507-1512 and above, text at n. 52

<sup>71</sup> Bull. EC 4-1992, 1.5.4

<sup>72</sup> Keesings, Vol. 38, 38832-33, 38848-50, 38920



The EC's statement of 15 January, referring to the decision not to recognise Macedonia, was the one decision that did not follow the "advice" of the Badinter Commission, which had found that Macedonia satisfied all of the Guidelines, including the specific clause in the Declaration on Yugoslavia requiring that "constitutional and political guarantees" be put in place:

*[E]nsuring that it ha[d] no territorial claims towards a neighbouring Community State and that it w[ould] conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.*<sup>73</sup>

However, the Greek objections remained, and the EC's desire for unanimity prompted the decision not to accord recognition in January. The basis of the Greek objection was the use of the historic name for the Republic and of the Hellenic Vergina star as its national emblem, particularly its use on the national flag. These two aspects were regarded in Greece as symbolic of the inherent claims over Greek territory also known by the name Macedonia. It led to a protracted period of negotiation essentially between Greece and Macedonia over these issues. The EC had expressed a willingness to accord recognition as a State under an alternative name. Some alternatives discussed included the "Republic of Macedonia (Skopje)", "Slavomacedonia" and "Nova Macedonia", but none of these satisfied both parties. Frustrations began to be evident in the EC with the Greek stance, especially in the light of Macedonia's acceptance as a successor State to the SFRY by the International Monetary Fund (IMF), and its pending application for membership of the UN.

At the UN, the practice had grown up to refer to it as "the former Yugoslav Republic of Macedonia" (FYROM), and it was under this provisional name, pending international arbitration with Greece, that it was admitted to membership in April 1993. The wording used was:

*[T]his State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State.*

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<sup>73</sup> EC Declaration on Yugoslavia (16 December 1991) reprinted in (1991) LXII BYIL 560-561 and EC Arbitration Commission, Opinion No. 6 (11 January 1992) reprinted in 31 ILM 1507-1512

The use of the provisional name in no way affected its status as a member State, but was simply a convenience until the issues of the name and the Vergina star were settled.<sup>74</sup> A few States had accorded recognition prior to this, but following the UN determination, a majority of States accorded recognition, including Russia, the USA and all of the EC Member States, with the exception of Greece.<sup>75</sup> Throughout this period, Macedonia proceeded to move towards effective independence and Statehood, including adoption of its own currency, despite the non-recognition of it. By the standards of the region, this process was remarkably peaceful, the JNA having voluntarily withdrawn in March 1992.<sup>76</sup>

The Badinter decisions themselves have already been commented on above - in particular their inconsistent, but generally brief, scrutiny of compliance with the EC Guidelines, and their total lack of reference to any other aspects of Statehood. The actual recognition decisions taken by the EC, in the light of these Opinions, seems to further clarify the emphasis of the process away from the traditional legal criteria of Statehood, and towards the possible criteria of self-determination and democracy, as well as more political considerations. Again, the most straightforward example is Slovenia - whatever the EC's reasoning, it was evident by the time of recognition that it had already achieved, or was in the process of achieving, effective independence. It generally satisfied the traditional criteria of Statehood, such that the EC's recognition decision

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<sup>74</sup> Keesings, Vol. 37, 38778-79, 38918-20, 38970-71, 39240-41; Vol. 38, 39251; Vol. 39, 39279, 39328, 39387, 39248, 39442; SC Res. 817 (7 April 1993); GA Res. 47/225 (8 April 1993). See also: Craven, *op cit.*; Wood, M.C. 'Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties' (1997) 1 Max Planck Yearbook of UN Law, pp. 231-257, at pp. 236-241. On acceding to membership, no flag was hoisted for the FYROM, and the delegation was seated next to Thailand ("the") to avoid determining precedence between the words "former" and "Macedonia". The issue of the flag was resolved by adoption of an eight-point star instead of the thirteen-point Vergina star - the new flag was raised outside UN HQ in October 1995.

For a brief view that the requirement of the provisional name was in breach of international law, see: Janev, I. 'Legal Aspects of the Use of A Provisional Name for Macedonia in the United Nations System' (1999) 93 AJIL 1, pp. 155-160. The author relies on the authority of the Conditions of Admission of A State to Membership in the United Nations (Charter, Art. 4) (Advisory Opinion) 1948 ICJ Reports 57

<sup>75</sup> Keesings. Vol. 38, 38734, 39240-41; Vol. 39, 39442, 39425-28, 39519, 39698, 39785-86; Vol. 40, 39872

<sup>76</sup> Keesings, Vol. 37, 38833, 38850; but *cf.* SC Res. 795 (11 December 1992) - extending UNPROFOR's mandate to cover a limited presence in Macedonia

merely confirmed this, and had been based upon additional political considerations, which were therefore entirely consistent with traditional recognition practice, if unprecedented in the actual process of execution.

This simple assessment cannot equally be applied to the recognition of the other three Republics. At the time of their recognition, in January and April respectively, neither Croatia nor Bosnia-Herzegovina can be said to have comfortably satisfied the traditional criteria of Statehood. The RSK's attempted secession and the JNA presence and conflict in Croatia, and the ongoing tripartite conflict, including extensive intervention and the attempted secession of RSHB in Bosnia-Herzegovina, mean that all four of the Montevideo criteria would require consideration. However, without doubt, neither government held effective control over all of the claimed territory or population. In addition, the less traditional criteria were also questionably applied - the fact of self-determination only being accorded to Republics has already been dealt with at some length<sup>77</sup>, and the use made of the ideas of democratic governance can be similarly questioned. Whatever the status and meaning of that principle<sup>78</sup>, it was emphasised within the EC process as an additional legitimating tool - it has been argued that this usage served to bolster the meta-legal process being used. However, the level of boycott in the referendum in Bosnia-Herzegovina, allied with the 'counter' referenda that had been held in the RSK and RSHB, at the very least would seem to require some further consideration. The same could be said of the Albanian boycott of the Macedonian referendum.

The final aspect of the questionability of the effective independence of both Croatia and Bosnia-Herzegovina was the UN intervention. In February, President Tudjman had finally consented to the deployment of UNPROFOR personnel to police the borders of Serb areas of Croatia. However, before the decision to actually deploy was taken, the approval of Serbian President Milošević had been sought, and the objections of RSK 'President' Babic had been sufficient to delay the deployment for two months. However, the deployment that did eventually take place served to establish relative stability over

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<sup>77</sup> Above, section 5.3.3

<sup>78</sup> Above, section 5.2.5

the succeeding months.<sup>79</sup> Bosnia-Herzegovina's internal stability had been the most tenuous of all of the Republics throughout the fragmentation process, and this position was tragically and destructively confirmed at the time the recognition question came into focus. Following the referendum and declaration of independence, a short period of desperate politics gave way to conflict on a scale not previously experienced during the already bloody recent history of the former Yugoslavia. The fighting involved the Bosnian-Muslims, frequently, but not always, allied with the Bosnian-Croats, who were supported by Croatian irregulars, and the Bosnian-Serbs, seeking to establish and secure Serb enclaves, supported by Serbia, Montenegro, and the remnants of the JNA. This escalation saw the international community, and the UN in particular, shift its primary focus from Croatia to the situation in Bosnia-Herzegovina. In particular, the level of UNPROFOR involvement, and the extent of its activities, including the establishment of no-fly zones and 'safe havens', served to at least raise questions as to the sovereign control of Bosnia-Herzegovina.<sup>80</sup>

At the times of recognition, the actual governmental effectiveness of the regimes in Bosnia-Herzegovina and Croatia, if not the certainty as to territory and population, were at least questionable. Yet the 'looseness' of their application contrasts strongly with the unprecedented level of strictness seen in the application of this same criterion

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<sup>79</sup> Keesings, Vol. 38 38704, 38734, 38778-78, 38833, 38849, 39013, 39012, 39149; SC Res. 721 (27 November 1991); SC Res. 724 (15 December 1991); SC Res. 727 (8 January 1992); SC Res. 740 (7 February 1992); SC Res. 743 (21 February 1992); SC Res. 749 (7 April 1992) - see below, Appendix B

<sup>80</sup> Keesings, Vol. 38, 38918-20, 38970-71, 39012, 39035-37, 39102-03; SC Res. 758 (8 June 1992); SC Res. 761 (29 June 1992); and SC Res. 770 (13 August 1992) - acting under Chapter VII, authorised States, in co-ordination with the UN, to use "all measures necessary" to safeguard the delivery of humanitarian assistance. See for example: Economides, S. and Taylor, P. "Former Yugoslavia", in Mayall, J. (Ed.) 'The New Interventionism, 1991-1994. United Nations Experience in Cambodia, former Yugoslavia and Somalia' (Cambridge: CUP, 1996), pp. 59-93.

Bosnia-Herzegovina's progress, from the demise of the SFRY, is succinctly characterised in: Bougarel, X. "Bosnia and Herzegovina - State and Communitarianism", in Dyker, D.A. and Vejvoda, I. (Eds.) 'Yugoslavia and After: A Study in Fragmentation, Despair and Rebirth' (London and New York: Longman, 1996), pp. 87-115

The external support to maintain the existence of Bosnia-Herzegovina included: the Western European Union International Police Task Force; the NATO-led Implementation Force (IFOR); the Constitutional provisions linking the domestic constitutional court to the European Court of Human Rights "[D]iscretion over internal affairs [w]as... surrendered for the sake of international survival" - Grant, *op cit.*, pp. 339-341, quotation at p. 340

to find the demise of the former State.<sup>81</sup> The possible legitimating factors of democracy and self-determination were at best narrowly applied. The actual stability of the entities also remained in doubt, in that both required, or would very soon require, significant UN intervention, and international aid, to remain viable. How then are these recognition decisions to be interpreted? The Slovenian model of political confirmation of the pre-existing legal fact would seem not to fit. Instead, it seems difficult not to impute some form of constitutive effect to the decisions, most especially in the case of Bosnia-Herzegovina, but also to an extent for Croatia.<sup>82</sup> And the basis of this partially-constitutive act included reference to both (suggested) legal principles and to political considerations. Whilst this entire process was partially conducted under the guise of objective determination by the Badinter Commission, the actual findings were cursory and only seemed of relevance insofar as they complied with the policies being followed by the EC States. As such, it is submitted that the recognition decisions were simply the concluding part of the meta-legal process already discussed, which had earlier involved the determination of State failure of the SFRY, through loss of government, and the concomitant grant of external self-determination to the next-most State-like units. Again, the traditional vocabulary of recognition, as well as the novel practice of the Arbitration Commission, merely served a(n apparent) legitimating function.<sup>83</sup>

Whilst the decision as to Macedonia's non-recognition was different again, it was arguably consistent with this basic position. It has been argued that the reasons upon

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<sup>81</sup> Türk, D. 'Recognition of States: A Comment' (1993) 4 EJIL 1, pp 66-71

<sup>82</sup> "It cannot be sustained, particularly in the light of the case of Bosnia-Herzegovina, that the legal function of diplomatic recognition is 'purely' declaratory" - Craven, M.C.R. 'The European Community Arbitration Commission on Yugoslavia' (1995) LXVI BYIL, pp. 333-413, at p. 411. The alternative, that it was premature, and therefore represented illegal interference within a sovereign State was argued by the Yugoslav *ad hoc* Judge. Milenko Kreča, in the Genocide Case - see, for example: Grant, *op cit.*, pp 325-329. However, given the nature of the prior determination of State failure, little support can be gained for this position.

<sup>83</sup> Specific political motivations have been suggested for the EC recognition practice, especially for Croatia and Bosnia-Herzegovina to internationalise the conflict to facilitate intervention - Mullerson, *op cit.*, pp 125-135, or, as a conflict management tool - Zametica, *op cit.*, pp 68-70. However, it is submitted that such views are consistent with the current analysis, in that they represent part of the political considerations in the wider process of limiting the potential vacuum of international law.

which the decision not to recognise Macedonia were based had nothing to do with its actual Statehood.

*Since the issue standing in the way of recognition did not go to statehood, it is proper to conclude that Macedonia's status as a State was not in question.*<sup>84</sup>

Indeed, the EC treated 'Macedonia' much as it did the other three Republics in the period after January 1992. As such, it might simply be said that this was an example of States withholding purely 'political' or 'declaratory' recognition. As such, it was:

*[A] perfect example of what de facto and de jure mean and do not mean. There are states recognized de jure, and there are states not recognized that do de facto exist; Macedonia is a perfect example of the latter.*<sup>85</sup>

However, a number of difficulties remain with this position. The emphasis of the EC's actual treatment of Macedonia is of little use since each of the six Republics was treated in an essentially State-like manner from as early as July 1991. In addition, for example, there was no discernible difference in treatment, save for the acts of recognition, in the treatment of Bosnia-Herzegovina between, January and April 1992. Whilst Macedonia's actual exercise of independence had progressed further than Bosnia-Herzegovina's, and its internal control was more effective than was Croatia's, it nevertheless saw a significant boycott of its independence referendum. Although the similar boycott in Bosnia-Herzegovina was arguably 'righted' by the partially-constitutive, political decision to recognise, this was precisely the aspect that was absent from the determinations as to Macedonia. Finally, the Macedonia decision is difficult in the light of the status of the EC Guidelines. Whatever the nature of the problem with Macedonia's situation, it nevertheless failed, in the view of Greece at least, to satisfy one of the EC conditions. Accordingly, if that simply meant it failed to meet a political condition for recognition, then that could be argued to be the status of

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<sup>84</sup> Warbrick (1993) 'Part 2', *op cit*, p. 438. Specifically with regard to the Commission's decision: "The implication of the Badinter finding was that Macedonia was a State." - *ibid.*, p. 437. However, it is submitted that the Commission's decisions did not address the issue of Statehood, merely the question of compliance with the Guidelines, which Macedonia did satisfy, and was therefore, in the EC's terms, eligible for recognition.

See also: Craven 'What's?', *op cit*, pp. 207-218

<sup>85</sup> Nagan, W.P. *et al* 'Yugoslavia: A Case Study of International Consequences of Independence Movements' (1993) Proc. ASIL, pp. 205-228, *per* Lilič, p. 226

all of the EC Guidelines - in which case Bosnia-Herzegovina's failure to satisfy the democracy aspect did nothing to deny its Statehood. In the alternative, if the Guidelines are to be regarded as more closely connected with Statehood, there appears to be no coherent justification for the stance that this one was an exception.

Again, it is submitted that these are the dilemmas of close legal scrutiny of the process, which fails to perceive the underlying meta-legal character of it. Just as the partially-constitutive recognition of Bosnia-Herzegovina was delayed by a political decision, so too was that of Macedonia. The difference was that the extent of Macedonia's actual independence was such that the decision regarding it was less-constitutive, meaning that the delay in recognition had less impact than it might have for Bosnia-Herzegovina. Whilst this assessment does not clarify the status of Macedonia prior to its recognition as the FYROM, it does reiterate the finding that the positions of Macedonia and Bosnia-Herzegovina were conditioned, throughout the entire process, by the overall treatment of the Yugoslav region, rather than in terms of their individual situations. The decisions regarding both of these Republics were simply a part of the EC's overall policy towards the failed Yugoslav State, and this view is further supported when the position of the remaining two Republics - Montenegro and Serbia - is considered.

### 6.3.5 *What Became of Yugoslavia?*

By April 1992, the EC process, through the Badinter Commission, had proclaimed the imminent demise of the SFRY, and had seen the emergence of three new States, whilst the fourth - Macedonia - was in the process of emerging, subject to the relatively limited caveat already mentioned. However, this left the ongoing problem of the Republics of Montenegro and Serbia, neither of which had sought recognition in December 1991. Instead, in response to the EC's Guidelines, they had each simply asserted that their respective sovereignties had been recognised at the Berlin Congress of 1878, and had subsequently been subsumed within the single Yugoslav sovereignty, which they had no desire to depart from.<sup>86</sup>

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<sup>86</sup> Rich, *op cit.*, p. 47

During the 1990 elections, the incumbent regimes had been returned to power in both Montenegro and Serbia.<sup>87</sup> Their two Presidents, respectively Momir Bulatović and Slobodan Milošević, consistently maintained their support for the continuance of the federal Yugoslav State. They opposed the ‘secessions’ of the various Republics, and sought to maintain control of the federal structures, and of the JNA, to hold the federation together in the face of such ‘insurgency’. Their policies included strong support for the Serb populations in Croatia and Bosnia-Herzegovina, initially against the independence moves of those Republics, then in the attempted secessions of the Serb communities to join with the federal Yugoslav State. This support included reference to rights of self-determination, which then contrasted with the repressive and restrictive regime within Serbia towards the two Autonomous Provinces of Kosovo and Vojvodina.<sup>88</sup>

This stance of Montenegro and Serbia ran directly counter to the wider fragmentation of the SFRY. As the international involvement increased, and the EC process saw through the separations, so did the intensity of their opposition and the level of the conflicts around the Serb areas of Croatia and Bosnia-Herzegovina. The two Republics, and Slobodan Milošević in particular, came to be associated externally as the main aggressors in the wars, and as the main violators of human rights. This led to the halting of aid, and the imposition of economic sanctions and arms embargoes, initially by the EC, and then more formally under the auspices of the UN.<sup>89</sup>

Following the Badinter determinations regarding the other four Republics, Montenegro and Serbia agreed in February 1992 to retain “the principles of a common state which would be the continuation of Yugoslavia”. It was to have a common government and parliament, and to retain the flag and anthem of the SFRY. A referendum in Montenegro, in March, voted by 96% to remain part of a federal

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<sup>87</sup> Above, Chapter 4, n. 131

<sup>88</sup> Keesings, Vol. 36, 37923-24; Vol. 37, 38080-81, 38559-60, 38685. See further, above, section 5.3.2

<sup>89</sup> Keesings, Vol. 37, 38203-04, 38274-75, 38314, 38373-76, 38420-22, 38559-60, 38684-85; Vol. 38, 38703-04; SC Res. 757 (30 May 1992); SC Res. 760 (18 June 1992); SC Res. 787 (16 November 1992); Bull. EC 12-1991, 1.3.19-20; Bull. EC 1/2-1992, 1.4.18-19. See generally: Teokarević, J. “Neither War nor Peace: Serbia and Montenegro in the First Half of the 1990s”, in Dyker and Vejvoda, *op cit.*, pp. 179-195



Yugoslavia. The turnout was 66%, since the Albanian and Muslim populations boycotted the vote. On 27 April, the 'Federal Assembly', in joint session with the Assemblies of the two Republics, adopted a new constitution, under the name of the Federal Republic of Yugoslavia (FRY), comprising the Republics of Montenegro and Serbia, including the two Autonomous Provinces of Kosovo and Vojvodina. It was to be a "sovereign federal state based on the principle of equality of its citizens and its member Republics", and the JNA was to be its army.<sup>90</sup>

When adopting the new constitution in April, Montenegro and Serbia sought not to form a new State, but rather to continue as the federal Yugoslav State, simply with an altered name, and differently constituted, after what they argued had been the secessions of the other four Republics. However, this position ran directly counter to the foundation of the EC approach - that the SFRY was "in the process of dissolution". This finding was based upon the unprecedented determination that the failure of the federal government was sufficient to signal the demise of the State, which had justified, and been justified by, the application of the principle of external self-determination to the constituent Republics. Accordingly, if the SFRY had not in fact disappeared, but remained in existence, albeit under a new name and in a different form, then the entire theoretical edifice upon which these decisions were based would be undermined.

The result was that the EC process had to deal with this issue head-on. In May, Lord Carrington submitted three questions to the Badinter Commission for consideration, two of which are central to this matter:

- 1 - *"In terms of international law, is the Federal Republic of Yugoslavia a new State calling for recognition by the Member States of the European Community in accordance with the joint statement on Yugoslavia and the Guidelines on recognition...?"*
- 2 - *"In its Opinion No 1 of 29 November 1991 the Arbitration Commission was of the opinion "that the SFRY (was) in the process of dissolution." Can this dissolution now be regarded as complete?"*<sup>91</sup>

<sup>90</sup> Keesings, Vol. 38, 38778-79, 38832-33, 38848-50; Scharf, M.P. 'Musical Chairs: The Dissolution of States and Membership in the United Nations' (1995) 28 Cornell ILJ 1, pp. 29-69, pp. 52-54; Zametica, *op cit.*, pp. 20-34

<sup>91</sup> EC Arbitration Commission, Interlocutory Decision (Opinions No. 8, 9 and 10) (4 July 1992) reprinted in 31 ILM 1518-1521. The third question concerned the basis upon which the problems of State succession were to be settled, which goes beyond the scope of this work. That question was

Before it approached them itself, the Commission circulated the questions to each of the Presidents of the six Republics, as well as to the Federal Presidency, for their responses to them. It is interesting to note that each of these seven entities was treated equally in the process, despite their considerably varying natures: three Republics were recognised as *de jure* States; one was not, but was generally accepted as existing *de facto*; two remained of unclear status, indeed their status was one of the questions to be resolved; and the Federal Presidency had been found to be so unrepresentative as to signify the imminent demise of the federal State. However, it is submitted that this approach represented the Commission's view of the most pragmatically 'safe' practice, rather than it having any specific legal significance. It represented a continuation of the approach that had been used throughout the process, which had been broadly accepted by all parties.<sup>92</sup>

In their response, Montenegro and Serbia challenged the Commission's competence to decide these questions, but only on the basis of its original mandate, as opposed to any arguments based upon interference within a sovereign State. The Commission relatively summarily rejected these claims, largely on the grounds that the two Republics had previously consented to the process, including Serbia having itself submitted questions to the Commission for resolution.<sup>93</sup> Having found that it did have competency, the Commission went on to answer the third question first, in its Eighth Opinion, since it viewed the answers to the other two questions as being contingent upon it. In its decision, the Commission reprised its First Opinion, then went on to observe:

*[T]he existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population,*

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addressed by the Commission in its Ninth Opinion - EC Arbitration Commission, Opinion No. 9 (4 July 1992) reprinted in 31 ILM 1523-1525

<sup>92</sup> This position is supported by the fact that the SFRY delegation continued to be represented at the EC conference after 4 July - for example, Warbrick (1993) 'Part 2', *op cit*, pp. 438-440.

In the alternative, if it were to have any significance, it would presumably be in reflecting again the meta-legal nature of the process, in the fact that legal precision gave way to political prudence.

Arguably, the importance of the treatment of the Republics as State-like entities had occurred at a much earlier stage in the process - Economides and Taylor, *op cit.*, pp. 91-92. See further, above, sections 4.5.2 & 5.3.3-5.3.4

<sup>93</sup> EC Arbitration Commission, Interlocutory Decision (Opinions No. 8, 9 and 10) (4 July 1992) reprinted in 31 ILM 1518-1521

*constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised.*

The fact of the four Republics having constituted new States was fairly straightforward. However, the Commission also stated that: “Serbia and Montenegro, as Republics with equal standing in law, have constituted a new state” - the FRY. On this basis, the Commission was able to find that “the former national territory and population of the SFRY” was “entirely under the sovereign authority of the new states”, such that:

*[T]he process of dissolution of the SFRY referred to in Opinion No 1 of 29 November.. [was] now complete and that the SFRY no longer exists.*<sup>94</sup>

In this way the Commission in fact, albeit tacitly, answered the question as to the status of the FRY first, with the question as to the existence of the SFRY in fact being contingent upon it, rather than the other way around. Accordingly, when the Commission came to answer the first question concerning the FRY, the outcome was inevitable - that it was “a new state which cannot be considered the sole successor to the SFRY”. As such, “its recognition by the Member States of the European Community would be subject to its compliance with the conditions laid down” in the Guidelines.<sup>95</sup> A year later, the Commission was asked to specify the respective dates of independence of the successor States. For Croatia and Slovenia, the date was 8 October 1991 - the date that the three month period of suspension of the declarations of independence expired. For Macedonia, it was 17 November - the date of its declaration of independence. Likewise, for Bosnia-Herzegovina, the date was 6 March 1992 - the date on which the referendum result was promulgated, and independence was declared - “notwithstanding the dramatic events that have occurred” since then. The Commission found some difficulty in setting a date for the FRY since it claimed to be a continuation of the SFRY, but settled on 27 April 1992 - the date that the new constitution was adopted. This final act also, in the Commission’s view, marked the final stage in the dissolution of the SFRY, such that it ceased to exist on that date.<sup>96</sup>

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<sup>94</sup> EC Arbitration Commission, Opinion No. 8 (4 July 1992) *reprinted in* 31 ILM 1521-1523

<sup>95</sup> EC Arbitration Commission, Opinion No. 10 (4 July 1992) *reprinted in* 31 ILM 1525-1526

<sup>96</sup> EC Arbitration Commission, Opinion No. 11 (16 July 1993) *reprinted in* 32 ILM 1587-1589

This final stage of the EC process with regard to the failure of Yugoslavia highlights a number of issues that ran through the entire approach. The most obvious is the fact that, whilst the four Republics seeking to gain their independence were able to exercise external self-determination, that same right was not accorded to Montenegro and Serbia - they were denied the choice and were forced to be independent.

*Self-determination was deliberately interpreted as the right to secede from Yugoslavia, but not as the right to remain part of it.*<sup>97</sup>

It could be argued that they did enjoy the same right as the other four, in that they could choose to emerge as separate States, form a joint State between them, or join with other States. The only aspect they were denied was for their joint State to retain the personality of the former State. However, this view misses the point that they were essentially forced to be independent, in that they could not retain their then current status - they could not remain as part of the State they were then a part of. If they could have done, then their act of 27 April, in adopting the new constitution, would not have terminated the existence of SFRY. It remains a point of pure speculation as to what might have occurred if they had not adopted that constitution, but had simply continued to act as the SFRY, whilst denying the independence of the other four Republics.<sup>98</sup> It may be that this lack of clarity, like the circularity of the Eighth and Tenth Opinions, merely serves to

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<sup>97</sup> Stojanovic, *op cit.*, p 358. Whilst the aspect of secession is at odds with the present analysis, the identification of the contradiction in the treatment of Montenegro and Serbia remains valid. See further, for example: Vujović, N., in Nagan, *op cit.*, pp 218-219.

The secession-dissolution debate has been the focus of much of the comment on this process. The focus tends to be the period of time involved: when Croatia and Slovenia, and later Macedonia, and even Bosnia-Herzegovina, gained their independence, the SFRY still existed, such that they had to be secessions. Dissolution, if it did occur, only did so on 27 April - for example, Kapetanovic, G. 'The Emergence of New States: A Trend Towards Destabilization?' (1992) Proc. CCIL, pp. 59-66, at pp 60-61. The counter view is that the dissolution process was commenced by the first moves of Croatia and Slovenia, such that 27 April simply marked the completion of that process - for example, Lloyd, D.O. 'Succession, Secession, and State Membership in the United Nations' (1994) 26 NYUJIL&P 4, pp. 761-796, at pp. 788-793.

Within the current analysis, this debate remains largely peripheral in that the actual assessment is predicated on the wider issues of State failure and the re-establishment of sovereignty, with the legal principles and processes merely serving to legitimate this meta-legal process. But, see further below, n. 111

<sup>98</sup> It is submitted that, given the rest of the Commission's approach, some other similar event would have been selected as sufficient evidence of the practical emergence of the new State. A possible example might be the first meeting of the federal Presidency, which would have required a change in procedure to be able to operate without four of its members.

illustrate the primacy accorded to political principles, and so to emphasise the meta-legal nature of the process.

Beyond this self-determination aspect, the fact of the Commission's decision that Montenegro and Serbia were independent of the SFRY, whether separately or jointly, without their having to show their compliance with the EC Guidelines, again tends to suggest that those Guidelines concerned only the granting of political recognition, which it has already been asserted was not true in all of their uses.<sup>99</sup> The dating of the respective independences further emphasises this point, but too seems to run counter to the underlying analysis - could it really be said that Bosnia-Herzegovina constituted a State on 6 March, prior to any recognition of it?

The reliance in the process on the idea of democracy as a legitimating principle is equally difficult to resolve, since the decisions of four of the referenda defeated the other two - and all six had precedence over those in the two Serb Republikas, and that in Kosovo. This is all the more so given the level of turnouts in the referenda in Bosnia-Herzegovina and Macedonia, albeit that a similar experience was had in Montenegro. Overall, it seems that democracy was interpreted in a very simplistic manner - a referendum need only have been held to provide a thin veil of legitimacy, without it actually needing to have represented the whole population. All that seemed to be required was that it had been generally open to all, without actual participation being necessary - seemingly inconsistent with the Commission's reasoning, which required that a referendum actual take place in Bosnia-Herzegovina because of the will of the whole population had not been sufficiently established. Ultimately, these processes only had validity when they took place within units that had been previously, and arguably undemocratically, defined, but which were then externally fixed as the determinative units. And they only served a legitimisation function as regards the EC's decisions, such that, when they went against those decisions, as had occurred in Montenegro and Serbia, they were effectively ignored.

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<sup>99</sup> See for example: Jovanovic, V. 'The Status of the Federal Republic of Yugoslavia in the United Nations' (1998) 21 *Fordham International Law Journal* 5, pp. 1719-1736, especially at pp. 1724-1727

With regard to all of these decisions, it is too easy to get caught-up in attempting to unravel the legal technicalities and complications inherent within them. In a purely legal analysis, the decisions are self-referencing, contradictory, and lacking in rigour. The explanation for this is that they formed a part of the EC's overall treatment of the failed Yugoslav State. As such, the process was a meta-legal one, albeit that legal principles were frequently used to inform the decisions. The underlying purpose remained that of limiting the vacuum of international law, and the re-establishment of sovereign Statehood over the entire region. Accordingly, the 'recognition' used in the process contained both legal and political characteristics. Put simply; it was part of an essentially political process that was to have legal effects. The ambiguities inherent in recognition, like those inherent in all international law dealing with Statehood, served to make it an ideal tool in this context.

In consequence, the use made of recognition in the Yugoslav experience would appear not to shed a great deal of light on the traditional debates surrounding recognition, or else it has simply confirmed the contradictions and uncertainties inherent within them. However, the issues of UN membership, and comparison with the events in the USSR remain to be considered before final conclusions can be drawn on this process.

### 6.3.6 UN Membership<sup>100</sup>

The difficulties that the EC and the Badinter Commission faced regarding the personality of the FRY were mirrored in the UN. In May 1992, Security Council Resolution 752 was the first to refer to the "former" SFRY, albeit within a preambular paragraph, and no further detail was given.<sup>101</sup> Then, at the end of the month, in the preamble to Resolution 757, the Security Council noted that the claim of the FRY "to continue automatically the membership of the former" SFRY in the UN "ha[d] not been generally accepted", but again with no further detail as to the impact of this.<sup>102</sup> It was not until September that the matter finally came for specific consideration. The Security Council considered that "the State formerly known as the Socialist Federal

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<sup>100</sup> On the general subject of the UN and State recognition, see: Dugard, *op cit.*

<sup>101</sup> SC Res. 752 (15 May 1991)

<sup>102</sup> SC Res. 757 (30 May 1992)

Republic of Yugoslavia ha[d] ceased to exist,” and that the FRY could not “continue automatically” the membership of the former SFRY. It therefore recommended that the General Assembly should decide that the FRY “should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly”.<sup>103</sup> The Resolution was adopted by twelve votes to none, with three abstentions. During the debate, the representatives from India and Zimbabwe, both of whom abstained in the vote, suggested that the Resolution was not an action in accordance with the specific provisions on the Charter dealing with Membership - Arts 4-6.<sup>104</sup> In a statement made after the adoption of the Resolution, the representative from China, who also abstained, indicated that the resolution did “not mean the expulsion of Yugoslavia” from the UN, only a restriction on its participation in the work of the General Assembly.<sup>105</sup> When the matter came before the General Assembly, the decision taken was that:

*[T]he Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore... that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership of the United Nations and that it shall not participate in the work of the General Assembly.*<sup>106</sup>

The Under-Secretary-General for legal affairs subsequently confirmed the opinion of the Chinese representative in the Security Council - the General Assembly Resolution only disallowed the FRY from participating in the work of the General Assembly, thereby making no statement as to its membership status.<sup>107</sup> Accordingly, the membership of

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<sup>103</sup> SC Res. 777 (19 September 1992)

<sup>104</sup> White has argued that in its treatment of the FRY, the UN has tacitly combined Arts 4 and 6, when the matter should, and could, correctly have been handled under Art 5 - White, N.D. ‘The Law of International Organisations’ (Manchester and New York: MUP, 1996), pp. 62-66. On the general issue of termination of membership, see further, for example: Bowett, D.W. ‘The Law of International Institutions’ 2 Edn. (London: Stevens, 1970), pp. 348-353

<sup>105</sup> Security Council Provisional Verbatim Record, 19 September 1992 (S/PV.3116, 19 September 1992), in Bethlehem, D. and Weller, M. (Eds.) ‘The ‘Yugoslav’ Crisis in International Law: General Issues, Part 1’ (Cambridge: CUP, 1997), pp. 110-114

<sup>106</sup> GA Res. 47/1 (22 September 1992)

<sup>107</sup> Letter dated 29 September 1992:

*[T]he only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.*

‘Yugoslavia’ - the SFRY - was not terminated. The old Yugoslav flag continued to fly outside the UN Headquarters; its nameplate and seat remained in the General Assembly hall. Practically speaking, the SFRY remained a Member State of the UN, despite the fact that three, and ultimately four, successor States to it were also Members. Indeed, on the 1992 assessed country list, ‘Yugoslavia’ appeared, whilst the new Member States - Bosnia-Herzegovina, Croatia, and Slovenia - did not.<sup>108</sup> And in practice Yugoslavia retained a delegation in New York, which continued to carry out its functions - it was the delegation that represented the FRY. The result was a situation that was “not free from legal difficulty”.<sup>109</sup> Or, in the remarkably non-technical words of the British Secretary of State for the Foreign Office, “Yugoslav representation at the United Nations is in a type of limbo.”<sup>110</sup>

It has been argued that the approach taken by the UN with regard to ‘Yugoslavia’ was invalid in that: it denied the FRY the rights that had been accorded to previous Member States when elements of them had seceded<sup>111</sup>; because it went against the tacit acceptance of the FRY as the successor State, given that it had acted in that capacity between April and September before the decisions were taken; and, because the Security Council and General Assembly do not have the authority to preclude a Member State

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*On the other hand, the resolution neither terminates nor suspends Yugoslavia's membership of the Organization.*

Letter from Carl-August Fleischhauer, UN Under-Secretary General for Legal Affairs, UN Doc. A/47/485 at 2 (1992).

This same ‘prohibition’ on participation was subsequently extended to the work of ECOSOC - SC Res. 821 (28 April 1993); GA Res. 48/252 (1993)

<sup>108</sup> Higgins, R. ‘The New United Nations and the Former Yugoslavia’ (1993) 69 *International Affairs*, pp. 465-483

<sup>109</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Provisional Measures) 1993 ICJ Reports 3 at p. 14

<sup>110</sup> H.C. Hansard, Vol. 208, col. 719, 21 May 1992. See further: Blum, Y.Z. ‘UN Membership of the “New” Yugoslavia: Continuity or Break?’ (1992) 86 *AJIL* 4, pp. 830-833 & Degan, V-D. *et al.*, ‘Correspondents’ Agora: UN Membership of the Former Yugoslavia’ (1993) 87 *AJIL* 1, pp. 240-251; Wood, *op cit.*, pp. 241-251

<sup>111</sup> Blum, *ibid.* For example: Pakistan from India in 1947 - Scharf, *op cit.*, pp. 33-41; Syria from the United Arab Republic 1961 - Young, R. ‘Editorial Comment - The State of Syria: New or Old?’ (1962) 56 *AJIL* 2, pp. 482-488; Singapore from Malaysia in 1965 - Jayakumar, S. ‘Singapore and State Succession: International Relations and International Law’ (1970) 19 *ICLQ* 3, pp. 398-423; and, Bangladesh from Pakistan in 1971.

On the aspect of secession, see above, n. 97



from participation.<sup>112</sup> It would be fair to state that considerable doubt remains as to the legal position of the determinations, and indeed of ‘Yugoslavia’ or/and the FRY.

Whatever the uncertainties, the UN provided a lead for other international bodies - for example, the CSCE formally disallowed the FRY from participating in the place of the SFRY. However, the Non-Aligned Movement, at its Tenth Summit, allowed the FRY to attend as a full member, whilst Croatia was only permitted observer status, and Bosnia-Herzegovina and Slovenia were merely “guests”.<sup>113</sup> A different approach again was taken by the IMF, which determined that the FRY, along with the other four States arising out of the SFRY, were to be “considered to have been... member[s] without interruption since the dissolution of the SFRY and to have continued... the membership of the SFRY”.<sup>114</sup>

Whilst the precise position remains unclear, it has throughout been one entirely of succession. The issue has never been whether the FRY is a State, but whether it is a new State, or the continuation of the SFRY. However, the sum total of the EC recognition process and the UN Membership debates, which between them dictated the majority of the international response to the situation, was that the FRY remained formally unrecognised and its UN status was “manifestly unsatisfactory from the legal point of view”.<sup>115</sup>

*Serbia and Montenegro remain the only republics of the former Yugoslavia which have not been internationally recognised, although they share the longest tradition of sovereign statehood among the ex-Yugoslav nations.*<sup>116</sup>

An assessment of these developments will best be undertaken alongside a consideration of the outcome of the dissolution of the USSR, and its consequences within the UN.

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<sup>112</sup> Jovanovic, *op cit.*, pp. 1722-1724, 1727-1729. It should be noted that Jovanovic was the FRY Ambassador to the UN.

<sup>113</sup> Keesings, Vol. 38, 38848-50, 38918-20, 39030-31, 39122

<sup>114</sup> International Monetary Fund Press Release No. 92/92 (15 December 1992), at p. 2. See further: Williams, P.R. ‘State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations’ (1994) 43 ICLQ 4, pp. 776-808

<sup>115</sup> Higgins, *op cit.*, p. 479

<sup>116</sup> Teokarević, *op cit.*, p. 179

### 6.3.7 *Back in the USSR?*

The dissolution of the USSR essentially occurred in two phases, one in August and one beginning in December 1991. In August, the effective independence of the three Baltic States occurred. Estonia, Latvia and Lithuania had remained of uncertain status since their annexation in 1940. Their practical inclusion within the USSR was unquestioned, but that inclusion was widely perceived to be illegal. Their re-emergence as independent States, which had received support from Russian President Boris Yeltsin, saw them receive effective recognition from much of the world community, including the EC States, the US, and even the USSR, in August. However, in this process “both legal niceties and political realities” were observed by the general avoidance of the term ‘recognition’.<sup>117</sup> All three were admitted as Member States of the UN on 17 September 1991.<sup>118</sup> Whatever the name given to this process, the status of these three was based more on history than practical facts - the international community’s acceptance of them was an acknowledgement of the end of domination, more than of their actual independent Statehood at that time. It was more an expression of political will than of legal fact.<sup>119</sup>

*In the case of the restoration of the independence of the Baltic states recognition was certainly not a simple act of declaration of fact. The fact of independence, though foreseeable, was not certain at all. In this case recognition undoubtedly contributed to the achievement of this fact. Therefore, we may conclude that these acts of recognition contained strong constitutive elements.*<sup>120</sup>

No recognition issues arose regarding the other twelve Republics until the actual dissolution of the USSR, which is perhaps best dated at 21 December 1991, with the signing of the Alma-Ata declaration and agreements, by eleven of those twelve.<sup>121</sup> The 21 December agreements had included general acceptance that Russia was to continue the international legal personality of the USSR, which was therefore largely followed

<sup>117</sup> Rich, *op cit.*, pp. 37-38, quotation at p. 38

<sup>118</sup> Keesings, Vol. 37, 38458

<sup>119</sup> The declarations of independence are classifiable either as a legal exercise of the right of self-determination in a case of illegal occupation, or as the confirmation of the pre-existing, if suspended, independence - Cassese, A. ‘Self-determination of Peoples: A Legal Reappraisal’ (Cambridge: CUP, 1995), pp. 258-264

<sup>120</sup> Müllerson, *op cit.*, pp. 119-122, quotation at p. 121

<sup>121</sup> Russia, Belarus and the Ukraine had sought to pre-empt this with the Minsk Declaration of 8 December - see above, Chapter 5, n. 166

in practice. For example, in a statement of 23 December, the EC acknowledged this fact when it clarified that the Russian Federation was deemed to have been already recognised. The remaining Republics were recognised either immediately, or within the succeeding months, as and when they were deemed to have complied sufficiently with the EC Guidelines - although the determinations were simply made by the EC Member States, requiring nothing like the complexity and formality of the Badinter Commission.<sup>122</sup> The last Republic to be recognised was Georgia, in March 1992, when the internal unrest it had been experiencing since late 1991 began to subside.<sup>123</sup> Many other States, including the US and Australia, followed a similar pattern to that of the EC.<sup>124</sup>

The emergence of the twelve Republics, signalled by their mutual agreement to dissolve the former State, meant that there was a considerable degree of actual independence. The decisions to emerge as States were based upon mutual consent as between all of the Republics, which therefore meant the whole of the Federal State. Accordingly, they also determined the units of this dissolution, as opposed to any external factors being involved. Whilst there was nevertheless a certain level of internal opposition to the units of dissolution, largely from sub-Republican units, such as Chechnya in the Russian Federation, or Nagorno-Karabagh in Azerbaijan, and from the minority Russian population in many of the Republics, the degree of consensus at the Republic level was considerable. And this was so without the need apparently to demonstrate popular support through the holding of referenda purely to satisfy externally determined requirements of legitimacy.<sup>125</sup>

The consequence of these realities was that the recognition accorded to the various Republics by the EC States, and the rest of the international community, were of a less constitutive nature than had been those of the Baltic Republics, and as those of a number of the emergent Yugoslav Republics were going to prove to be in the coming months. Nevertheless, since recognition for these Republics, like for all new States,

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<sup>122</sup> Bull. EC 12-1991, 1.4.10 & 1.4.13

<sup>123</sup> Bull. EC 3-1992, 1.4.9

<sup>124</sup> Rich, *op cit.*, pp. 44-47

<sup>125</sup> Above, sections 6.3.2-6.3.3

tends to occur just as they are emerging, it will necessarily serve some function in consolidating their recently acquired independence.

*Therefore, though recognition does not, of itself, create states, it is often, if not always, much more than a simple declaration of existing facts, and will inevitably have important legal consequences. A contemporary state can normally exist and very often even survive only when accepted by the world community of states.*<sup>126</sup>

As regards membership of the UN, prior to the dissolution of the USSR, it had been a founding Member State and a Permanent Member of the Security Council, whilst Byelorussia and the Ukraine were original members.<sup>127</sup> In the Alma-Ata process, the eleven Republics agreed that the Russian Federation should continue the USSR's membership of the UN.<sup>128</sup> Accordingly, on 24 December, Ambassador Vorontsov, the Permanent Representative of the USSR, formally requested that the Russian Federation assume the USSR's membership, and all appropriate technical changes be made, such as alteration of nameplate, substitution of flag, and so forth. Since this continuation only applied to the Russian Federation, the remaining nine Republics required to be admitted as new Member States, which occurred in the early months of 1992.<sup>129</sup>

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<sup>126</sup> Müllerson, *op cit.*, p. 124

<sup>127</sup> The membership of these two Republics is a classic example of law giving way to *real politick*. See for example: Dolan, E. 'The Member Republics of the U.S.S.R. as Subjects of the Law of Nations' (1995) 4 ICLQ 4, pp. 629-636; Higgins, R. 'The Development of International Law Through the Political Organs of the United Nations' (London: New York, Toronto: OUP, 1963), pp. 15-17; Schermers, H.G. "International Organizations, Membership", in Bernhardt, R. (Ed.) 'Encyclopedia of Public International Law' (Amsterdam, New York, Oxford: North-Holland, 1983), pp. 147-151, at p. 148. However, the case of these two 'Member States' does serve as a reminder that status within the UN is not absolutely indicative of external legal status.

<sup>128</sup> Decision By the Council of Heads of States of the Commonwealth of Independent States (21 December 1991) reprinted in 31 ILM 151 (First operative paragraph) "The States of the Commonwealth support Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council, and other international organizations."

<sup>129</sup> Keesings, Vol. 38, 38842, 39033; Blum, Y.Z. 'Russia Takes Over the Soviet Union's Seat at the United Nations' (1992) 3 EJIL, pp. 354-361, pp. 355-356; Scharf, *op cit.*, pp. 43-49

These events are perhaps difficult to classify, but will present a useful comparison with the situation of the FRY.<sup>130</sup> At a factual level, the Russian Federation comprised 76% of the territory of the USSR (17,075M sq. km out of 22,400M sq. km), and constituted 51% of its population (148M out of 288.7M).<sup>131</sup> It would, therefore, have been plausible for the situation to be regarded as the continuation of the previous State after a number of secessions from it, relying on some of the relatively few precedents - for example, India (Pakistan) in 1947; United Arab Republic (Syria) in 1961; and Pakistan (Bangladesh) in 1971. However, a case can be made that this was not what actually occurred. Given that the USSR was terminated as a State, probably on 21 December by the Alma-Ata Declaration, or even possibly on 8 December by the Minsk Declaration, then all twelve Republics emerged from a then non-existent State, which means that none of them seceded, since there was no State left to secede from. Accordingly, at the time of Ambassador Vorontsov's letter, on 24 December, there was no membership of the USSR that could be 'continued' - the State did not exist, so how could its Membership?<sup>132</sup> In terms of the UN Membership issue, the lost three days could be said merely to reflect administrative time lag, rather than an actual conceptual difficulty. However, under this strict assessment, the nature of the dissolution and succession remains aloof from precise categorisation - in practice there was both dissolution of the former State, and a continuation of its personality, much as the Badinter found there could not be in the case of the SFRY<sup>133</sup>. It is submitted that the difficulty the UN experienced in dealing with the Soviet situation is

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<sup>130</sup> The alteration of name gives rise to no legal issues, and simply requires administrative changes, as evidenced by numerous previous examples, such as: Congo-Leopoldville becoming Zaire in 1971, Ceylon becoming Sri Lanka in 1972, Dahomey becoming Benin in 1975, Upper Volta becoming Burkina Faso in 1984, or Burma becoming Myanmar in 1989 - *per* Blum 'Russia', *op cit.*, pp. 357-358. Another point of reference is the experience of Czechoslovakia. In the so-called 'velvet divorce', the State of Czechoslovakia ceased to exist at midnight on 31 December 1992, and two new States emerged to replace it. Its membership of the UN was terminated and the Czech and Slovak Republics were both admitted as new Member States on 19 January - Keesings, Vol. 39, 39299. This situation was the result of the prior agreement of the two entities. However, the other part of their agreement, by which they sought to divide-up between themselves the memberships of various committees and bodies that had been held by Czechoslovakia, was thwarted. In practice, with the termination of the existence of Czechoslovakia, a vacancy was created for which a normal selection process was required. See: Scharf, *op cit.*, pp. 65-67

<sup>131</sup> Blum 'Russia', *op cit.*, p. 355, n. 4; Craven 'Arbitration Commission', *op cit.*, pp. 370-371

<sup>132</sup> Blum 'Russia', *op cit.*, pp. 357-361. But *cf.* Lloyd, *op cit.*, pp. 776-779; Scharf, *op cit.*, pp. 49-52

<sup>133</sup> Above, text at n. 95

evidence of the general difficulty faced by international community in dealing with situations of termination of Statehood. Legal precision seems often to take second place to pragmatism and acceptance of political realities. Whilst in the context of the Soviet dissolution, the legality and reality were merely slightly out of step, the same degree of legal uncertainty in a more testing situation could lead to far greater difficulties. The not-inconceivable scenario of the Russian Federation itself similarly dissolving should present sufficient prospect to cause concern.

Whatever the level of legal uncertainty as regards the USSR-Russian transfer, it is relatively minor compared to the SFRY-FRY situation. As such, a comparison of the two situations will clarify whether the Soviet experience can shed any light on the ‘Yugoslav mess’. The distinctions between the two cases are numerous:

- the Alma-Ata agreement specifically provided for Russia to continue the USSR’s international legal personality in numerous contexts, including its UN membership. No such agreement existed for the SFRY - indeed, the other former Republics actively opposed the attempt by the FRY to continue the personality of the SFRY;
- Russia comprised the majority of the territory and population of the USSR, as well as virtually all elements of the former federal structure. Whilst the FRY comprised the largest of both of these elements of any of the post-SFRY units, it did not constitute even a bare majority of either (40% of the territory, and 45% of the population<sup>134</sup>). In addition, by no means all of the federal structures existed within it, despite the Serbian capital - Belgrade - also being the federal capital;
- The practical administrative transfer occurred largely without opposition in the Russian Federation, but the same was not true in the Yugoslav experience. As one example, not all Yugoslav embassies automatically transferred to Serbian (or FRY) control, whereas all Soviet embassies, without exception, transferred to representing the Russian Federation; and,
- The level of international condemnation of the activities of the FRY and the ‘blame’ for the fact and manner of the break-up of the SFRY was in stark contrast to the desire

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<sup>134</sup> For example: Craven ‘Arbitration Commission’, *op cit.*, pp. 370-371. However, the figure as to the Serbian percentage of the total population is subject to some controversy, for example: Türk ‘Remarks’, *op cit.*, cites the figure as closer to 35%. See Appendix A

of the international community to support the Russian Federation in its emergent form, and the generally held view of that entity's role in the break-up of the USSR.<sup>135</sup>

Despite the slight technical-legal hiccup as to UN Membership, it can be seen from the foregoing that the transfer of the USSR's international legal personality to the Russian Federation was simply a reflection of the most plausible and generally accepted interpretation of the actual experience. The same was very evidently not true of the Yugoslav experience. Rather than what this might convey about whether or not the FRY should be accepted as continuing the international legal personality of the SFRY, the key consideration for the present study is what this indicates about international law's treatment of State failure. The slight legal difficulties in the USSR-Russian experience remained sufficiently minor only because they were not dealing with a (very) 'hard case' - there was no significant dispute requiring legal solution. If the case had been harder - as it was and is for the SFRY-FRY - the slight fault lines that were evident might have shown the mechanisms of the international legal system to be inadequate to deal with them. As such, the non- or meta-legal aspects of the international practice would have more obviously been to the fore, much more than they were in practice, and much as they have been argued to be in the Yugoslav experience.<sup>136</sup>

#### 6.3.8 *Post-Communist Recognition*

*Historians will argue about the timing of the recognition of Croatia and Slovenia, but no one could seriously suggest that it could have been long delayed. No one could seriously suggest that we could have gone on pretending the old Yugoslavia still existed. We must deal with realities, and the reality was that Croatia existed.*<sup>137</sup>

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<sup>135</sup> Lloyd, *op cit.*, pp. 779-782; Rich, *op cit.*, pp. 53-54, 58-60

<sup>136</sup> And it is likely that the criticisms of Professor Blum, which so often appear at first sight to be overly legalistic and pedantic, may well serve as timely warnings of the shortcomings of the international law they seem always so supportive of. Professor Blum's consistency of observation of the legal complexities involved in the delicate business of alterations in UN Membership significantly pre-date the recent experiences in Eastern Europe - see for example: Blum, Y. 'Indonesia's Return to the United Nations' (1967) 16 ICLQ 2, pp. 522-531

<sup>137</sup> 3 May 1995, HC Hansard, Vol. 259, col. 332

In this statement, then UK Foreign Secretary Douglas Hurd neatly encapsulates the underlying ethos of recognition practice as it was applied in the Balkans. The primary assumption was continuity of the State - of the SFRY. Once this continuity of the State was deemed to be impossible, the next best alternative was continuity of Statehood generally. Thus, if Yugoslavia had become a fiction, then Croatia's Statehood had to become a reality, and likewise the other Republics. The possibility that Yugoslavia could have ceased to exist, and that no new State had yet emerged to replace it, was not a conceivable outcome. Indeed, the SFRY could not have been found to have ceased to exist without the existence of sufficiently State-like entities ready to replace it. This then, it is submitted, is the underlying logic that must be at the heart of any assessment of the process of recognition of the Yugoslav Republics.

The EC process of recognition made almost no reference to the traditional criteria of Statehood.<sup>138</sup> The prior finding of the failure of the SFRY had only been possible because new States were ready to emerge - the sole basis for the finding had been to ensure the continuity of Statehood, once the continuity of the State seemed unlikely. As such, the new States did not so much emerge, as were revealed as the next-most State-like entities when the former State 'retracted'. Hence, in the EC process, the emphasis was not upon the traditional criteria of Statehood, but on the newer considerations of self-determination and democratic governance<sup>139</sup>, upon which the EC Guidelines were based. In this way, the two ideas that had been used to legitimate the original finding of State failure, and were themselves legitimated by it, were also used to legitimate the emergence of the new States.

The Guidelines were initially applied by the Badinter Commission as part of what was presented as a legal process. However, the nature of the Guidelines themselves, and the manner of their application, casts doubt upon the strict legal objectivity of the process. Their application by the Commission was neither consistent nor rigorous, but instead seemed tailored to accord support for the emergence of the Republics.<sup>140</sup> These

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<sup>138</sup> Türk, D. 'The Dangers of Failed States and A Failed Peace in the Post Cold War Era' (1995) 27 NYUJIL&P 4, pp. 625-630

<sup>139</sup> Above, section 2.3.3

<sup>140</sup> Above, section 6.3.3



determinations were merely advice upon which the actual recognition decisions were to be made, but which were strictly to be made by each individual recognising State, according to their own policies.<sup>141</sup> As such, the determinations based upon the criteria have been argued to have been simply decisions as to the establishment of diplomatic relations - recognition in its most declaratory sense.<sup>142</sup> But such an approach fails to perceive the role recognition was playing in the wider process. Recalling the words of the UK Foreign Secretary above, once the failure of the SFRY had been found, within the EC process, there was no alternative but to find the existence of new States.<sup>143</sup> Such a position meant that the individual recognition decisions were less based upon objective criteria, than on the wider policy agenda. Each case was not treated individually, but was dealt with as part of a collective whole.<sup>144</sup> When the SFRY had been determined to be in the process of dissolution, all elements within it were treated alike. When the USSR ceased to exist as an international legal entity, all elements within it were treated alike. In both cases this was so despite the huge disparities of ethnic homogeneity, history, and *de facto* autonomy between the various Republics emerging. Each unit had to emerge as a State, and the only referents used were the principles of self-determination and democratic governance as embodied in the Guidelines. But their use was to legitimate emergence, as opposed to acting as a mechanism for establishing the existence of Statehood according to objective standards. This then is the reason behind the inconsistency, and sometimes even laxity, of their application in the Badinter decisions. They were principles, in themselves of uncertain legal status, used in a non-legal manner.

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<sup>141</sup> Above, text at n. 59. See also: HC Hansard, Vol. 204, col. 439W (25 February 1992); Vol. 205, col. 488 (5 March 1991); Vol. 208 cols. 716-717 (2 June 1992); Vol. 210, col. 593W (1 July 1992)

<sup>142</sup> Rich, p. 56; Weller, M. 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', (1992) 86 AJIL 3, pp. 569-607, at pp. 586-588, 596-597. Weller acknowledges that the recognition process, and the EC Guidelines were used essentially politically, but then goes on simply to present this within a traditional legal-declaratory approach to recognition - pp. 603-607

<sup>143</sup> Craven 'Arbitration Commission', *op cit.*, pp. 375-380

<sup>144</sup> Indeed, this approach was evident from the outset, in that the first EC statements regarding possible recognition of emergent Republics were tied into participation in the wider process - for example, Bull. EC 10-1991, 1.4.7 and 1.4.15. See also: Weller, *ibid.*, p. 581

Characterisations of the EC Guidelines and the Badinter process as representing a new ‘rights based’ approach to Statehood<sup>145</sup>, or as evidencing only a new consistent approach to political recognition<sup>146</sup>, fail to account for the wider aspects of the process. It is only by perceiving the full context that the difference between the largely-declaratory decision regarding Slovenia can be reconciled with the partially-constitutive decision regarding Bosnia-Herzegovina.<sup>147</sup> Likewise, the determinations regarding the FRY, and the legal anomalies created in this regard, become clearer when the underlying approach is perceived.<sup>148</sup> And these perspectives are largely borne out by the legal anomalies thrown-up by the UN membership issues of Yugoslavia/the FRY and, albeit to a lesser extent, by that of the USSR-Russian Federation.

*[T]he question of recognition of states has become less predictable and more a matter of political discretion as a result of recent practice. The traditional criteria for statehood retain an uneasy existence alongside the new EC Guidelines...*<sup>149</sup>

*As the Yugoslavia crisis shows, recognition under political international law has developed from a purely formal point of view based on facts, to one based on political discretion and is - as such - becoming a tool for political action. Whereas, under classical doctrine it was only asked if the four criteria (...) had been fulfilled, political realities are now taken into account.*<sup>150</sup>

For Yugoslavia, the determination of the lack of government and the finding of self-determination were both part of a meta-legal process, albeit one that referred to legal principles for legitimisation, dealing with a situation State failure. The recognition

<sup>145</sup> Knop, *op cit.*, pp. 43-56

<sup>146</sup> Rich, *op cit.*, pp. 42-44, 55-56. And see further: Hillgruber, C. ‘The Admission of New States to the International Community’ (1998) 9 EJIL 3, pp. 491-509

<sup>147</sup> Above, section 6.3.4

<sup>148</sup> Above, section 6.3.5

<sup>149</sup> Rich, *op cit.*, p. 63, and at p. 64: “It now seems that the ‘political realities’ have gained primacy over the inclinations to maintain consistency by applying accepted criteria to test the fact of statehood.”

<sup>150</sup> Hille, S. ‘Mutual Recognition of Croatia and Serbia (+Montenegro)’ (1995) 6 EJIL 4, pp. 598-611, at p. 611. But, *cf.* Müllerson, *op cit.*, p. 134:

*[T]he first criterion for recognition is the existence of statehood, ...notwithstanding the fact that acts of recognition may carry rather strong constitutive elements. But the presence of constitutive elements does not mean that recognition can create states. Recognition can consolidate and strengthen recently acquired and feeble statehood, and can help to make independence irreversible.*

decisions marked the end of that same process by placing the seal of international legal personality on the new States emerging from that failure. This process has caused ripples within the wider legal context, most noticeably within the UN, as arguably all 'hard cases' have the potential to do, given the difficulty for international law in dealing with such issues of Statehood. The meta-legality involved in such processes, despite the ostensibly legal framework in which they occur, is neatly characterised in Hille's reference to "political international law". However, this assessment remains incomplete without final reference to the application of recognition to the other ongoing experience of State failure - that in the Somali region of the Horn of Africa.

#### **6.4 And the Somali Context?**

In the previous two Chapters, the major distinction between the Somali and Yugoslav experiences has been seen to be the finding of the break-up of the latter, and not of the former, despite the fact that both appear to satisfy the concept of State failure. The basis of this distinction has been said to be the different application of the requirement of government for existing States, coupled with the legitimating factor of self-determination. Whilst it was asserted that self-determination was only accorded once State failure had been found, it was equally true that the finding of State failure was based upon a sufficient level of attempts to exercise external self-determination, which was significantly different in the two cases. The Yugoslav experience saw a number of Republican and sub-Republican units seeking to self-determine, whilst in Somalia the only unit to actually pursue such a course was that of Somaliland, although it has been argued that the Darod-northeast tacitly did likewise. Accordingly, the number of units seeking recognition was significantly different in the two experiences - only Somaliland actively pursued a policy of seeking external recognition of its claimed Statehood. This then will form the main basis of the consideration of recognition, although again reference will be made to the remainder of Somalia, primarily as a comparison with the experience of the FRY.

#### 6.4.1 Somaliland, 1991-1993

The former British colony of Somaliland - the northern-western part of the Somalia - had retained a sense of its own identity and difference throughout the life of the single Somali State. It was arguably the source of the original spark that ignited the fragmentary explosion within that State, with the brutal and bloody conflicts in 1988-89. Following the fall of Siyad Barre's military regime in January 1991, and after a few months of attempted internal settlement, the Great *Guurti* of the Isaq clan forced the dominant SNM regime to declare the Republic's independence on 18 May 1991.<sup>151</sup>

The first regime of the Republic, under the leadership of Ali 'Tour', was fraught with instability and conflict. Whilst it retained clear autonomy from the south, and avoided the scale of brutality seen elsewhere, especially in Mogadishu, it nevertheless experienced its own internal dissent and conflicts. Whilst a governmental regime did exist, and functioned to an extent, it was unable to establish the basic infrastructure for the society to develop and move on from its tragic recent history. The resultant intra-Isaq *mudjadeen* conflicts, which first flared in Burao in January 1992, saw the clan structures and the local *Guurti* dominating the conflict settlement processes.<sup>152</sup>

During this period of Tour's leadership, Somaliland was unable to secure any international recognition. It could be argued, under a conventional analysis, that this was because it had failed to satisfy the traditional criteria of Statehood. In addition to the difficulties of territory and population inherent in its nomadic character, the primary problem was the effectiveness of its government. The SNM regime was unable to secure effective control, and considerable autonomy and fragmentation existed in the region. These doubts were compounded by the ambiguous relationship with the clan *Guurti*, which arguably came to hold a greater degree of control than did the SNM, although their role never encompassed the external representation of the region.<sup>153</sup>

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<sup>151</sup> Above, sections 3.3, 4.2.3 & 4.3.4

<sup>152</sup> Above, section 5.4.1

<sup>153</sup> It might also be argued to be less 'State-like' than the more western-style political organisation of the SNM - recalling the discussion above, Chapter 4, text at nn. 25-26

However, it is submitted that these issues were of significantly less importance than they would have been under a traditional analysis. The reason for this was that such an analysis did not take place - whether Somaliland satisfied the traditional criteria for emergent States was not a question that the international community set itself. The reason for this was the prior determination, albeit as part of a wider tacit process, that the State of Somalia continued to exist, despite its very evident troubles, and would continue to do so. It remained a State in international law, such that Somaliland could be nothing other than a part of that State. As such, the traditional strictures created by the inertia of State continuity would apply, as would strong presumptions against secession and independence, in the absence of 'consent' from the 'parent' State. The nature of the Somali failure was such that neither resolution through internal settlement, as in Cambodia, nor through emergence of sufficient new States, as in Yugoslavia, seemed viable. Failure was denied, and the inertia of Statehood persisted.

This finding is evidenced by the obvious contrasts with the experiences of the Yugoslav Republics. Whilst the internal conflict and lack of clear central control in Somaliland were undeniable, it is not obvious that they were significantly, if at all, worse than that in Croatia, or more particularly in Bosnia-Herzegovina. Whilst there was a lack of clear central control in Somaliland, no part of it had attempted to secede - like the RSK and RSHB had - and the level of conflict was relatively minor, involving clashes between different *mudjadeen*, as opposed to involving ethnically organised military forces assisted by external actors. Finally, whilst the SNM's control was to an extent doubtful, it was arguably bolstered by a widely accepted clan structure, which represented the vast majority of the population, which seems to contrast with the significant levels of ethnic opposition to, and non-participation in, the 'governments' and referenda of both Croatia and Bosnia-Herzegovina. Nevertheless, the Yugoslav Republics were accorded the status that Somaliland was persistently denied.

#### 6.4.2 Somaliland, 1993-

The lack of internal control, and external recognition, achieved by the SNM, coupled with the extent of the clan influence, saw the convening of a second Great *Guurti* in

January 1993. This was also a part of the process envisaged in the 1991 *Guurti* to revisit the situation of the government of the Republic - Ali Tour's had only ever been intended as an interim regime for the first two years. The *Guurti* lasted over four months, and its style and process allowed for conflicts and flash points to arise and be resolved within the conferences. The outcome was the adoption of a National Charter that was to act as an interim constitution for two years, pending the new government's adoption of a permanent constitution, which would then be subject to a referendum. The interim regime was to be made up of an elected lower house and a *guurti* upper house, and former Somali Prime Minister Ibrahim Egal was appointed as the interim President.<sup>154</sup>

The new administration made significant achievements in establishing a functioning civil society, within its first eighteen months of power, including: police, civil service, education, tax collection, and the issuing of passports and a new currency. Initially this progress only extended to the three main cities of Hargeisa, Berbera, and Borama, but gradually Egal's administration achieved greater links with the more rural regions. Economically, the region could and indeed had existed independently from the remainder of Somalia<sup>155</sup> - *qat*<sup>156</sup> production, and commerce via the port of Berbera being its mainstays. Whilst the progress was gradual, and the stability was relative, the contrast with the south remained stark. This was so notwithstanding the outbreak of intra-Isaq conflict around Hargeisa in November 1994. Although the conflict continued into 1995, its scale and extent never approached that of the situation UNOSOM II left in the south, following its withdrawal in March 1995. These distinctions were contributed to, and evidenced by, the considerable degree of autonomy Somaliland enjoyed, both from the rest of Somalia and from the external involvement it experienced.<sup>157</sup>

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<sup>154</sup> Above, section 4.3.4

<sup>155</sup> But *cf.* above, Chapter 3, text at n. 40

<sup>156</sup> *Alt. Qaat. Catha edulis* - Mild narcotic. The leaves of the plant are chewed for their stimulant properties.

<sup>157</sup> Bradbury, M. 'Somaliland Country Report' (London: Catholic Institute for International Relations, 1997), pp. 21-35; Drysdale, J. 'Somaliland: The Anatomy of Secession' (Brighton: Global Stats, 1992), pp. 28-36; Gilkes, P.S. 'Two Wasted Years: The Republic of Somaliland, 1991-1993' (London: Save the Children Fund, 1993), pp. 37-40, 48-61; Gilkes, P.S. 'Acceptance Not Recognition: The Republic

In the period before the outbreak of violence, the Egal regime had arguably been edging towards a level of *de facto* acceptance or recognition. It began to experience wider international links, although always it was treated as an internal regime, in contrast to the State-like treatment of the Yugoslav Republics during the earliest stages of the Balkan conflict. In addition, practical day-to-day relations were established with its two neighbours - Djibouti and Ethiopia. With both, the desire for stability in order to prevent conflict over the various borderlands meant effective support for, or at least co-operation with, the incumbent regime.<sup>158</sup> However, it is without doubt that, whatever progress might have been being made more widely was largely halted by the internal conflict that began in November 1994. Somaliland remained, or slipped back to being, in the eyes of the international community, just another troubled part of the State of Somalia, and accordingly not a subject for international recognition.

The post-May 1993 experience of Somaliland represents an interesting contrast with that of Bosnia-Herzegovina. The latter had sought recognition in December 1991, which had been denied purely for its lack of a clear mandate. This was 'cured' by the holding of a single referendum, which was boycotted by roughly one third of the population, but was nevertheless sufficient for the incumbent regime to declare independence in March 1992. The result was the virtually simultaneous receipt of international recognition and descent into protracted and bitter violence, that necessitated a significant level of international intervention, and prevented the establishment of any form of effective civil regime.<sup>159</sup> Somaliland, having sought recognition since May 1991, was denied it throughout. Following the establishment of the new regime in May 1993, significant progress was made against conflict and in support of establishing a functioning civil society. This happened, not in the space of the five months required for recognition of Bosnia-Herzegovina, but over eighteen months, which commenced two years after the original proclamation of independence. Throughout that time, international intervention was minimal, and effective autonomy

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of Somaliland, 1993-1995' (London: Save the Children Fund, 1995); Samatar, S.S. 'Somalia: A Nation In Turmoil' (London: Minority Rights Group, 1991; update 1995), update pp. 5-6

<sup>158</sup> Bradbury, *op cit.*, pp. 29-30

<sup>159</sup> Above, text at nn. 47-51, 67-72

from the other parts of Somalia was significant. Nevertheless, no recognition took was received.

The extent to which the differing recognition treatments of both Bosnia-Herzegovina and Somaliland actually contributed to the conflicts they each experienced remains subject to debate, but that is not the central issue for the present purpose. The key point is the justification of the difference in recognition treatment. Under a traditional application of recognition, the difference would seem at least difficult to justify. If recognition is declaratory of the fact of the existence of Statehood, which is evidenced by satisfaction of the Montevideo criteria of Statehood, it would seem reasonable to assert that neither entity was suitable. However, if this were not the case, there seems no clear reason, under such a traditional assessment to distinguish Somaliland from Bosnia-Herzegovina.

Reference to the less traditional criteria of self-determination and democracy - towards a possibly more constitutive political determination - again seem at best equivocal. The application of self-determination to an artificially constituted ethnically mixed political entity, based upon the vote of less than two thirds of the population, does not immediately seem to present a stronger case than that of a largely ethnically homogenous region, that first held a legal identity within its current borders in the late Nineteenth Century. This is all the more so given the clan-based support for the independence, expressed through traditional structures that themselves significantly pre-date the first identity of the entity seeking recognition.

Obviously, this is a cursory assessment of complex situations, and could easily be subject to effective counter arguments. However, it serves to illustrate the point that no such assessment was made in either the case of Somaliland, or of Bosnia-Herzegovina. The decision to recognise Bosnia-Herzegovina, which was then partially-constitutive of its Statehood, and not to recognise Somaliland, was not justified on clear legal grounds, and it is submitted that it cannot be. Instead, the difference between the treatment of the two was based upon the same difference that has been referred to throughout this study - that the State of the SFRY had been deemed to have failed, whilst that of Somalia had not. And that determination was



itself the result of a meta-legal process seeking to preserve international stability by seeking to limit any potential vacuum of international law, insofar as that was possible. ‘Recognition’ was simply a tool used to provide ostensible legitimation to the process.

#### 6.4.3 *And the Rest of Somalia...*

The distinctions shown between the treatment of Somaliland and Bosnia-Herzegovina, can equally be seen as between the other parts of the Somali and Yugoslav experiences. The reasoning applies to the tacit emergence of the autonomy of the Darod-northeast of Somalia, as well as to the remainder of the State. It was the initial determination regarding State failure that conditioned the subsequent responses. The Somali State had not failed, so no recognition issues arose as to the parts within it, hence the claims of those in Mogadishu to represent the whole State, whilst clearly unfounded, nevertheless met with international responses seeking to deal with those who could represent the whole State - they were accorded a status that did not reflect their actual position, which in part explains the international focus on Ali Mahdi and Aideed for so much of the conflict. In contrast, once the Yugoslav State had been found to be in the process of failure, those seeking to represent the former State, however much legitimacy they might have possessed in that capacity, were denied such status. Montenegro and Serbia were denied the status of continuing the personality of the former State, despite at least an arguable case under traditional criteria, with reference to a number of precedents. Instead, they were ‘forced to be independent’ because there was no SFRY of which they could remain a part.<sup>160</sup>

### 6.5 Conclusions

The recent experiences of Yugoslavia and Somalia, and of the USSR, tend to suggest that recognition decisions are often *sui generis*. This in itself is not inconsistent with ‘conventional’ recognition theories, involving as they do a number of unresolved dichotomies. This is perhaps inevitable, given that they deal with matters so

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<sup>160</sup> Above, section 6.3.5

fundamental to Statehood.<sup>161</sup> Nevertheless, the debates take place on the international legal plain, and so call for legal assessment.

In Chapter Four, the basic distinction between the treatment of Yugoslavia and Somalia was observed to be that the former had been found to have failed, whilst the latter had not, on the basis of the loss of government.<sup>162</sup> In Chapter Five, an explanation for this difference in finding was offered in terms of a meta-legal process concerned with limiting the possible vacuum of international law that would be created by State failure. By making use of the concept of self-determination, the finding of State failure for Yugoslavia was legitimated to make way for the emergence of the then-present next-most State-like units - the Republics. In Somalia, insufficient similar units meant that no finding of State failure was made - the vacuum of international law was denied by the perpetuation of the legal existence of the State, despite its actual situation. Both determinations were not part of a legal process, but of a meta-legal one, albeit one that relied on, or made use of, legal principles, but not in a legally rigorous way.<sup>163</sup>

The inevitable flexibility resulting from the uncertainty surrounding the concept of recognition in international law, like that of self-determination, makes it an ideal tool for use in this meta-legal process. As such, it is submitted that the recognition decisions made in the Yugoslav experience, and to a lesser extent in the Soviet experience, were a means of completing the emergence of the new States, to close the meta-legal process and re-establish the 'normal' application of international law. Likewise, the non-use of the concept in the Somali experience was based upon a need to preserve the existence of the single Statehood to prevent the emergence of a vacuum of international law. The evidence of this can be seen in the various apparent legal inconsistencies and anomalies in each of the cases. The process was meta-legal, but was disguised behind a patina of legality in its frequent reference to, and reliance on, legal principles. However, it was a meta-legal process that was not acknowledged as such by the international community.

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<sup>161</sup> Above, text at n. 33

<sup>162</sup> Above, section 4.6

<sup>163</sup> Above, section 5.5

## Chapter 7: State Failure in Political International Law<sup>1</sup>

*You still have nations! How strange. We had nations long ago. Our children sometimes play at nations even now: it is a phase they go through.*

*Vaygan - A Martian*<sup>2</sup>

*"It shouldn't have to be like this!" Vimes shouted, at the sky in general. "You know? Sometimes I dream that we could deal with the big crimes, that we could make a law for countries and not just for people..."*<sup>3</sup>

### Abstract

State failure has been seen to represent a potential vacuum of law, such that it can only be acknowledged by the system where there exists a means by which it can be brought to an end. This was the case in Yugoslavia. The failed State was replaced by newly emergent ones. And this meta-legal process was facilitated by reference to legal principles. However, the use made of the principles in this process was not legally rigorous. A determination of failure was not made in the case of Somalia, despite its evident failure in practice. This was because the international legal system, as currently conceived, could not accommodate such a situation of 'not-a-State'.

Before drawing final conclusions, reference needs to be made to limitations of the study undertaken, in terms of the case-studies relied on, the model of State failure utilised, and the narrow basis upon which the broader theoretical conclusions are drawn. The conception of international law arrived at has been one that has a limited reach - that cannot deal with matters relating to the existence, continuity, extinction, and failure of States. These matters are meta-legal, but instead of a rejection of law in these areas, it is possible to recast the concept as a part of the wider global political order. To redesignate it as "political international law".

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<sup>1</sup> The phrase "political international law" is taken from Hille, S. 'Mutual Recognition of Croatia and Serbia (+Montenegro)' (1995) 6 EJIL 4, pp. 598-611, at p. 611. See above, Chapter 6, text at n. 150. and further below, n. 32

<sup>2</sup> Beynon, J. 'Stowaway to Mars' (London: Coronet, 1972), p. 167 [Writing in 1935. This was the original pen-name of John Wyndham]

<sup>3</sup> Pratchett, T. 'Jingo' (London: Corgi, 1998), p. 378

## 7.1 Reprise

*There is some risk, therefore, that even this essay, written with the aim of clarification, will do little more than muddy the already murky waters. It is thought, however, that a little reflection upon the nature of the problems that arise may go some way towards ameliorating their effect.*<sup>4</sup>

At the outset, the task set for the present study was a consideration of international law's treatment of State failure. The reasoning for this choice of topic was primarily the novelty of the subject - State failure is a relatively recent phenomenon, and as such it is one that international lawyers are only just beginning to come to terms with. Yet this form of problem - of societal and governmental collapse, followed by violence, suffering, and fragmentation - is unlikely to go away, in the near future at least.

*Failing states promise to become a familiar facet of international life. They will necessarily exact heavy tolls on their own people and on all countries... The real challenge to U.N. members is to address the problem directly, by creating a conceptual and juridical basis for dealing with failed states as a special category...*<sup>5</sup>

The emergence of the concept of State failure has coincided with the explosion in reconsiderations of States and their position in the global order. The practical and theoretical developments that have come to be known as globalisation reflect the growing range of 'international' interactions that occur within and across Statal boundaries. These developments represent challenges to Statist-paradigms of international relations, and equally to the traditional ideas of international law. And these challenges can perhaps most clearly be seen through the manner in which international law deals with an aspect of the global phenomenon - the failure of States.

State failure remains an imprecise concept. It is generally characterised by governmental and societal collapse so severe as to prevent the internal and external exercise of sovereignty. Such failure will usually take the form of disintegrative internal collapse or/and a fracturing of the State into its component parts. The end of such failure is likely to be marked either by internal reconstruction, or the erection of

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<sup>4</sup> Craven, M.C.R. 'The Problem of State Succession and the Identity of States Under International Law' (1998) 9 EJIL 1, pp. 142-162, at p. 143

<sup>5</sup> Helman, G.B. and Ratner, S.R. 'Saving Failed States' (1992) 89 Foreign Policy, pp. 3-20, at p. 20

new States in place of the failed one. The alternative - of continued failure - remains a possibility, but is likely to be the most difficult to accommodate within a legal framework.<sup>6</sup>

It is accepted that this account of State failure is only a starting point, and so will face difficulties in accounting for 'borderline' cases. However, the two primary cases under consideration - Somalia and Yugoslavia - fall squarely within it, so as not to present any difficulties. Both experienced such an extent of governmental and societal collapse as to render them incapable of sustaining their internal or external sovereignty, the former through destructive implosion, the latter through explosive fragmentation.<sup>7</sup>

Traditional international law offers no clear account of State failure, so any treatment of these experiences will be reliant upon other areas of the subject. The detailed scrutiny of States generally within the discipline has only emerged relatively recently, as challenges to Statehood have emerged. Whilst some general ideas as to State extinction have arisen, they remain largely the 'poor-relation' to the more developed area of the creation of States. However, all such accounts dealing with issues of Statehood offered by international law tend to be sources of ambiguity, more than of rigorous schema for application to extant problems. Emergence and extinction of the component elements of the international legal system represent its 'hardest cases'. Since failure occurs as an ill-defined category sandwiched in the nether-region between these two aspects of Statehood, it too will pose similar conceptual difficulties for the discipline.<sup>8</sup>

These difficulties notwithstanding, the tools international law uses to deal with the creation and extinction of States will also have to be utilised to deal with their failure. The lynch-pin of the traditional criteria based State system is the element of government. It is the essence of States - linking the internal elements, and representing the State externally. As such, consideration of the loss of government is central to a

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<sup>6</sup> Above, section 1.2

<sup>7</sup> Above, section 1.3, and Chapter 3

<sup>8</sup> Above, Chapter 2

thesis of the extinction of States through loss of any of the criteria of them. In addition, governmental collapse is the central aspect of the failure of a State.

Without doubt, the defining aspect of the Somali experience, certainly after the fall of Siyad Barre in January 1991, and probably even before then, was the absolute loss of central governmental authority and control. Nevertheless, this most clear example of loss of government was, and has remained, insufficient for the international community to proclaim the failure of Somalia's Statehood. In contrast, the relatively limited collapse of the Yugoslav federal authorities, in terms of their lack of "representativeness" after the first attempted secessions during the second half of 1991, was deemed by the Badinter Commission as sufficient to proclaim that the SFRY was "in the process of dissolution"<sup>9</sup> - that it was failing. This apparent inconsistency of application of the law regarding the loss of government, of itself, does little to advance the understanding of the treatment of State failure. To be of use, it requires reference to wider issues.<sup>10</sup>

Self-determination is perhaps the most representative of the principles that have developed in the UN-era, in that it embodies the human rights trends in international law, as well as containing echoes of globalist ideas, and it represents perhaps the most comprehensive challenge to the stability of the Statal order, whilst also, in some contexts, serving to reinforce that same system. Characteristically for a concept so closely bound-up with the existence and continuity of States, it is a legal principle that produces more problems than solutions. Its evolution has encompassed a multitude of developments of varying degrees of certainty, including the possibly emergent right to democratic governance. Yet this ambiguity also represents flexibility of the concepts. As such, the principle was able to be applied in the Yugoslav situation both to underwrite the finding of failure of the SFRY, and to support the emergence of the successor States, which would thereby bring that failure to an end. This same flexibility was reflected in the differential application of the principle both within the Yugoslav situation, and as between the Yugoslav and Somali situations.<sup>11</sup>

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<sup>9</sup> EC Arbitration Commission, Opinion No. 1 (29 November 1991) reprinted in 31 ILM 1494-1497

<sup>10</sup> Above, Chapter 4

<sup>11</sup> Above, Chapter 5

Recognition, like self-determination, is an area of international law about which much debate has persisted. It can be both legal and political in its nature, and in its consequences. And like self-determination, such ambiguity also represents flexibility. This was most clearly evidenced by the recognition of Bosnia-Herzegovina - an ethnically confused, barely formed area of tripartite conflict; and its denial to Somaliland - an historic, ethnically homogenous clan-based region that emerged quickly, distinctly and relatively peacefully, from the failure of the Somali State.<sup>12</sup> Again, the range of uses of the principle(s) of self-determination, and the various recognition decisions, made in the Somali and Yugoslav contexts do not immediately clarify international law's treatment of State failure.

The justification offered for these various differences relates to the perceived outcomes of the processes. Yugoslavia was found to be failing, by means of its 'governmental collapse', because (some of) its constituent elements were attempting to self-determine. The finding was underwritten by the support they were given to self-determine, which was confirmed by their recognition as emergent States, precisely because these events would bring the failure to an end. Yugoslavia was only found to be failing because that finding would lead to the end of the failure. The same conditions did not apply in Somalia. Its failure was characterised by internal degenerative collapse. What fragmentation there was offered insufficient potential to end any failure that might have been found. The existence of failure was denied, and remained so, in the absence of any potential internal resolution.<sup>13</sup>

International law has been characterised as resistant to the idea of failure. The threshold beyond which a State's collapse must pass before a finding of failure will be made is not one in terms of its actual condition, but is instead one made in terms of the potential outcome. Failure will only be deemed to be occurring when a solution to that failure is already evident. This then is a description of the treatment of State failure - what remains is to provide an analysis of it.

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<sup>12</sup> Above, Chapter 6

<sup>13</sup> Cambodia represents a possible example of the finding of failure to facilitate an internal solution to that failure - above, sections 4.3.2 & 4.3.3

## 7.2 Thesis

*Up to the present day, International Law has been considered an exclusively juridical science, on a par with civil law, and having the same characteristics... As a consequence of this conception of the Law of Nations, it was studied with the same method and the same criteria as civil law... Everything outside juridical rules, notably the acts of the Governments or the other aspects of the life of nations, was considered to be foreign to the Law of Nations and was studied separately in courses having no connection with it... in the department of political science (...) in the colleges and universities under the title of "international relations"....<sup>14</sup>*

According to the characterisation of State failure offered in the present study, both Somalia and Yugoslavia failed during 1990-1992. However, in dealing with these tragic experiences, the international community differed in its own classification of them. Regardless of the terminology, the finding that the SFRY was “in the process of dissolution” represented a finding of failure. But this determination was part of an unprecedented process, which was of ambiguous legality, and the reasoning upon which it was based was largely inconsistent with the generally accepted international law approach to loss of government in an existing State.

The explanation offered to account for this process is that the international community of States, acting primarily through the EC, was dealing with a situation that was meta-legal in character<sup>15</sup> - it was a situation in which Statehood was disappearing, representing a potential vacuum of international law. As such, the process taken to deal with it was a largely political, meta-legal one. The treatment of State failure happened “beyond the regulation of the existing body of [international] laws”.<sup>16</sup>

The classification of the EC response to the Yugoslav collapse as meta-legal is at first sight potentially destructive to the international legal order of States. However, it is submitted that this is in fact not the case, for two clear reasons. Firstly, the meta-

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<sup>14</sup> Alvarez, A. ‘The New International Law’ (1929) 15 GST, pp. 35-51, at pp. 35-36

<sup>15</sup> Craven, M.C.R. ‘The European Community Arbitration Commission on Yugoslavia’ (1995) LXVI BYIL, pp. 333-413, at p. 359: “[T]he existence of the State is a meta-legal phenomenon embracing historical and political facts which the law can only presuppose.” - Above, Chapter 5, text at n. 160

<sup>16</sup> Cassese, A. ‘Self-determination of Peoples: A Legal Reappraisal’ (Cambridge: CUP, 1995), p. 270. Above, Chapter 5, text at nn. 167-168



legality of the process was only acknowledged as a means to most quickly re-establish Statehood, in the form of new States. The vacuum of international law was only allowed to emerge because a mechanism existed for its limitation. And this is precisely the reason that the situation in Somalia was not classified as one of State failure - no prospect of the solution to that failure was present, such that a finding of failure would have proved impossible to accommodate, even within the meta-legal process.

Secondly, whilst the process was in itself meta-legal, it was not isolated from the international legal order. As such, the decisions and determinations made throughout always referred to the principles of international law - the criteria of Statehood; self-determination; democratic governance; human and minority rights; recognition. And the mechanisms established to undertake the primary determinations were overtly legal in appearance. It is through this characterisation that the anomalies and inconsistencies in the application of these various legal principles can be explained. The process was essentially meta-legal, such that the use made of the principles of international law was not a rigorous legal application. But the process sustained its legitimacy by that same reference to the principles and processes of international law - it sought to minimise its meta-legality. And by this means, the conditions were in place for the re-emergence of sovereignty, and of the application of international law, whether of State succession, non-use of force, or human and minority rights provisions.

As the vacuum of international law closed, and its normal application returned to the process of dealing with the aftermath of the Yugoslav failure, the difficulties encountered served to re-emphasise the meta-legality of the foregoing process. This difficulty is most clearly seen in the status of the FRY at the UN, which remains unresolved and “in a sort of twilight zone”.<sup>17</sup> The conceptual confusions faced by the

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<sup>17</sup> Scharf, M.P. ‘Musical Chairs: The Dissolution of States and Membership in the United Nations’ (1995) 28 Cornell ILJ 1, pp. 29-69, at p. 63:

*The resolutions, in effect, placed the FRY’s membership in a sort of twilight zone pending its admission into the organization as a new member. This interim arrangement allowed the FRY to operate a U.N. mission and circulate documents but precluded the FRY from participating as a member in the vast majority of bodies within the U.N. system.*

UN, and the consequent legally-ambiguous situation, were arguably a direct result of the process of the Badinter Commission's determinations as to the FRY's status. The FRY was deemed to be a new State, rather than a continuation of the previous SFRY, despite a number of conflicting 'precedents', because the prior determination that the SFRY was failing formed the conceptual basis of the EC's entire approach. The determination was not concerned with the situation of the FRY, so much as with the overall situation in the area of failure. This was equally true of all the other determinations within the process.<sup>18</sup>

It has already been said that no finding of failure was made regarding Somalia despite the extent of its collapse, because of the lack of any potential solution to the situation. This then raises the question as to whether this stance was itself one made within the realms of law. In making such an analysis, the primary difficulty remains the fact that no clear decision-making process took place. Nevertheless, the basic position of Somalia was in terms of its governmental collapse, which was without doubt sufficient to prevent either its internal or external exercise of sovereignty. In dealing with this situation, the international community followed the predominant traditional approach of international law that:

*[T]he State continues to exist, with concomitant rights and obligations... despite a period in which there is no, or no effective, government.*<sup>19</sup>

Accordingly, at no point during the Somali crisis was its Statehood questioned. This was so despite the effective assumption of significant aspects of sovereignty by UNOSOM II, and the extent of the fragmentation.<sup>20</sup>

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Above, Chapter 6, text at n. 110

<sup>18</sup> Above, sections 6.3.5-6.3.6. This conclusion is supported, albeit to a lesser extent, by the experience of the dissolution of the USSR, and the status of the Russian Federation within the UN - above, section 6.3.7

<sup>19</sup> Crawford, J. 'The Creation of States in International Law' (Oxford: Clarendon. 1979), p. 28 - previously cited, above, Chapter 4, n. 13

<sup>20</sup> Above, section 4.4

This approach did not represent a simple entrenchment of existing international law. Instead, the extent of the collapse and the scale of the international intervention served to raise uncomfortable issues for traditional international law.

*[T]he phenomenon created by the absence of an effective politico-legal authority and UN intervention to fill the vacuum escapes categorisation by existing precedents.*<sup>21</sup>

Nevertheless, the reason for this was prevention of further conceptual difficulty for the Statal order. The alternative finding of State failure, without any prospect of an end to that failure, would have confronted international legal theory with a fundamental issue of Statehood with which it could not deal - it would have introduced onto the global map an area that could only be designated by a concept such as 'not-a-State', which was not part of the existing juridical (or international-political) vocabulary. As such, whilst the basic finding of the continuity of Somalia is largely consistent with traditional international law, it is submitted that this international law is itself unable to reach any other finding given its current conceptual underpinning. Stepping outside of the legalist paradigm, it can be observed that the international legal system, under its current terms, is compelled to perpetuate Statehood. As such, failure can only be conceived of when it can be swiftly eliminated. Otherwise, legal fictions must be sustained, however far they are from the practical reality they seek to describe.<sup>22</sup> It remains that all 'hard' questions of Statehood, and not merely of State failure, are necessarily meta-legal.<sup>23</sup>

State failure poses a fundamental threat to international law. An absence of Statehood - a situation of 'not-a-State' - is anathema to the international legal order. As such, it will be denied where possible. It is for this reason that the criteria of Statehood are normally only relevant to emergence. Loss of any of the criteria cannot give rise to 'not-a-State', for that concept threatens all States, and the authority to make such a determination would necessarily be meta-Statal. Hence, the normal situation,

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<sup>21</sup> Osinbajo, Y. 'Legality In A Collapsed State: The Somali Experience' (1996) 45 ICLQ 4, pp. 910-923, at p. 911 - previously cited, above Chapter 4, n. 121

<sup>22</sup> Above, Chapter 4, text at nn. 17-19

<sup>23</sup> Above, n. 15

represented by Somalia, will be that internal collapse, however complete, will be regarded as the temporary incapacity of a continuing State.

The exception to this, represented by Yugoslavia, is the finding of failure legitimated by Statehood. The precise grounds upon which the finding is made remain secondary to the fact that it can be limited. In the instant case, the finding was legitimated by the application of the right of self-determination to previously defined administrative units that already possessed a significant degree of 'State-like-ness', the status of which was confirmed by the process of recognition. The failure of the Yugoslav State did not result in a situation of 'not-a-State', but was instead a situation of the emergence of new States. And the ambiguities inherent in this process merely reflected the brief period of meta-legality necessitated by it.

### 7.3 Caveats

Having set down the basic finding of this study, it remains to reconsider the basis upon which it has been made, and then to overview briefly the possible implications of it. Perhaps the first, and most obvious concern about the foregoing study is its primary focus upon just two examples of situations that have been classified as State failure - Somalia and Yugoslavia. Whilst it is accepted that this represents a small basis upon which to draw such broad conclusions, it has allowed the two examples to be examined in considerable depth. In addition, it is submitted that the analysis proposed is the only one that could effectively account for the events that occurred with regard to the SFRY. As such, this study alone is sufficient to evidence the theory. The Somalia example, then, merely serves to confirm it - as do the other main examples referred to during the study; Cambodia and the USSR. Nevertheless, it is undoubtedly the case that further study, drawing on the numerous other examples of varying degrees and forms of State failure, would serve to refine the present study.

A further concern remains the selection of these primary case-studies. It is evident that the Yugoslav experience involved the most overt decision-making process, and is therefore the most accessible example. In addition, the actual decisions made presented so many anomalies for traditional international law, and have generated a

considerable degree of interest and debate amongst international legal academics and practitioners, that the selection was perhaps obvious. However, it also offered a very clear example of failure resulting in fragmentation. Somalia, then, offered a clear example of the other form of failure - of the implosion of a State. It also experienced an unprecedented level of international intervention, which served to bring it too into the focus of international debate. Finally, the choices of Somalia and Yugoslavia allowed juxtapositions as between Africa and Europe; between peripheral and direct Cold War influence; between largely self-created and artificially colonially created States; and, between developing and developed world experience.<sup>24</sup>

The potential benefits of the juxtapositions in the two cases are, however, to an extent, offset by the distinct differences between the two that need to be accounted for, particularly in terms of the responses made to them by the international community. Somalia was dealt with through the primary mechanism of the UN. However, it was a UN under the steerage of a new Secretary-General, Boutros Boutros-Ghali, whose personal aims included the development of a new role for the organisation within this “time of global transition”.<sup>25</sup> Accordingly, the operations and interventions undertaken in Somalia are potentially more a result of these factors, than of the conditions in the failed State. Equally, the lead was taken, with regard to Yugoslavia, by the EC, and primarily through its mechanism of European Political Co-operation (EPC). The EPC mechanism can be seen to have been the immediate predecessor to the greater political cohesion of the European Union, which was in its final planning stages at the time of the EC involvement in Yugoslavia. Again, this political context undoubtedly conditioned in part the nature of the process undertaken. However, whilst the extent of the influence of these various contexts is in no way disputed, it remains the current position that the forms that their respective involvements took in no way weakens the analysis offered. The nature of their interventions is of less relevance than the fact that such interventions were perceived to be necessary, and were in fact possible to carry

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<sup>24</sup> Above, section 1.3 and Chapter 3

<sup>25</sup> Boutros-Ghali, B. ‘An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-keeping’ (New York: UN, 1992), pp. 5-10. at p. 5. The basis of Boutros-Ghali’s vision were the linked approaches of preventative diplomacy, peacemaking, peace-keeping, and the then novel concept of post conflict peace-building, pp. 13-34

out. In addition, the UN, and to a lesser but still significant degree, the EC, represent primary actors in the global order, such that their political motivations will in large part condition the nature of the governing global order and its responses to other experiences of State failure.

On a more theoretical level, the two obvious weaknesses of the current work are the definition of State failure offered, and the lack of analysis of the factors of which it is a result. In terms of the definition, it represents a relatively imprecise concept which nevertheless attempts to characterise an inherently complex situation. Accordingly, in its current form, numerous problems will arise in all but the most clear cases. Thus, even reference to the two subsidiary experiences drawn on in the present work - Cambodia and the USSR - reveal difficulties. Cambodia's history has been one characterised by internal instability, revolutionary changes of governmental regime, and frequent conflicts with its neighbours. However, throughout its existence as an independent State, it has sustained a relatively coherent internal polity, and has always maintained a form of external sovereignty, albeit that at certain times there have existed at least two regimes claiming to represent it. As such, the characterisation of its situation as one of failure, in terms of the relatively limited definition given, will prove problematic.

However, it has not been the intention here to claim that Cambodia definitively did fail. Instead, the Cambodian experience was drawn on to evidence the difficulties inherent with all matters concerning alteration in State control and sovereignty, and to briefly consider the possible means of resolving such difficulties through largely internal reconstitution. Similar observations could be made regarding the dissolution of the USSR. Nevertheless, there remains considerable potential to develop the concept of State failure from the very limited model used herein.

These difficulties regarding the development of the model of failure can be taken a stage further to encompass the lack of consideration of the factors prior to failure. Whilst it seems evident that the precise nature of the experience of failure will inevitably be a consequence of the factors that have preceded it, it was never the intention of the present study to deal with such issues. The reference to the

background of the two primary case-studies was offered only to allow a contextualisation of the events during the failures. For the purpose of analysing the legal implications of failure, such contextualisation was deemed to be sufficient. To engage in an analysis of the factors leading to failure, and indeed of the nature of the failure itself, would constitute an entirely different project which must remain beyond the scope of the present work.

Finally, the conclusions that have been drawn in this Chapter will necessarily impact on wider conceptions of international law. The study of State failure has been taken to indicate a specific area of international interaction that has been argued to be beyond the reach of international law. Instead, it has been asserted that it is in fact the subject of meta-legal processes. Further, the implication drawn from this, and indeed part of the contributory reasoning behind it, has been that all such matters concerning the existence, continuity and extinction of Statehood have the same potential to be meta-legal. In addition, the primary areas of substantive international law that have been relied upon - the criteria of Statehood; self-determination; and recognition - have all been asserted to be capable of application in a meta-legal context, which has been argued to be a consequence of their very natures. All of these conclusions necessarily raise fundamental questions as to the international legal order. However, they have all been drawn as the result of a narrow study of one phenomenon in a very limited time-frame, and without a broader survey of the underlying juridical context which they inhabit. As such, in the final part of the study, when the possible implications for general international law of the analysis of State failure are considered in outline, it is acknowledged that any conclusions drawn can only be regarded as of an interim nature, and will require considerable further assessment before they can be held to be of anything more than preliminary validity.

#### 7.4 Consequences

*International law will remain an important instrument for future changes and sovereign states will remain its principle actors. However, in order to make international law more adequate as a means to bring forth necessary changes, it is important to have the*

*support, imagination, and vision of academics and policy-makers alike.*<sup>26</sup>

Given the starting point of this study - of State failure and globalisation - the obvious place to begin the final assessment is as to the situation of States. Within the confines of this study, it remains without doubt that the currently conceived international legal order continues to be based upon States. The implication of the study is to raise questions as to their treatment, and as to possible difficulties as regards their experiences of failure. But these experiences have all evidenced the reality of the inertia of Statehood. However, whilst that concept has normally meant the inertia of a particular State, despite the apparent failure of it, the experience of Yugoslavia suggests that it might, in certain circumstances, alternatively mean the inertia of Statehood generally. The system works towards the preservation of Statal organisation, such that when this is better served by the emergence of new States at the cost of an existing one, the continuity of that existing one will be foregone.

The more fundamental issue raised by these conclusions is the role and meaning of international law in this process. The primary finding that the treatment of State failure is meta-legal suggests a weakness or retraction of international law. This position is emphasised by the implication that all matters concerned with the existence of States might similarly be beyond international law's reach. In dealing with this issue, it must be stated that no implication is suggested for the generality of international law in contexts other than those directly concerned with State continuity.<sup>27</sup> As regards the particular aspect of the treatment of States, the position is far from clear. The nature of the conclusion that international law is unable to resolve such 'hard cases' very closely matches Nathaniel Berman's assessment of the role of self-determination - as a textual discourse through which the vacuum of international

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<sup>26</sup> Türk, D. 'The Dangers of Failed States and A Failed Peace in the Post Cold War Era' (1995) 27 NYUJIL&P 4, pp. 625-630, at p. 630

<sup>27</sup> But cf. Danilenko, G.M. 'The Changing Structure of the International Community: Constitutional Implications' (1991) 32 Harv. ILJ 2, pp. 353-361, at pp. 357-361; Janis, M.W. 'International Law?' (1991) 32 Harv. ILJ 2, pp. 365-372. Both argue that recent developments will have fundamental implications on the generality of international law.



law can be limited.<sup>28</sup> Likewise, it echoes Martti Koskenniemi's conclusion as to the ultimate indeterminacy of international legal argument.<sup>29</sup>

Both views assert that the international law is incapable of resolving certain fundamental disputes concerned with the nature of Statehood<sup>30</sup> - indeed Koskenniemi's analysis goes considerably further. However, rather than this view denoting a limit to international law, it can be argued that it in fact marks a reassessment or re-categorisation of it. Just as globalisation recognises the blurring of boundaries in the international environment, so too this blurring can be seen in the context of doctrine. Instead of seeing international law as an autonomous normative order serving the international system of sovereign States, it can be seen as a part of the whole global political order.<sup>31</sup> Accordingly, when 'hard cases' fall for consideration, less normative weight will be able to be brought to bear on them, and so they will require reliance on principles drawn from wider contexts beyond the narrow normative order of traditional international law - contexts currently labelled as, for example, 'emergent norms of international law', 'policy', or 'politics'. Under traditional international law, such references would be shunned, or would signal the end of law and the beginning of politics; under the present analysis, such references should be seen as part of the single whole of the global order.

The need to step beyond law to make determinations as to matters of State failure has been shown to remain grounded in principles of international law, albeit those at the periphery of the normative order - self-determination, the right to democratic governance, and aspects of recognition and the criteria of Statehood for extinction. Accordingly, to characterise this as not being international law does not truly reflect the position. Instead, it is preferred to redesignate the process undertaken, not as meta-

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<sup>28</sup> Berman characterised self-determination as an "exceptional competence" for international jurisdiction to fill the vacuum of international law - Berman, N. 'Sovereignty in Abeyance: Self-determination and International Law' (1988) 7 Wisconsin International Law Journal 1, pp. 51-105, at pp. 52, 56-60, 103-105. Above, Chapter 5, text at nn. 99-100, 102

<sup>29</sup> Above, Chapter 1, text at nn. 42-45

<sup>30</sup> Above, section 2.3.3

<sup>31</sup> This view owes much to the role presented of international law in a neorealist context - Hsiung, J.C. 'Anarchy and Order: The Interplay of Politics and Law in International Relations' (Boulder and London: Lynne Rienner, 1997)

legal, but as being a part of “political international law”.<sup>32</sup> What this conception will mean for the theory and practice of international law remains to be seen; and remains something to be considered elsewhere.

## 7.5 An Ending

*Before finally drawing this study to a close, I feel the need to note one final aspect of it. Throughout the research of the case-studies, the single greatest difficulty I have encountered has been to absorb, make sense of, and make use of, experiences that have involved unbearable amounts of human suffering. At times, the taking of these tragic accounts as the basis of a doctrinal discussion has felt almost callously inappropriate. As such, whilst the particular subject of the study has not been the prevention or resolution of State failure, it nevertheless remains important always to keep in focus the purpose of international law - the ordering of all society for the good of the entire population of the world. The furtherance of this aim can be the only justifiable purpose for any study of international law.*

If the international community, benevolently inclined, continues its growing involvement in conflict areas around the world, its principle weapon must be knowledge.<sup>33</sup>

*...and understanding.*

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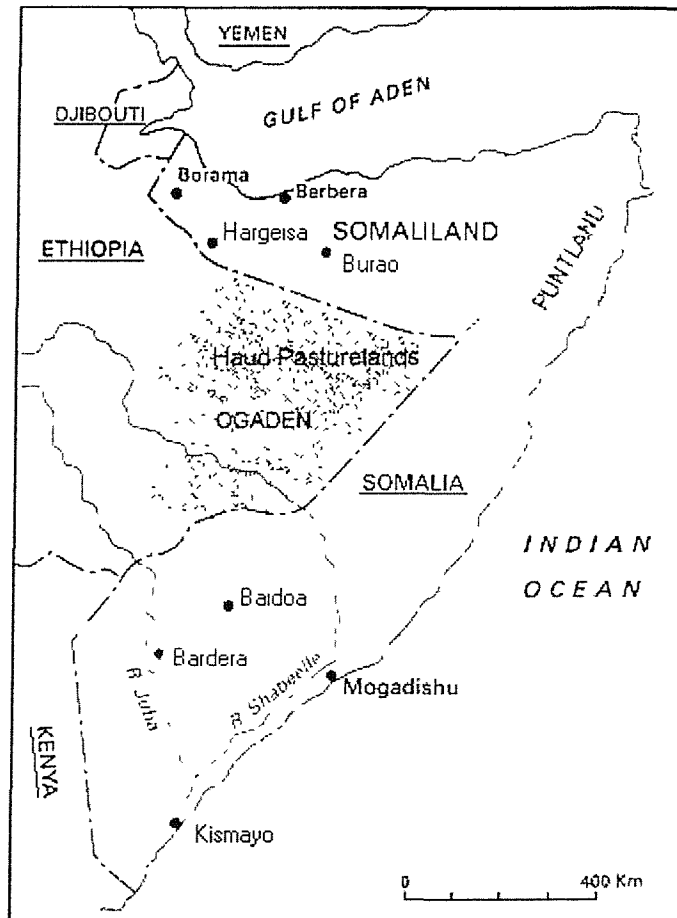
<sup>32</sup> Hille, above, n. 1. Unfortunately, Hille does not develop any further the meaning of this designation of the subject.

<sup>33</sup> Zametica, J. ‘The Yugoslav Conflict’ (1992) 270 Adelphi Paper, p. 76

## Appendices

### Appendix A: Basic Maps and Facts<sup>1</sup>

#### *Somalia*<sup>2</sup>



Note: The area marked as Puntland represents the region I have referred to as the Darod-northeast. The name Puntland did not emerge until after the time period covered in the current thesis. It gained prominence in the build-up to the Djibouti-sponsored effort at resolving the Somali troubles, which was first announced to the UN General Assembly in October 1999, and which remains ongoing and unresolved.

<sup>1</sup> Turner, K. (Ed.) 'Philip's World Handbook' (London: Philips, 1995)

<sup>2</sup> Bradbury, M. 'Somaliland Country Report' (London: Catholic Institute for International Relations, 1997), p. 3, 9, 19-20; Lewis, I.M. 'Understanding Somalia: Guide to Culture, History and Social Institutions' (London: Haan, 1993), pp. 9-10; Samatar, S.S. 'Somalia: A Nation in Turmoil' (London: Minority Rights Group 1991; update 1995), pp. 6-8

*Somalia* [Mogadishu]- Pre-failure population of roughly 7 million, of whom 60-65% were nomadic pastoralists, and no more than 20% were involved in agriculture. There was also an estimated urban population of roughly 35%, which suggests some overlap between categories, and emphasises the lack of any accurate figures for Somalia. It is estimated that pre-war Mogadishu had a population of roughly 1 million people.

*Somaliland* [Hargeisa]- 117,500 square kilometres of Somalia's 637,000 square kilometres. Pre-1988 population of between 1.8 and 2 million. Estimated to have fallen to approximately 1.35 million by January 1992. Dominated by Isaq, but with small numbers of Dir (Gadabursi and Issa) primarily in the northwest, and Darod (Dolbahante and Warsangali) in the east. Also, significant nomadic overlap with Ogaden region of Ethiopia to the south (Darod-Ogadeni) and with northeastern Somalia to the east (Darod-Majerteen). Less so, but not insignificant with Djibouti to the northwest.

### *Yugoslavia*<sup>3</sup>



*SFRY* [Belgrade] - Population, just under 24 million of which: 8.1m Serb, 4.4m Croat, 1.7m Slovene, 1.7m Albanian, 1.3m Macedonian and 1.2m 'Yugoslav', plus various other minorities.

<sup>3</sup> Carter, F.W.; Hall, D.R.; Turnock, D. and Williams, A.M. 'Interpreting the Balkans' Geographical Intelligence Paper No. 2 (London: Royal Geographical Society with the Institute of British Geographers, 1995), p. 16; Weller, M. 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 AJIL 3, pp. 569-607, p. 569; Zametica, J. 'The Yugoslav Conflict' (1992) 270 Adelphi Paper, pp. 12-40

*Bosnia-Herzegovina* [Sarajevo]- Total population of 4.1m, of which: 40-43% Muslim, 32% Serb, & 17-18% Croat.

*Croatia* [Zagreb]- Total population of 4.7m, of which: 85% Croat, 11.5-12.5% Serb (especially in Krajina and Petrinja).

*Macedonia* [Skopje]- Total population of 2.1m of which: 67% Macedonian, 20-25% Albanian, plus various other minorities.

*Montenegro* [Podgorica *aka* Titograd]- Total population of 650,000 of which: two-thirds Montenegrans, plus minorities of Muslims and Albanians.

*Serbia* [Belgrade]- Total population of 9.8m of which: two-thirds Serb. Includes provinces of Kosovo [Pristina] (Albanian majority of 91%) and Vojvodina [Novi Sad] (Hungarian minority of 21%). Constituted approximately one third of the total territory of the SFRY.

*Slovenia* [Ljubljana]- Total population of 1.9m of which: 90% Slovene, plus small Croat, Hungarian, and Serb minorities.

Note: All figures are based upon estimates, and are of the position at the end of 1991

## Appendix B: Security Council Resolutions and other UN Documents

The list below cover the broad periods of the two case-studies contained in the thesis. For Somalia, this period is January 1992, when the UN first became involved, and ends in November 1994, when UNOSOM II's final withdrawal date was fixed. For Yugoslavia, the dating is more approximate because the events dealt with in the initial break-up have extended far beyond the period of that break-up into the lives of the emergent States. As such, the end date is somewhat arbitrary. The period begins in September 1991 with the UN's first comment on the beginnings of failure, and ends in April 1993 with the extension of the FRY's non-participation to encompass the work of ECOSOC. Many important developments have occurred, and continue to occur as regards the UN's treatment of the former Yugoslav region, but these are more accurately dealing with the new situation, rather than the period that can properly be described as that of the Failure of the SFRY.

### *Somalia*

SC Res. 733 (23 January 1992) - Called for cease-fire, and imposed arms embargo under Chapter VII

SC Res. 746 (17 March 1992) - Requested Secretary-General to pursue humanitarian effort in Somalia, and requests parties to respect security of UN technical team recommended in the resolution

SC Res. 751 (24 April 1992) - Agreed in principle to establish UNOSOM, to consist of 500 peacekeeping troops and to deploy immediately 50 observers to monitor cease-fire in Mogadishu

SC Res. 767 (27 July 1992) - Authorised emergency airlift to provide food and medical supplies to the 'Triangle of Death'

SC Res. 775 (28 August 1992) - Authorised increase of UNOSOM peacekeeping troops, with the emphasis on securing the humanitarian environment

SC Res. 794 (3 December 1992) - Authorised UNITAF force, under Chapter VII powers, on humanitarian grounds

SC Res. 814 (26 March 1993) - Authorised UNOSOM II, increased in size and with expanded mandate, extended to 31 October 1993

SC Res. 837 (6 June 1993) - Condemned attack on 5 June on UN troops, and called for Aideed's arrest

S/26022 Report of the Secretary-General on the Implementation of Security Council Resolution 837, 1 July 1993 - Effectively issued a warrant for Aideed's arrest, which UNOSOM II had begun to implement on 17 June

SC Res. 865 (22 September 1993) - Condemned attacks on UNOSOM II personnel

SC Res. 878 (29 October 1993) - Extended UNOSOM II mandate until 18 November 1993

SC Res. 885 (16 November 1993) - Suspended the warrant for Aideed's arrest and established a Commission of Inquiry to investigate the attack of 5 June

SC Res. 886 (18 November 1993) - Extended UNOSOM II mandate until 31 May 1994

SC Res. 897 (4 February 1994) - Condemned continued violence in Somalia and against UNOSOM II personnel and authorised reduction in UN forces to 22,000

SC Res. 923 (31 May 1994) - Welcomed Somali peace efforts, as well as recognising UNOSOM II achievements and extended UNOSOM II mandate until 30 September 1994

SC Res. 946 (30 September 1994) - Extended UNOSOM II mandate until 31 October 1994, and prepared arrangements for its possible withdrawal

SC Res. 954 (4 November 1994) - Extended UNOSOM II mandate for final time until 31 March 1995

### *Yugoslavia*

SC Res. 713 (25 September 1991) - Expressed full support for the EC and CSCE efforts in Yugoslavia; implemented a complete arms embargo against Yugoslavia, acting under Chapter VII

SC Res. 721 (27 November 1991) - Examined the possibility of a UN peace-keeping force for Yugoslavia

SC Res. 724 (15 December 1991) - Agreed to send small team of officials to Yugoslavia with the aim of assisting in preparing suitable conditions for the deployment of a UN peace-keeping force

SC Res. 727 (8 January 1992) - Agreed to send a further fifty military liaison personnel

SC Res. 740 (7 February 1992) - Increased the military liaison personnel to seventy-five; called on all of the Yugoslav parties to co-operate with the Conference

SC Res. 743 (21 February 1992) - Decided to establish a UN Protection Force (UNPROFOR)

SC Res. 749 (7 April 1992) - Authorised the deployment of UNPROFOR

SC Res. 752 (15 May 1991) - Calls on all parties interfering in Bosnia-Herzegovina to cease, including withdrawal of JNA and Croatian military; first reference to the “former” SFRY

SC Res. 753 (18 May 1992) - Recommended admission of Croatia as Member State

SC Res. 754 (18 May 1992) - Recommended admission of Slovenia as Member State

SC Res. 755 (18 May 1992) - Recommended admission of Bosnia-Herzegovina as Member State

SC Res. 757 (30 May 1992) - Imposed sanctions on FRY until it complies with requirements of Res. 752; Noting in its preambular paragraph that the claim of the FRY to continue automatically the membership of the SFRY has not been generally accepted

SC Res. 758 (8 June 1992) - Established security zone encompassing Sarajevo and its airport to aid delivery of humanitarian aid

SC Res. 761 (29 June 1992) - Authorised re-deployment of UNPROFOR troops from Croatia to Bosnia-Herzegovina to secure Sarajevo airport

SC Res. 764 (13 July 1992) - Authorised further re-deployment of UNPROFOR troops to Bosnia-Herzegovina to secure Sarajevo airport

SC Res. 769 (7 August 1992) - Enlarged UNPROFOR strength and mandate

SC Res. 770 (13 August 1992) - Acting under Chapter VII, authorised States, in co-ordination with the UN, to use “all measures necessary” to ensure the delivery of humanitarian assistance to Sarajevo and other parts of Bosnia-Herzegovina

SC Res. 776 (14 September 1992) - Enlarged UNPROFOR strength and mandate for humanitarian assistance in Bosnia-Herzegovina

SC Res. 777 (19 September 1992) [GA Res. 47/1] - Considered that the FRY could not continue automatically the membership of the SFRY, and recommended that the GA should call for it to apply for membership and not participate in the work of the GA

SC Res. 781 (9 October 1992) - Established ban on military flights in airspace of Bosnia-Herzegovina



SC Res. 786 (10 November 1992) - Increased strength of UNPROFOR to enforce the flight ban over Bosnia-Herzegovina

SC Res. 787 (16 November 1992) - Acting under Chapters VII and VIII, authorised stop-and-search of vessels to enforce UN embargo

SC Res. 795 (11 December 1992) - Extended UNPROFOR's mandate to cover a limited presence in Macedonia

SC Res. 817 (7 April 1993) - Recommended admission as a Member State, the State being provisionally referred to as "the former Yugoslav Republic of Macedonia"

SC Res. 821 (28 April 1993) [GA Res. 48/252] - Recommends extension its decision of GA Res. 47/1 to includes the FRY's non-participation in the work of ECOSOC

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