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CONSTRUCTING STATES: THE ROLE OF THE INTERNATIONAL COMMUNITY IN THE CREATION OF NEW STATES

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Traditional models of state creation focus on the capability of the new state to govern its population and territory and to interact with existing states. The collapse of the Soviet Union and Yugoslavia, and the creation of new, smaller states from their constituent parts, indicate that the focus has shifted. The international community has indicated its willingness to recognize states that merely make commitments to protect human rights, govern themselves democratically, and promote international peace and security. However, by abandoning the old standards, these new states likely lack the capacity to fulfill those commitments. The international community that created these new states will find itself drawn into the state-building process if it wants to see those commitments met.

INTRODUCTION

States remain the most significant members of the international community despite the rise of non-state actors. Of all the actors important to international relations, states possess the broadest range of rights, duties, and capabilities. Statehood is thus a crucial issue for nations, peoples, and other political communities – and for the international community as a whole. Yet, until recently, legal scholars and analysts have paid surprisingly little attention to the legal and political processes through which new states emerge.¹

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The high stakes of statehood, particularly in light of the disintegration of the Soviet Union and Yugoslavia, make developing an improved understanding of state creation crucial. The post-Cold War collapse of the Soviet Union and Yugoslavia points to an enhanced role for recognition by other states in the process of creating new states. While recognition has played a key role in state creation during the wave of decolonization that followed the Second World War, these developments indicate that it has assumed even greater importance.

While some scholars have long acknowledged a role for recognition in the process of state creation, even this view fails to capture the significance of recognition in post-Cold War practice. Earlier theories focused on the empirical attributes of the recognized states, such as their territory, population, and effective government. Post-Cold War processes of state creation seem to place at least equal, if not greater, importance on the values of the recognizing states, including support for human rights and democracy. These values, so crucial to the contemporary period, have no place in earlier theories of state creation.

I will begin my exploration of these changes by surveying two major theories of state creation that have developed along with our contemporary state system. Next, I will discuss the collapse of the Soviet Union and Yugoslavia in the context of these models. As insights from international relations theory will show, these legal theories no longer accurately describe how the international community constructs new states. Finally, I discuss the policy implications of the emerging model of state creation.

RECOGNITION AND STATE CREATION IN INTERNATIONAL LAW

Questions about statehood and the rights and duties that are attached to it now occupy a central position in international law and international relations. However, this was not always the case. Early on in the development of the international legal system, when natural law principles dominated the study of international law, questions of statehood and state creation held little importance for international lawyers.

During the 17th century, the law of nations was tantamount to the law of nature, which applied universally (Crawford 1979). The political status of a territory made no difference with respect to legal obligations; the leader of that territory would be bound by natural law whether the territory happened to be a state or a dependent territory. At that point, international lawyers lacked a precise conception of statehood and used the terms “state” and “nation” interchangeably (Wallace-Bruce 1994, 21-2).

As legal positivism displaced natural law, the question of statehood gained greater significance. Early legal positivist writers, including Emmerich de Vattel, introduced the concept of independence as essential to statehood. As Vattel described,

[e]very Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign state* . . . To give a nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws (Crawford 1979, 7, emphasis in original).

This concept of independence would remain central to the factual criteria that later theories would put forward.

Over time, two theories on recognition and state creation emerged: the declaratory theory and the constitutive theory.² Both theories place great importance on the satisfaction of four factual criteria. Declaratory theory, the majority view among international lawyers and diplomats, holds that upon the satisfaction of these criteria, an entity becomes a state, regardless of any action or inaction by the international community. The constitutive theory, in contrast, imposes the additional requirement that the entity be recognized by other states.

DECLARATORY THEORY

According to the declaratory view of recognition, an entity becomes a state upon satisfying four empirical criteria. These criteria find their classical statement in the 1933 Montevideo Convention on the Rights and Duties of States:

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 into relations with the other states. (Convention on the Rights and Duties of States, art. 1).

Those who advocate the declaratory view, as the majority of international legal scholars do, hold that once an entity satisfies the above criteria, it becomes a state regardless of its recognition, or lack thereof, from other members of the international community. Because these four factual criteria occupy such an important position in both declaratory and constitutive theory, they merit further elaboration:

(a) a permanent population

The population of an entity seeking statehood must be both perma-

nent and significant. This requirement relates closely to the territorial requirement, and implies the need for a stable community (Brownlie 1990).

(b) a defined territory

Because states are territorial entities, an entity seeking statehood must possess a permanent territory (Crawford 1979). However, no minimum amount of territory is required for statehood. While this requirement seems straightforward, two potential problems arise with regard to territory: claims to the entire territory of a prospective state, and claims that potentially affect the boundaries of the new state (Crawford 1976-77). The general view, as stated by James Crawford, is that “a State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to or is claimed by any other State (Crawford 1976-77, 113).” By implication, then, claims to part of its territory likewise do not generally defeat a case for statehood. However, some scholars hold that in cases where the disputes cast serious doubt upon the future frontiers of a state, statehood may be denied until those disputes have been settled (Crawford 1979).

(c) a government

A state need not possess any particular type of government, but its government must provide some degree of internal stability and should enjoy “the habitual obedience of the bulk of the population (Lauterpacht 1947, 28).” An effective government provides its citizens and residents with remedies and carries out duties *vis-a-vis* other states (Lauterpacht 1947). In addition, the government must be “actually independent” of any other state, including the parent state. A complete lack of interdependence is impossible, as “a degree of interdependence is in the nature of things,” but the prospective state must possess an “essential core of independence,” so that the entity seeking recognition as a state does not merely represent a manifestation of some other state (Higgins 1994, 41). The requirement of effectiveness became somewhat relaxed in the context of decolonization (Brownlie 1990), when the right to self-determination required that colonial peoples be granted independence despite the “[i]nadequacy of political, economic, social or educational preparedness (Declaration on the Granting of Independence to Colonial Countries and Peoples 1961).”³ Colonialism did not withstand this assault, and the former colonies became independent regardless of whether or not they were prepared

to govern themselves (Jackson 1992). At least in situations of decolonization, the right to self-determination eroded the criterion of effective government.

(d) *the capacity to enter into relations with other states*

The capacity to enter into international relations consists of the constitutional competence to do so, as well as the ability to exercise that competence. Formal independence, which implies that mechanisms for the conduct of foreign relations exist, cannot satisfy this requirement without actual independence, which implies that the community can in fact exercise its formal independence (Brownlie 1990). In other words, though an entity may possess the mechanisms for entering into international relations, if those mechanisms are systematically and permanently controlled by another state, then this criterion cannot be considered satisfied. While a community must possess the capacity to engage in international relations, an entity may voluntarily cede its foreign policy powers to another state without jeopardizing its own case for statehood (Restatement, Third, 1987 §201, cmt. e). As long as the agency exists in law as well as in fact, the protected state satisfies the criterion of independence (Brownlie 1990).

These four criteria, for declaratory theorists, are determinative of statehood. As stated by Ti-Chaing Chen, a leading advocate of the declaratory view, “a State, once having satisfied certain objective tests, *ipso facto* becomes a person in international law (Chen 1951, 4).” The declaratory theory considers statehood to be a purely factual question, rather than a legal one. Recognition signals the willingness of the recognizer to enter into diplomatic relations, but it has no effect whatsoever on the existence of the new state.

Constitutive theory

Despite the large degree of scholarly consensus it enjoys, the declaratory theory nonetheless receives criticism from those who assign greater importance to recognition. Particularly relevant in this context is the objection that statehood cannot be a purely factual question. Proponents of constitutive theory contend that objective knowledge cannot exist without a subject to know it (Lauterpacht 1947). Those who support the constitutive view further contend that treating statehood as a factual question is inappropriate because statehood is a legal, not a natural, phenomenon (Crawford 1979). By adding recognition to the factual

requirements for statehood, constitutive theory attempts to remedy this flaw in the declaratory view.

The constitutive view also places considerable significance on the satisfaction of the factual criteria for statehood, but it requires something additional: the recognition of the new state by existing states. Though not sufficient to create the state in the absence of recognition, the satisfaction of the factual criteria maintains an extremely important position within the constitutive theory. If recognition of an entity takes place prior to its possessing a permanent population, a defined territory, a government, and the capacity to enter into international relations with other states, then that recognition is premature. As constitutive theorist Hans Kelsen has argued, a state violates international law if it extends recognition to a community that does not fulfill the requirements for statehood (Kelsen 1952).

The constitutive theory grows out of legal positivism, which emphasizes the consensual nature of international law, and places great importance on the consent of sovereign states to their legal obligations. The creation of a new state creates such new obligations for existing sovereign states. Therefore, their consent, expressed through their recognition of the new state, must be obtained.

Given the centrality of sovereign consent to legal positivism, it is not surprising that most scholars who adhere to the constitutive theory agree that states are under no duty to recognize new states (Kelsen 1952). Lauterpacht, the exception among the constitutive theorists, does argue for such a duty (Lauterpacht 1947). Opponents of the constitutive view on recognition contend that the requirement of recognition, coupled with the lack of a duty to recognize, means that a community satisfying the criteria for statehood could be wrongfully denied its rights because of a capricious decision to deny recognition (Menon 1990). This decision could have further consequences for the unrecognized entity, because without international legal personality, that entity would lack many of the important protections granted to states by international law.

Despite these shortcomings, the constitutive theory, by recognizing the role of the international community in accepting or rejecting claims to statehood, provides a more complete picture of state creation. With the movement away from empirical statehood, illustrated by state practice during the disintegration of Yugoslavia and the Soviet Union, the international community's acceptance or rejection of a statehood claim has become still more important. Contrary to the state of theory, statehood has become a question of value rather than a question of fact.

THE DISSOLUTION OF THE SOVIET UNION AND YUGOSLAVIA

At the time of their creation, some states formed from the disintegrating Soviet Union and Yugoslavia found themselves embroiled in civil war and chaos. The willingness of the international community to accept these entities as states despite shortcomings under the traditional definition of statehood indicates that the process of state creation has been fundamentally altered. The wave of state creation from the collapse of Yugoslavia and the Soviet Union illustrates the application of new criteria for statehood.

The Collapse of the Soviet Union

The post-Cold War wave of state creation that encompassed the former republics of Yugoslavia and the Soviet Union began on 21 August 1991, when the Russian Federation recognized the independence of the Baltic Republics of Estonia, Latvia, and Lithuania. Many states, including the United States, never recognized the Soviet Union's annexation of these republics and regarded their independence as a correction of an old injustice.⁴

Because of these special circumstances surrounding the Baltics, their loss did not spell destruction for the Union of Soviet Socialist Republics. The secession of Ukraine struck a far more serious blow to Soviet Union, as Ukraine and Russia had enjoyed more than 300 years of union (Subtelny 1988). Aside from the historical relationship with Russia, Ukraine possessed a significant share of the Soviet Union's resources and population. The loss of Ukraine thus struck both a symbolic and a material blow to the USSR.

On 24 August 1991, Ukraine declared its own independence subject to the results of a referendum to be held on 1 December.⁵ In that referendum, 80 percent of the population voted, with over 90 percent of voters favoring Ukrainian independence. Russia,⁶ Canada, Poland, and Hungary recognized Ukraine's independence the following day.

The U.S. Ambassador to Moscow expressed reluctance to recognize Ukraine, stating that the United States "will acknowledge the fact that millions of people have voted for freedom and independence, and we'll do something about it, (but) that doesn't mean . . . we will rush into anything precipitously (Hiatt 1991a, A1)." The reason cited in favor of recognition—the vote for freedom and independence—has no place under the declaratory theory, the leading model of state creation in contemporary international law.

While the United States reacted cautiously, Ukraine's independence caused alarm in Russia. After the referendum, one Russian legislator wondered, "How can you speak about a Soviet Union without the Ukraine (Dobbs 1991)?"

On 8 December 1991, the leaders of Russia, Ukraine, and Belarus dissolved the Soviet Union and agreed to establish the Commonwealth of Independent States (CIS). As the founders of the Soviet Union, these countries declared that the Union of Soviet Socialist Republics "as a subject of international law and a geopolitical reality no longer exists (Agreement Establishing the Commonwealth of Independent States)." A few days later, the leaders of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan met and affirmed their willingness to join the CIS, which would be established on 21 December 1991 (Protocol to the Agreement Establishing the Commonwealth of Independent States).

In an effort to respond effectively and coherently to these rapidly unfolding events, the Foreign Ministers of the European Community (EC) issued a *Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union* (1992) and a separate *Declaration on Yugoslavia* (1992). Their use of the term "New States" foreshadowed the Community's policy toward this region. The declarations issued by the European Community provided an important statement of the principles that purported to guide the Community's practice through the minefield of a dissolving superpower.

The *Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union* affirmed the willingness of EC Member States to recognize, subject to the "normal standards of international practice," new democracies that accepted certain international obligations (1992). These obligations included:

- respect for the provisions of the United Nations Charter, the Helsinki Final Act, and the Charter of Paris, especially with regard to the rule of law, democracy, and human rights;
- guarantees for minority, ethnic, and national rights;
- respect for the inviolability of frontiers;
- a commitment to disarmament, nuclear non-proliferation, and regional stability; and
- a commitment to settle peacefully any disputes regarding state succession and regional disputes.

The United States joined the European Community in its support of these standards and their role in the recognition of new states (Hoffman 1991).

While purporting to preserve the traditional practices relating to recognition, the other principles in these documents came to play a more important role than the more familiar elements of statehood, such as territory, population, and effective government (Rich 1993). The replacement of the traditional criteria for statehood with these new principles—including human rights guarantees and a commitment to disarm—reflects the diminishing importance of empirical statehood and the increasing significance of constructively defined normative principles.

On 21 December 1991, delegates from Armenia, Azerbaijan, and Moldova joined Russia, Ukraine, Belarus, Kazakstan, Kyrgyzstan, Uzbekistan, Turkmenistan, and Tajikistan at Alma Ata to establish the Commonwealth of Independent States (CIS) (Rupert 1991). Shortly afterwards, President Bush extended recognition to the majority of the former Soviet republics. In his Christmas address to the nation, Bush announced that he recognized and established diplomatic recognition to Russia, Ukraine, Belarus, Kazakhstan, Armenia, and Kyrgyzstan (Oberdorfer 1991). The United States recognized Moldova, Turkmenistan, Azerbaijan, Tajikistan, Georgia, and Uzbekistan as independent states, but withheld the establishment of diplomatic relations pending their commitment to the principles listed above.

Most other states withheld recognition of Georgia because of its internal civil war, which prevented it from joining the CIS at the Alma Ata meeting. The EC did not recognize Georgia until 23 March of the following year when it attained a degree of stability through a coalition government (Rich 1993). On 31 December 1991, the Community's statement recognized eight former Soviet republics, but remained silent on Georgia. The European Community further pledged to recognize Kyrgyzstan and Tajikistan once they had affirmed their willingness to accept the principles embodied in its guidelines.

Yugoslavia Dissolves

While the Soviet Union fell apart, several Yugoslav republics also expressed a wish to secede from Yugoslavia. The *Declaration on Yugoslavia* required any Yugoslav republics seeking recognition to notify the EC by 23 December 1991 (1992). Republics seeking recognition were also to inform the EC of their acceptance of the commitments set forth in the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, in addition to provisions related to the rights of ethnic groups. Furthermore, any republic seeking recognition was obliged to support efforts of the United Nations Security

Council and the Secretary-General as well as the Conference on Yugoslavia. In addition to Slovenia and Croatia, which unilaterally declared independence in June 1991, Bosnia and Macedonia notified the European Community that they sought recognition.⁷

Following its unsuccessful campaign for collective European Union (EU) recognition, Germany unilaterally recognized Slovenia and Croatia⁸ despite harsh criticism from the United States, the United Nations, and others (Vogel 1991). Despite widespread criticism of Germany's recognition of Slovenia and Croatia as premature, the European Community and its Member States followed Germany's lead and recognized Slovenia and Croatia on 15 January 1992 (Rich 1993). Other nations soon extended recognition to the former Yugoslav republics. Over the next few days, Canada, Australia, and Argentina recognized Croatia and Slovenia. Within a few months, Russia, Japan, the United States, China, and India also recognized these new states.

Following the results of this referendum, the United States and the European Community recognized Bosnia-Herzegovina, and the United States recognized Slovenia and Croatia. Significantly, the U.S. statement noted that Croatia, Slovenia, and Bosnia-Herzegovina met the criteria for recognition, but failed to elaborate on the content of those criteria.

THE CHANGING CRITERIA FOR STATEHOOD

Did the newly independent states of the former Soviet Union and Yugoslavia satisfy the factual criteria espoused by both the declaratory and constitutive theories of state creation? Did each possess a defined territory, a permanent population, an effective government, and the capacity to enter into international relations? Or, have shared values replaced adherence to these more empirical standards?

Conditions within these newly created states raise obvious questions about their satisfaction of the traditional criteria for statehood, including possession of a defined territory and effective government. Convincing evidence of the fragility of these new states lies in the number of peacekeepers deployed in these states and the broad scope of their missions.⁹

Georgia and Bosnia-Herzegovina present the most striking, though by no means the only challenges to the traditional criteria advocated by both the declaratory and constitutive theories of recognition. At the time of its recognition by the United States, Georgia's internal turmoil precluded membership in the CIS. In particular, the regions of Abkhazia and South Ossetia sought independence from the newly formed Georgian state.

Rebel forces ousted Georgian President Zviad Gamsakhurdia in early January 1992, shortly after President Bush had recognized Georgia's statehood. The installation of former Soviet Foreign Minister Eduard Shevardnadze as Georgia's new President did little to quell the substantial unrest that plagued that state. The subsequent establishment of a fragile coalition government prompted additional states and the European Community to recognize Georgia's statehood. Georgia joined the CIS nearly two years after its creation (Hockstader 1993).

Although a community need not possess any particular type of government to be considered a state, both declaratory and constitutive theories require that the government be effective. Setting aside the territorial questions raised by the secessionist movements, the Georgian government lacked the capacity to rule even its remaining territory. The government toppled less than two weeks after its recognition. The strife continued under the Shevardnadze government indicating continuing difficulties for Georgia's government and putting Georgia's territorial integrity in jeopardy.

Similar questions persisted about the former Yugoslav republics, especially Bosnia-Herzegovina. Recognized only a few months after Georgia, Bosnia-Herzegovina suffered from many of the same difficulties. Bosnia-Herzegovina's chief obstacle stemmed from the separatist claims of its Serbian population. The Serbs, who boycotted the referendum on Bosnia's independence, lodged their own claims of statehood against the newly formed Bosnian entity.

The claims of the Bosnian Serbs to their own republic, Srpska, coupled with the state of war that persisted in Yugoslavia, undermined the territorial integrity of Bosnia-Herzegovina even after its recognition as an independent state. In early 1993, the Vance-Owen Plan proposed the division of Bosnia-Herzegovina into ten cantons based on the patterns of the ethnic minorities within its borders. The division of Bosnia-Herzegovina, presumably a sovereign state, would conflict with the prevailing models of statehood, which grants states the right to territorial integrity and non-recognition of territory gained through aggression. To reconcile this conflict, the international community faced the decision either to abandon those esteemed legal principles or acknowledge the peculiar nature of Bosnia-Herzegovina's "statehood." With these doubts regarding Bosnia-Herzegovina's territory or population, its government could hardly exert effective control over either its land or people.

Despite the flaws in Bosnia-Herzegovina's empirical case for statehood, recognition by the international community established Bosnia as a

member of the international community. Recognition, rather than functioning as a “refutable assumption” that the criteria for statehood had been met, actually “served as a substitute for these features, which were obviously missing (Hillgruber 1998, 493).”

The difficulties outlined above really amount to a lack of ability on the part of these states to undertake the traditional roles of the state independently from outside interference. Independence, once the core of statehood, has been supplanted by international recognition. Rather than building that capacity from within prior to recognition, these states were created from without, based upon the norms and values possessed by the international community. Though formally equal members of that community, these new states present a novel set of problems and challenges to be met.

STATEHOOD AS A STRUCTURE

The gap between theory and practice reveals how statehood as a concept has become static. While ideas about statehood have remained static,¹⁰ statehood as an institution has grown and changed. Through reification, concepts such as statehood “are made into things and then treated as though they were things which existed prior to our invention of them (Boyle 1985, 329, n. 4).” In this instance, statehood evolved at a particular point in history and the idea of a state became fixed at that stage of its evolution. A new understanding that can take account of changing meaning would overcome the stagnant nature of current understandings of statehood.

This new understanding requires an appreciation of the role that members of the international community and their actions play in the creation and evolution of concepts such as statehood. To be persuasive, an account of state creation must provide for changes in the meaning of statehood and the process by which new states emerge. Clearly, this requires a focus not only on the communities seeking recognition, but also on the communities holding the power to grant or withhold recognition.

Social constructivism ascribes a central role to meaning as “people act toward objects, including other actors, on the basis of the meanings that the objects have for them (Wendt 1992, 396-7).” In international relations, collectively shared meanings form structures under which state actions are organized. These shared meanings arise out of the social interactions of the states whose actions they shape (Wendt 1992). Structures, such as statehood, and agents, such as states, are mutually constitutive. In other words, just as the concept of statehood guides recognition

practice, so those practices shape the very idea of statehood.

Far from being a finished product, the concept of the state continues to grow and change as state practice evolves. Like other structures, statehood and sovereignty arise out of enduring and accepted practices of states. As those practices change, so do the structures they constitute. The dissolution of the Soviet Union and Yugoslavia, and the creation of new states from those territories, differ significantly from the practice codified in the Montevideo Convention on the Rights and Duties of States. To understand the significance of these changes requires a broader perspective on the nature and purpose of statehood.

The abandonment of the objective criteria in favor of more normative considerations really began after World War II with the wave of decolonization, when the criteria were relaxed in favor of the principle of self-determination. More recently, the dissolution of Yugoslavia and the Soviet Union illustrated a still looser adherence to these objective criteria. The willingness of existing states to recognize new states has superseded the empirical criteria that previously occupied the central position in the process of state creation.

The decline of the objective criteria began with the wave of decolonization following World War II. Robert Jackson argues that the majority of these new states, which he deems “quasi-states,” bore little resemblance to the states that existed at the time these quasi-states were created (Jackson 1990, 67).¹¹ Despite their formal equality, states and quasi-states differ in two significant ways. First, the quasi-states lack the economic capacity of other states (Jackson 1990). While economic differences among states have always existed, the economic divide between states and quasi-states is so pronounced that the terms “Third World,” “less developed,” and “developing” have evolved to describe the gap. The enormous quantitative economic differences amount to a qualitative distinction. Second, political underdevelopment deprives quasi-states of the capacity to protect the human rights of their citizens, creating vastly inferior civil conditions *vis-à-vis* other states (Jackson 1990).

Despite their fragility, the quasi-states survived because the rules of international politics changed. Jackson distinguishes between positive and negative sovereignty games. Negative sovereignty, which entails freedom from outside interference, is a formal-legal condition (Jackson 1990). This type of sovereignty “presupposes governments which are deemed capable and responsible,” whether or not they possess this capacity and responsibility (Jackson 1990, 28). By contrast, positive sovereignty directly addresses these qualities. While negative sovereignty describes a formal

condition, positive sovereignty indicates the substantive capacity to enjoy this liberty (Jackson 1990).

Under the positive sovereignty regime, the international community distinguished between sovereign states and dependent territories based on their capacity to defend themselves (Jackson 1990). If the rules of the positive sovereignty game had endured after decolonization, the weakness of the quasi-states would have tempted stronger neighboring states to invade them. Now, the rules of the negative sovereignty game played by the quasi-states not only preserve their territory but also promote their welfare by permitting them to claim assistance from stronger states.

The first and most important component of negative sovereignty has been the rise of non-intervention. The effect of non-intervention is to exempt quasi-states from “the power contest,” making their territory safe from conquest (Jackson 1990, 23). The second important change is that the economic, political, and social weakness of the quasi-states has become a basis for assistance from other states. While in the past, the positive sovereignty game would have allowed quasi-states to be assimilated by more powerful states, now the quasi-states consider themselves entitled to aid by virtue of their own weakness.

The fragility of these quasi-states became all too clear with the end of the Cold War. While American-Soviet rivalry dominated international politics, many quasi-states effectively played East against West for their own benefit. Somalia, for example, courted both the United States and the Soviet Union, and at various points received aid from each superpower.¹² The decline of Cold War tensions saw a corresponding decline in aid to these countries. Without this aid, several quasi-states have utterly collapsed, ceasing to perform any state functions.¹⁴ Although state collapse is not a new phenomenon, the increased occurrence of state collapse since the end of the Cold War reveals the lack of capacity that plagues many states created during decolonization.

These collapsed or “failed” states might have served as a cautionary tale for those wishing to further relax the rules regarding state creation, but instead the post-Cold War era saw a further deterioration in the threshold for state creation. The trend toward substituting recognition for empirical statehood that began with the quasi-states moved beyond the realm of decolonization and has encompassed other areas of the world. Some new states that grew out of the remains of Yugoslavia and the USSR could not satisfy even the relaxed standards set by the decolonization process. Not only is their effective governance questionable; their ability to satisfy the other criteria is also highly suspect. The fact that these entities have

nonetheless been recognized as states signals fundamental changes in the process of state creation. Recognition, more than any other factor, has become determinative of the success of a community's statehood claims. In addition to conferring statehood upon communities that do not satisfy the criteria set forth in the Montevideo Convention, recognition can deny statehood to an entity that otherwise satisfies the empirical criteria (Pegg 1998).

CONCLUSION

At a time when the declaratory theory, which emphasizes statehood as effectiveness, reigns supreme, the international community has recognized the existence of several states that seemingly lack the barest of empirical essentials for statehood. Rather than indicating that the empirical criteria for statehood have been met, recognition seems to indicate, more than anything else, the willingness of the recognizer to accept the entity as a state. Recognition and statehood have become so intertwined that recognition has, for all practical purposes, taken the place of effectiveness and the more concrete attributes of a territory, population, government, and the capacity to enter into international relations.

This willingness to accept some entities as states and not others tells us more about the recognizing states and their values than the recognized states and their attributes. The empirical characteristics of new states no longer play the decisive role in decisions about recognition that our legal understanding of statehood would lead us to expect. Thinking of statehood as a structure, the principles under which it operates assume new importance.

The declarations issued by the EC and the United States provide us with some of these principles. These statements emphasize several key tenets:

- The maintenance of new international (and formerly internal) borders;
- A dedication to democracy and the rule of law;
- Human rights guarantees, in addition to special guarantees for the protection of minority rights; and
- Commitments to disarmament and nuclear non-proliferation.

Practice suggests some others, including a demand for statehood by the population in question and the significance of internal boundaries.¹⁴ These criteria bear little resemblance to the more empirical criteria held dear by constitutive and declaratory theorists alike. Statehood, once a

“question of fact,” has become primarily a question of norms.

Ironically, the new emphasis on these norms, which has apparently come at the expense of the traditional empirical criteria, may end up jeopardizing the norms promoted by the international community. These new states seem marked by a lack of capacity to abide by the commitments demanded by the international community in exchange for statehood.

In light of this state of affairs, the international community has two options. First, it could modify the new standards of statehood to incorporate the old tests and demand that nascent states possess defined territory, permanent population, and most importantly, an effective government capable of exercising control over its territory and population and of engaging in international relations. This option seems impractical. Decolonization and this most recent wave of state creation have altered the meaning of statehood. The fact that these concepts are socially constructed does not imply that their content is arbitrary or infinitely malleable. The conflation of statehood with international recognition cannot be reversed.

A second, more feasible, option might be to acknowledge that without the old criteria for statehood, it is likely that new states will lack the capacity to adhere to their commitments regarding international peace and respect for human rights. The large number of peacekeeping operations in new states bears out this proposition. Institutionalizing some form of state-building operations to help these new states solidify democracy, the rule of law, and respect for human rights may prevent the need for peacekeeping operations to be established later. While such assistance would undoubtedly constitute a substantial commitment of personnel and resources, the commitment required to address internal or regional conflict would be even greater.

NOTES

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¹ Until recently, international law applied nearly exclusively to states alone. States still possess the broadest range of rights and duties under international law. The question of state creation, then, represents in some ways the fundamental issue

for international law. Despite its significance, little scholarly attention or effort has been dedicated to developing a sophisticated understanding of how states emerge.

In *The Recognition of States*, Thomas D. Grant addresses the lack of development found in both prevailing models of state recognition. Declaratory theory submits potential states to an empirical test that equates statehood with possession of defined territory, permanent population, effective government, and the capacity to engage in international relations. Constitutive theory requires the recognition of existing states in addition to these other elements. Describing what he calls the “once-great” debate between constitutive and declaratory theory, Grant notes that:

both doctrines ignored critical factors. Instructions as to how, as a practical matter, recognition is to be extended can only be gleaned from the doctrines by implication. The doctrines do not take adequate account of the composite character of the state, ignoring that statehood is probably best described as a bundle of rights, obligations, and functions. And neither doctrine directly addresses where recognition falls along the spectrum between law and politics (1999, 1).

² The two dominant theories have been the declaratory and constitutive theories discussed below. However, there have also been attempts to reconcile these two views, as P.K. Menon points out. Some writers have attempted to draw a distinction between international personality, which they believe to exist even absent recognition, and the exercise of international rights, which requires recognition. Others draw a distinction based on the type of right asserted, arguing that recognition is declaratory with regard to certain minimum rights (such as the right to self-defense) but constitutive with respect to other types of rights (Menon 1990).

³ Support for self-determination has been limited to the context of decolonization. Thus far it has not been accepted as a basis for minority groups within existing states to secede and create their own states (Hannum 1990).

⁴ These states did not “recognize” the Baltic republics as independent states, but merely reestablished diplomatic relations with them as the United States did on 2 September 1991.

⁵ All Soviet republics, with the exceptions of Russia and Kazakhstan, declared independence after the failed coup in August 1991 (Hiatt 1991a).

⁶ Boris Yeltsin conditioned Russia’s recognition of Ukraine on Ukraine’s observation of international arms limitation and nonproliferation treaties and on Ukraine’s non-nuclear status (Hiatt 1991b).

⁷ Serbia and Montenegro claimed that recognition in 1878 at the Berlin Congress endowed them with international legal personality and that they did not require recognition.

⁸ Though it acted unilaterally, Germany's decision to recognize Croatia and Slovenia was made contingent upon those republics' agreement to accept the principles expressed in the EC's previously issued Guidelines on Recognition (Vogel 1991).

⁹ The stationing of peacekeeping forces in newly created states is not an entirely novel phenomenon, but the number of cases and the nature of the missions points to underlying factors in these cases. Specifically, the questionable capacity of these new states to meet the empirical threshold for statehood makes international support for the continued existence of these states a necessity.

The United Nations has made a massive commitment to the new states formed out of the former Yugoslavia in terms of both troops and resources. For an analysis of UN operations in Yugoslavia (Durch 1996).

The UN has not made such an extensive commitment to the former Soviet Union despite the frailty of those new states. The inadequate political institutions in many of these new states are no match for the ethnic and religious conflicts they inherited from the Soviet era. In a few of these new states where tensions have boiled over, Russia has stationed troops to manage the conflict. These Russian troops, in conjunction with troops from the host state or from other CIS members, are currently stationed in Georgia, Tajikistan, and Moldova. In addition, armed conflict flared up between the new states of Armenia and Azerbaijan.

¹⁰ Thomas Grant argues that the definition of statehood, which is still cited almost as a reflex, has become obsolete. It encompasses certain qualities, such as the capacity to engage in international relations, which no longer belong exclusively to states and it omits certain other characteristics that have become important since the drafting of the Montevideo Convention (Grant 1999).

¹¹ Some "quasi-states" existed prior to the wave of decolonization, such as Haiti, Ethiopia, and Liberia (Jackson 1990).

¹² Somali dictator Mohamed Siad Barre first courted the Soviet Union by declaring his government to be a Marxist revolutionary regime (Samatar 1993). In 1977, the Soviet Union signed a treaty with Somalia's historical rival, Ethiopia. This new alliance between Somalia's former patron and its historical enemy prompted Siad Barre to seek and receive military and economic assistance from the United States. The strategic position of Somalia's Gulf of Aden assisted it in playing the superpowers against each other, but the decline of Cold War tensions coincided with a decline in foreign aid. By the late 1980s, the United States and the European Community, with the exception of Italy, had all but abandoned Somalia both diplomatically and economically (Makinda 1993).

¹³ During the Cold War, Third World states like Somalia could successfully manipulate the dueling superpowers. With the end of the Cold War and the loss

of superpower support, many of these states could no longer sustain themselves. States have collapsed throughout history, but the phenomenon of state collapse became more common with the end of the Cold War (Zartman 1995 and Helman and Ratner 1992).

¹⁴ All states thus far created out of the territory of Yugoslavia and the former USSR have been formed along the lines of the internal boundaries of those extinct states. Other groups seeking statehood, such as the Kosovars in the Federal Republic of Yugoslavia or the Chechens in Russia have so far found their demands met with indifference by the international community.

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