

# 1. Subjects

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This chapter discusses the doctrine of subjects in relation to the state. This part of the doctrine of subject is sometimes called “the law of statehood”. The choice to focus on the law of statehood – rather than on those discourses and practices pertaining to other actors of international law – should not be read as manifesting any state-centricism. This is a debate that is not tackled here but that will re-surface in chapter 3 on law-making. This chapter is solely concerned with those academic projects that have shaped the design and deployment of the law of statehood.

The international law of statehood epitomizes the scholarly hunger for doctrinal domestication of the rise and fall of states in the international legal order. Indeed, as it is argued here, the sophisticated constructions behind the international law of statehood have been aptly deployed by a group of professionals seeking to secure a grasp on a subject-matter, that is, state creation. According to the view defended here, the law of statehood is best construed as a delicate elixir which allows international lawyers, not only to make state creation a legal phenomenon worthy of legal investigation, but also to claim control of the volatile phenomenon of births and deaths in the international society. In the pursuit of this project, international lawyers have been guided by the aspiration to control an entire chain of manufacture of international law. In spelling out this argument, this chapter will seek to expose the main methodological moves unfolding in the international law scholarship devoted to the law of statehood and speculate about the specific rationales behind them. It will show that the law of statehood is informed not only by a regulatory and explanatory agenda but also by a few intra- and extra-professional dynamics.

This argument will develop in the following sequence. First, a few remarks are formulated about the main methodological moves – and the corresponding epistemological tensions – witnessed in the mainstream contemporary international legal scholarship on issues of statehood. Reference will be made to the tensions between the facticists and

legalists on the one hand and those between the subjectivists and the objectivists on the other (I). Second, the chapter will shed light on the main projects pursued by the advocates of a law of statehood (II). Attention will be paid to the regulatory, explanatory and epistemological agendas of the law of statehood. This chapter will conclude with a few final remarks (III).

Before substantiating this argument further, a few caveats are necessary. Preliminarily, this chapter is neither a critique nor a deconstruction of the law of statehood. What this chapter pursues is more elementary. The following merely speculates about the rationales behind the impressive ingeniousness of international lawyers to construct a law of statehood. Certainly, the point made is unorthodox. Yet, it is not unheard of. Similar critiques of other foundational branches of international law exist in the literature. For instance, the theoretical, political, sociological and epistemological moves behind the doctrines of the sources of international law<sup>1</sup> or the international law of responsibility<sup>2</sup> have long been exposed to similar critiques. Those rules and practices that explain, regulate or feed the emergence of states on the international plane have been spared from a comprehensive, foundational exploration. It is particularly astounding that so few self-critical and reflexive studies by international lawyers on the international law of statehood exist in the legal scholarship.<sup>3</sup> The reasons for such scholarly clemency towards the construction behind the law of statehood are mysterious. It is not the

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<sup>1</sup> M. Koskenniemi, "The normative force of habit: international custom and social theory", 1 *Finnish Y.B. Int'l L.* 77 (1990); D. Kennedy, "When renewal repeats: thinking against the box", 32 *N.Y.U. J. Int'l L. & Pol.* 335 (2000); J. d'Aspremont, "The politics of deformalization in international law", 3 *Goettingen J. Int'l L.* 503 (2011); S. Singh, "International law as a technical discipline: critical perspectives on the narrative structure of a theory", in *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, app. 2 at 236–61 (2013).

<sup>2</sup> P. Allott, "State responsibility and the unmaking of international law", 29 *Harv. Int'l L.J.* 1 (1988); G. Nolte, "From Dionisio Anzilotti to Roberto Ago: The classical international law of state responsibility and the traditional primacy of a bilateral conception of inter-state relations", 13 *Eur. J. Int'l L.* 1083 (2002).

<sup>3</sup> See M. Fabry, "International legal theory of state recognition: a critique" (on file with author); see also G. Simpson, "Great powers and outlaw states: unequal sovereigns in the international legal order" (2004). But see M. Koskenniemi, "National self-determination today: problems of legal theory and practice", 43 *Int'l & Comp. L.Q.* 241 (1994).

purpose of this chapter to solve such a mystery,<sup>4</sup> but rather to allay this lack of foundational inquiry.

## I. CARTOGRAPHIC OVERVIEW OF THE CONTEMPORARY LEGAL SCHOLARSHIP ON THE LAW OF STATEHOOD: A TWOFOLD COGNITIVE TENSION

The following observations shed light on some of the fundamental tensions that drive the international legal scholarship on the law of statehood. The international legal scholarship can be read as the scene of a compound pitted epistemological battle. On the one hand, international lawyers have been divided between the *facticists* and the *legalists*, that is, between those arguing that statehood is a fact and those arguing that statehood is a legal construction. On the other hand, and at a different level of their scholarly inquiries, the law of statehood has been the battleground between the *objectivists* and the *subjectivists*, that is, between those contending that statehood is objectively ascertained by international law and those arguing that international law accommodates inter-subjectivity in the determination of statehood.

It is of the utmost importance to clearly demarcate the two aforementioned epistemological divides. Indeed, these two epistemological battles take place at different levels and in very different terms.<sup>5</sup> The debate between the *legalists* and the *facticists* pertains to the capture of statehood by international law whereas the debate between the *objectivists* and the *subjectivists* relates to the operation of statehood within the system of international law. Said differently, the first debate takes place at the fringe of the international legal system whereas the second one rages within it, that is, once the phenomenon of state creation has been apprehended by international law.

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<sup>4</sup> For further discussion, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2005). The same probably explains why voluntarism has remained such a vivid idea.

<sup>5</sup> M. Forteau, "L'Etat selon le droit international: une figure à géométrie variable", 4 *Revue Générale de Droit International Public* 737, 739–42 (2007).

## 1. Epistemological Battle: Penetrating the Legal System as a Fact or as a Legal Institution

The pitted battle between facticists and legalists is an old one. It is also very well known and it does not seem to require much attention here. It opposes those who claim that the state exists inherently as a factual matter<sup>6</sup> and those who contend that it is a legal construction.<sup>7</sup> The first view argues that the state pre-exists as a fact before its capture by international law. According to that view, the yardstick to determine statehood is “success or failure”.<sup>8</sup> This facticist view expresses an attempt to consign state creation “to exogeneity in the sense of their surpassing international legal grasp or comprehension”.<sup>9</sup> The facticist approach has been deemed reminiscent of Carl Schmitt’s idea of sovereignty as external to international law.<sup>10</sup> Opposite to the facticist approach, the legalists contend that the state is a creation of international law.<sup>11</sup> They argue that statehood is constructed and recognized by international law and does not have an autonomous existence outside international law.

To a large extent, the debate between facticists and legalists has become moot and a belated consensus seems to have emerged among international lawyers.<sup>12</sup> Contemporary mainstream scholarship seems to

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<sup>6</sup> L. Oppenheim, *International Law: A Treatise*, 264 (1905); see also G. Arangio-Ruiz, *L’Etat dans le sens du droit des gens et la notion de droit international*, 3–63, 265–406 (1975); J. Crawford, *The Creation of States in International Law* 23 (1979); “The opinions of the Badinter arbitration committee”, Opinion n.1, reprinted in A. Pellet, “The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples”, 3 *Eur. J. Int’l L* 178, 182–3 (1992).

<sup>7</sup> See H. Kelsen, *General Theory of Law and State* (1949); R. Ago, “Second report on state responsibility”, 2 *Y.B. Int’l L. Comm’n* 177 (1970), U.N. Doc. A/CN.4/233, 202–203, pp. 38–9; A. Peters, “Statehood after 1989: effectiveness between legality and virtuality”, in 3 *Select Proceedings of the European Society of International Law* 171 (J. Crawford and S. Nouwen (eds) 2012).

<sup>8</sup> D. Anzilotti, “Corso di diritto internazionale: lezioni tenute nell’ Università Di Roma Nell’anno Scolastico 1922–23”, 154–5 (Working Paper, 1923) (on file with author).

<sup>9</sup> F. Johns, *Non-Legality in International Law: Unruly Law* 10 (2013).

<sup>10</sup> Koskenniemi, *supra* note 4, at 231.

<sup>11</sup> For an illustration of that approach, see the authors cited by M. Koskenniemi, *supra* note 4, at 229–30.

<sup>12</sup> For M. Koskenniemi, the disagreement between legalists and factualists has lost its contradictory character as each of these arguments comes to rely on each other in a way which makes preferring either one impossible. See Koskenniemi, *supra* note 4, at 272.

simultaneously vindicate both positions in a way that reconciles them. According to this conciliatory view, state creation is a factual process<sup>13</sup> but the state itself is a legal construct.<sup>14</sup> The state is seen as having first emerged as a social reality before being apprehended by the law.<sup>15</sup>

There certainly is some merit to this conciliatory approach. Indeed, it seems difficult to deny that apprehension of a fact by the law necessarily entails a legal construction. Said differently, capturing a fact boils down to reconstructing it in legal terms for there cannot be apprehension of any phenomenon without reconstruction of such a phenomenon according to pre-existing legal categories. Recognizing the virtue of this conciliatory approach does not mean, however, that such a scholarly consensus is exempt from fundamental epistemological flaws, especially because facts themselves do not exist independently of any descriptive framework through which they are constructed.<sup>16</sup> This chapter is certainly not the place to fault the epistemological moves behind the contemporary mainstream conciliatory position. It matters more to highlight here that, as a result of the compromise reached between legalists and facticists, the epistemological struggle within the law of statehood has moved to another level. It is argued here that the divide in the law of statehood is no longer about whether statehood is received as a fact or constructed by the law but, rather, *how* it is received and constructed by international law.

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<sup>13</sup> See C. de Visscher, *Les effectivités du droit international public* 34 (1968); G. Abi-Saab, “Cours général de droit international public”, in 207 *Recueil des cours: Collected Courses Hague Academy Int’l L.* 9, 68 (1987); Crawford, *supra* note 6; see *The Opinions of the Badinter Arbitration Committee*, *supra* note 6 (“[T]he existence or disappearance of a state is a question of fact.”).

<sup>14</sup> See Peters, *supra* note 7; J. Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice*, 49 (Hart, 2013); Crawford, *supra* note 6, at 15.

<sup>15</sup> Forteau, *supra* note 5, at 736–69; see also *id.*, at 739 (“[A] tout le moins, puisqu’il en est pour douter de l’existence d’un phénomène étatique en dehors du monde du droit, existe-t-il une réalité sociologique, quelle que soit l’idée que l’on s’en fait, à laquelle le droit international va s’intéresser”). For a historical overview of the state as social reality, see A. Cassese, “States: rise and decline of the primary subjects of the international community”, in *The Oxford Handbook of the History of International Law* 49 (B. Fassbender and A. Peters eds, 2012).

<sup>16</sup> A. MacIntyre, *Whose Justice? Which Rationality?* 333 (1988).

## 2. Epistemological Battle: Deploying Statehood in the Legal System in Absolute or Relative Terms

The main conceptual controversy permeating the international legal scholarship on statehood is probably not the ontological nature of statehood prior to its capture by international law but about how it operates *within* international law once it has been apprehended. In this respect, international lawyers seem to be divided into two camps, which, contrary to the clash between facticists and legalists, appear more irreconcilable. These two positions rest much more on fundamental and paradigmatic tensions in international law. The purpose of this section is certainly not to revisit the theoretical foundations of such discrepancies but rather to delineate the elementary manifestation of this scholarly rift in the law of statehood when it comes to determining how statehood operates within the legal system.

The way in which mainstream legal scholarship captures, constructs and explains statehood is well-known and does not need exhaustive recapitulation. Among international lawyers, it is traditionally accepted that a number of criteria must be fulfilled for an entity to qualify as a state – without such criteria necessarily being legal criteria. According to the mainstream way of apprehending statehood which emerged in the nineteenth century after Georg Jellinek developed the so-called doctrine of three elements and which came to be embedded in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States.<sup>17</sup> The effectiveness (or *effectivité*) of the entity becomes the linchpin of statehood-determination.<sup>18</sup> Such *effectivité* was subsequently systematized, into two dimensions, namely an *internal* and an *external* one.<sup>19</sup> The internal dimension of *effectivité* pertains to the ability of the authority that claims a monopoly on the exercise of public authority on a piece of territory to actually impose its will – and enforce its decisions – on the people living on that territory. For its part, the external dimension

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<sup>17</sup> Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

<sup>18</sup> In the following paragraphs, we will use the term *effectivité*, which is the terminology used by the ICJ.

<sup>19</sup> On this distinction, see J. d'Aspremont, "Regulating statehood: the Kosovo status settlement", 20 *Leiden J. Int'l L.* 649, 654 (2007).

of *effectivité* relates to the ability of that entity to enter into inter-state relations and claim state-like existence in the international arena of states.<sup>20</sup>

This nineteenth-century doctrine has been resilient and remains dominant in contemporary scholarship, albeit not without controversy. While international lawyers agree on the criteria of capture put forward by this mainstream construction, they disagree on what do with the object of their capture. On the one hand, there are international legal scholars who believe that once statehood has been captured by international law it becomes objective and universally opposable data within the whole international legal system. For them, once a state has penetrated the international legal system it becomes opposable to all parts of that system and to all stakeholders. In that sense, a state captured by international law is objectivized by the latter and statehood has a community-bestowed character.<sup>21</sup> The objectivation is made possible by the “Montevideo mirage”<sup>22</sup> meant to provide a formal yardstick to ascertain states, and supposedly constituting a rule of customary international law.<sup>23</sup> On the other hand, there are international legal scholars for whom the state enters the international legal system in relative terms only, existing within that system only to the extent those stakeholders are ready to accept it. For them, the concept of statehood operates within the system of international law inter-subjectively, thereby generating legal effects only in relation to those actors or regimes that are ready to give it some legal significance.<sup>24</sup> In other words, the fundamental difference between objectivists and subjectivists is as follows: the objectivists project stability in

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<sup>20</sup> Note in particular that the external *effectivité* of an entity hinges primarily on its recognition by other states. *Id.* at 655.

<sup>21</sup> T.M. Franck, *The Power of Legitimacy Among Nations* 190 (1990).

<sup>22</sup> By reference to the famous 1933 Montevideo Convention on the Rights and Duties of States, which, for the sake of the Convention, elaborates on the criteria an entity should satisfy to be considered a state.

<sup>23</sup> C. Ryngaert and S. Sobrie, “Recognition of states: international law or realpolitik? The practice of recognition in the wake of Kosovo, South Ossetia, and Abkhazia”, 24 *Leiden J. Int’l L.* 467 (2011); see also D. Bederman, *The Spirit of International Law* 49 (University of Georgia Press, 2002) (arguing that clear rules for what are the subjects of international law are felt essential for the construction of an international legal system).

<sup>24</sup> Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Req. for Advisory Op.), at 60 (Dec. 8), available at <http://www.icj-cij.org/docket/files/141/15726.pdf> (“Again, it is the factual context that should decide which value should weigh heaviest.”); Accordance with International Law of the

state-identification whereas inter-subjectivists accept that the notion, even within the legal system, remains in constant flux according to inter-subjective dynamics. While the tension between subjectivists and objectivists is of a paradigmatic nature, it is noteworthy that, from a historical point of view, the inter-subjectivist perspective predates the objectivist approach.<sup>25</sup> It is also interesting to note that the inter-subjectivist perspective has been called “positivist”, despite the latter having scarcely anything to do with voluntarism and state will.<sup>26</sup>

Arguably, most of the controversies witnessed in connection to statehood in the contemporary international legal scholarship revolve around these structural tensions between objectivism and intersubjectivism.<sup>27</sup> It suffices here to provide a few examples.

For instance, the old debate on the nature of recognition<sup>28</sup> that has been unfolding for the last century can be understood as unfolding along the lines of the above-mentioned conflict.<sup>29</sup> Proponents of the declaratory theory affiliate themselves with an objectivist approach to statehood whereas advocates of the constitutive theory have been embracing a

Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ 404 (July 22); *Oppenheim's International Law* § 12, at 17, § 71, at 108 (1st ed., 1945); para. 71; see also *Oppenheim's International Law* § 5, at 14, § 39, at 128 (R. Jennings and A. Watts (eds), Oxford Univ. Press 9th ed. 2008). Lauterpacht himself came to terms with this inter-subjectivism but found it an anomaly. It is this anomaly that led him to put forward his idea of a duty to recognize. See H. Lauterpacht, *Recognition in International Law* 87 (1947).

<sup>25</sup> This evolution is discussed in Crawford, *supra* note 6, at 14–19.

<sup>26</sup> *Id.* at 17.

<sup>27</sup> This chapter leaves aside the tensions between sovereign equality and anti-pluralism as well as legalized hegemony that may be operating in the law of statehood. For a study of those tensions in international law since 1815, see G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).

<sup>28</sup> J. d'Aspremont, “Recognition”, *Oxford Bibliographies Online*, (Nov. 21, 2012), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0009.xml>.

<sup>29</sup> In the same vein, see Koskeniemi, *supra* note 4, at 272. Some authors propose a “third way” to bridge this gap, in which recognition is neither merely constitutive nor merely declaratory but is more simply conducive to the effectiveness of the entity. See D.J. Bederman, *The Spirit of International Law* 83 (2002); J. Verhoeven, *La Reconnaissance Internationale dans la Pratique Contemporaine* 679 (1975); d'Aspremont, *supra* note 19, at 655. For the remarks on this approach made by Ryngaert and Sobrie, see *supra* note 23, at 471.



subjectivist approach.<sup>30</sup> The declaratory theory is probably more dominant in mainstream legal scholarship.<sup>31</sup> The reason this happens is precisely because recognition is thought of as objectivizing the birth of new states, conveying the impression that state creation is, within the legal system, not subject to “political arbitrariness”,<sup>32</sup> the inter-subjective posture being deemed “counter-intuitive”.<sup>33</sup>

The profound cleavage witnessed in the international legal scholarship during Kosovo’s declaration of independence manifested a similar oscillation between objectivism and inter-subjectivism. The dominant positions which emerged during the controversy shrouding the advisory opinion can also be understood in the light of this dichotomy. Indeed, both those arguing that Kosovo could not qualify as a state by virtue of some allegedly wrongful origins and those conversely saying that Kosovo had mustered enough recognition and effectiveness to qualify as a state expressed positions informed by objectivism.<sup>34</sup> On the contrary, those arguing that Kosovo constituted a state only in its relation with those recognizing the entity as a state can be seen as proponents of an inter-subjective approach.<sup>35</sup>

A last controversy that proves illustrative of the ubiquitous tension between inter-subjectivism and objectivism is the one that arose in connection to the entitlement of Palestine to seize the Prosecutor of the International Criminal Court.<sup>36</sup> In that case, the divisive point for

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<sup>30</sup> For a similar reading of these two approaches, see Crawford, *supra* note 6, at 21; K. Marek, *Identity and Continuity of States in Public International Law* 132 (1968); Ryngaert and Sobrie, *supra* note 23, at 467–90.

<sup>31</sup> Crawford, *supra* note 6, at 23, 25; *Deutsche Continental Gas-Gesellschaft v. Polish State*, 5 Ann. Dig. I.L.C. 11 at 13 (Germano-Polish Mixed Arb. Trib. 1929); “Opinions of the arbitration committee of the peace conference on Yugoslavia, opinion no. 1”, reprinted in A. Pellet, “The opinions of the Badinter Arbitration Committee. A second breath for the self-determination of peoples”, 3 *Eur. J. Int’l L.* 178, 182 (1992); “Opinions no. 10 of the arbitration commission of the international conference on Yugoslavia”, reprinted in D. Turk, “Recognition of States: A Comment”, 4 *Eur. J. Int’l L.* 66, 90 (1993).

<sup>32</sup> Ryngaert and Sobrie, *supra* note 23, at 470 (“An important aspect of its success lies in the fact that it deprives states of the prerogative of deciding on statehood based on political arbitrariness, in favour of objective legal norms.”).

<sup>33</sup> *Id.* at 467–90.

<sup>34</sup> *Id.*

<sup>35</sup> “J. d’Aspremont and T. Liefländer, “Consolidating the statehood of Kosovo: leaving the international law narrative behind”, 1 *J. Euro. Int’l Aff.* 8, 13 (2013).

<sup>36</sup> A. Zimmermann, “Palestine and the international criminal court *quo vadis?* Reach and limits of declarations under article 12(3)”, 11 *J. Int’l Crim. Jus.*

international lawyers was the nature of the determination of Palestine as a state. For some international lawyers, the status of Palestine – whether as a state or as a non-state entity – was objectively ascertained by international law in a way that binds the ICC. For others, the treatment given to Palestine was regime-specific in that the ICC can determine for itself whether Palestine is a state for the sake of the application of its statute.

While illustrations could be multiplied *ad infinitum*, these examples suffice to show the structural importance of the divide with respect to the way statehood operates within the legal system once it has been captured. The above-mentioned examples show how much scholarship on the law on statehood is fragmented between these two paradigmatic poles.<sup>37</sup> It is not necessary to discuss this structural divide any longer. Nor is it necessary to evaluate any of them. Instead, the next section tries to show that whatever side of these epistemological fences scholars have put themselves – legalism vs. facticism or objectivism vs. inter-subjectivism – they have all been part of the same enterprise, that is, the establishment of a law of statehood. It is the agenda behind this scholarly project that the following sections will critically review.

## II. THE AGENDA OF THE INTERNATIONAL LAW OF STATEHOOD AND THE MODERN ADVANCEMENT OF INTERNATIONAL LAW

This chapter argues that irrespective of their ultimate paradigmatic positions (that is irrespective of whether they are facticist, legalist, objectivist or subjectivist) experts of the law of statehood have been involved in a common project for the advancement of international law. Indeed, however they understand the apprehension of the volatile practice of state creation by the legal system and the effects of statehood within the legal system, experts have – consciously or unconsciously – been partaking in an explanatory, regulatory and epistemological quest whose contours are described here. It is the aim of this section to speculate on

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303 (2013); J. Vidmar, “Palestine and the conceptual problem of implicit statehood”, 12 *Chinese J. Int’l L.* 1 (2013).

<sup>37</sup> Note that Bederman identifies another dialectical move in the literature, namely between “neomedievalism” (centered on an unequivocal break of states’ authority and the rise of new actors) and “globalism” (based on the idea of an explosion of new and legitimate topics of international legal regulation). See Bederman, *supra* note 29, at 92–3.

the various motives that have informed the scholarly quest for an international law of statehood. According to the argument made here, the various agendas behind the idea of a law of statehood generally follow three specific dynamics: explanatory, regulatory and epistemological. These dynamics are *explanatory* in the sense that the law of statehood constructed by international legal scholars seeks to make sense of the intricate and volatile practice of state creation. They are *regulatory* in the sense that the law of statehood seeks to order the intricate and volatile practice of state creation. They are *epistemological* in the sense that they manifest the pursuit by one group of professionals of ownership on the intricate and volatile practice of state creation.

## 1. Explanatory and Elucidatory Ambitions

The first dimension of the project of the law of statehood is explanatory and elucidatory. It is geared towards generating intelligibility of an otherwise unintelligible phenomenon. The explanatory project behind the law of statehood is multifold. It includes a penchant for disentanglement through law of law-created problems (1.1) while also being anthropomorphic (1.2). Each of these inclinations is briefly reviewed and illustrated. Mention is then made of two of the main instruments by which the explanatory virtues of the law of statehood are maintained: proceduralization and territorialization (1.3).

### 1.1 Disentanglement of self-generated entanglements

The law of statehood is a self-nourishing prophecy. It provides a cognitive structure to look at the world. This cognitive structure is necessarily restricting. It comes to generate a certain type of complexity that only the law of statehood can solve. Said differently, the law of statehood creates entanglement which needs to be disentangled according to the paradigms in which the entanglement originated. It is noteworthy that the self-nourishing and self-referential law of statehood grows unabated as the international life continues to generate practice that does not fit in the growingly complex law of statehood paradigms, thereby constantly calling for adjustments and further sophistication. In that sense, the sophisticated modeling put forward by the law of statehood constantly generates cognitive insufficiency and the need for refinement to preserve its ability to explain the practice.<sup>38</sup> As a result, there is a

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<sup>38</sup> J. Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* 11 (2013).

sense of need among experts of the law of statehood that the latter yields problems that are “insufficiently explored”,<sup>39</sup> thereby generating calls to “take the international law of statehood further”.<sup>40</sup> This undoubtedly situates the law of statehood in the unbound hamster wheel of the constant disciplinary need for renewal witnessed in international law.<sup>41</sup>

The self-referential dynamic behind the law of statehood can be easily illustrated. For instance, international legal scholars have felt that it behooves them to explain why some effective entities cannot become states even while satisfying the criteria of statehood.<sup>42</sup> A disconnect between the law of statehood and the practice of non-recognized entities has itself spawned calls for new modeling and theorization. In the same vein, it has been claimed that the post-1990 developments were marked by an entanglement of the process of democratization and state creation. It has accordingly been contended that the status of democracy in the international law of statehood still is in need of scholarly clarification and ordering.<sup>43</sup> Another traditional example of such need for the disentanglement of a self-created entanglement is the common idea that neither the declaratory nor constitutive theories of recognition are satisfactory to explain the modern practice of recognition.<sup>44</sup> The famous duty to recognize designed by Lauterpacht can also be read in this light, for it was meant to correct the “anomaly” created by the constitutive character of recognition.<sup>45</sup>

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<sup>39</sup> *Id.* at 6–8.

<sup>40</sup> *Id.* at 11.

<sup>41</sup> Kennedy, *supra* note 1, at 335, 407.

<sup>42</sup> Vidmar, *supra* note 38, at 5.

<sup>43</sup> *Id.* at 3, 63–5.

<sup>44</sup> Crawford *supra* note 6, at 5. This is also a criticism made by Brownlie with respect to recognition:

[T]heory has not only failed to enhance the subject but has created a *teritum quid* which stands, like a bank of fog on a still day, between the observer and the contours of the ground which calls for investigation. With rare exceptions the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis.

I. Brownlie, “Recognition in theory and practice”, in *The Structure and Process of International Law: Modern Essays in Legal Philosophy, Doctrine and Theory* 197, 197 (R. St. J. Macdonald and D. Johnston (eds), 1983).

<sup>45</sup> Lauterpacht, *supra* note 24, at 65–7.

## 1.2 Anthropomorphism

Although this is not without paradox, the world often seems more intelligible if constructed and analyzed through models inspired by human nature. Thus, it is not surprising that anthropomorphism – this inclination, in the course of a descriptive exercise, to ascribe human forms or attributes to constructs, phenomena, practices or dynamics which are not necessarily themselves human – is omnipresent in the international law of statehood. It is argued here that the mainstream statehood doctrine manifests a clear anthropomorphist calling as access to the Eden of non-interference, immunity, sovereign equality, and territorial integrity – to name only a few of the privileges inherent in the recognition of a legal being in the international legal order – is reserved for privileged holders of the three or four keys prescribed by the famous criteria of statehood.<sup>46</sup> The famous doctrine of “fundamental rights of the states” is also a manifestation of the inclination of thinkers to transpose a human blueprint on their prescriptive and normative constructions of inter-state relations.<sup>47</sup>

This – surprisingly unchallenged – common understanding of the law of statehood often constitutes a mechanical transposition, without attention to the specificities of states and the dynamics of the international legal order, and of how the legal condition of individuals is understood under domestic law.

The anthropomorphic move behind the law of statehood should certainly not be seen as singular or extraordinary. Anthropomorphism is rather commonplace in the social sciences. In the thinking about international law, it occurs more often than not. In fact, anthropomorphism has been with international legal thinking since the early natural law manifestations of international law. It is, for instance, very present in the naturalist conceptualizations of international law found in the early scholastic systematizations of international law.<sup>48</sup> Even after

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<sup>46</sup> I have already made that point elsewhere. See J. d’Aspremont, “The law of recognition: a reply to E. Tourme-Jouannet”, 24 *Eur. J. Int’l L.* 691 (2013).

<sup>47</sup> See generally F. Poirat, “La doctrine des droits fondamentaux de l’etat”, 16 *Droits: Revue Française de Theorie Juridique* 83 (1992).

<sup>48</sup> See, e.g. A. Gentili, *On the Law of War* (J.C. Rolfe trans., 1933); F. de Vitoria, *Political Writings* (A. Pagden and J. Lawrance (eds), 1991). On Gentili, see generally *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Benedict Kingsbury and Benjamin Straumann (eds), 2011).

the estrangement of international law from natural law thinking,<sup>49</sup> international legal scholarship remained replete with anthropomorphic moves.<sup>50</sup>

Although not unprecedented, the anthropomorphist moves behind the law of statehood reinforce its elucidatory virtues and its overall appeal to international lawyers. Accordingly, it contributes to the explanatory project behind the law of statehood.

### 1.3 Elucidatory instruments of the law of statehood

Two aspects of the law of statehood seem to serve best its explanatory agenda: proceduralization and territorialization. These tools are instrumental in the elucidatory agenda of the law of statehood. Each deserves attention.

*1.3.1 Proceduralization* For lawyers, probably more than for international relations scholars, procedures can be more easily captured than eclectic and multi-layered processes whose intricacies are more difficult to understand. More precisely, for international lawyers, procedures constitute a way to make sense of complex processes by constraining them within formal walls. This is why the international law of statehood comes with a high degree of proceduralization of state creation. A good example of this is the proceduralization inherent in the right of self-determination whereby the exercise of that right must follow certain procedural patterns.<sup>51</sup> Proceduralization also resides in the voluminous literature dedicated to collective recognition processes<sup>52</sup> and collective creations of states.<sup>53</sup> Proceduralization is omnipresent in contentions that

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<sup>49</sup> See E. Jouannet, *Vattel and the Emergence of Classic International Law* (Hart Publishing, 2015).

<sup>50</sup> For a critical exploration of the anthropomorphic foundations of human rights law through the lens of modern communications theory, see W.P. Nagan and C. Hammer, "Communications theory and world public order: the anthropomorphic, jurisprudential foundations of international human rights", 47 *Va. J. Int'l L.* 725 (2007).

<sup>51</sup> *Western Sahara*, Advisory Opinion, 1975 ICJ 12 (Oct. 16) available at <http://www.icj-cij.org/docket/files/61/6195.pdf>. On the democratic dimension of the exercise of the right to self-determination, see J. d'Aspremont, "La création internationale d'états démocratiques", 4 *Revue Generale de Droit International Public*, 2005, at 889.

<sup>52</sup> See, e.g., J. Dugard, *Recognition and the United Nations* (1987).

<sup>53</sup> See, e.g., J. d'Aspremont, "Post-conflict administrations as democracy-building instruments", 9 *Chi. J. Int'l L.* 1, 1 (2008); d'Aspremont, *supra* note 51, at 889–908.

state creation is an “international law-governed process of overcoming an applicable counterclaim to territorial integrity”<sup>54</sup> or in the idea that secession is “a regulated process which prescribes peaceful and democratic procedures”<sup>55</sup> and which can be null or invalid.<sup>56</sup> There eventually are other forms of proceduralization which emphasize formal international acceptance<sup>57</sup> or “a grant of legal authority”.<sup>58</sup>

It is argued here that the success of the law of statehood can be traced back to its cognitive and explanatory virtues and the proceduralization that it makes possible. The proceduralization found in the law of statehood provides international lawyers with an elucidatory tool that can prove instrumental in the recognition of what is otherwise a volatile process. It is interesting to note, however, that proceduralization has become both a reason for the success of the law of statehood as well as a goal in itself. Indeed, in the recent literature, proceduralization is seen as an ideal towards which the law of statehood must lean.<sup>59</sup>

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<sup>54</sup> Vidmar, *supra* note 14, at 3–11 (state creation is an “international law-governed process of overcoming an applicable counterclaim to territorial integrity. This process is influenced by the statehood criteria, among other factors. The process prescribes certain democratic procedures and may even result in the international imposition of “democratic institutions”; he seeks to “demonstrate that the act of recognition was not crucial for the emergence of new states in the territory of the federation (of SFRY)”, arguing that it “was rather that the international involvement led to an internationalized extinguishing of the SFRY’s personality which made its claim to territorial integrity inapplicable”).

<sup>55</sup> A. Peters, “Does Kosovo lie in the lotus-land of freedom?”, 24 *Leiden J. Int’l L.* 95, 107 (2011) (“Any extraordinary allowance to secede has to be realized in the appropriate procedures, notably under recourse to free and fair referendum on independence or after democratic elections, ideally under international supervision.”).

<sup>56</sup> T. Christakis, “The ICJ advisory opinion on Kosovo: has international law something to say about secession?”, 24 *Leiden J. Int’l L.* 73, 73–86 (2011); see Peters, *supra* note 55, at 95–108. But see J. d’Aspremont, “Kosovo and international law: a divided international legal scholarship” (2008), available at <http://igps.files.wordpress.com/2008/03/kosovo-and-international-law-daspremont.pdf>; see also *Maritime Dispute* (Peru v. Chile), Verbatim Record, (Dec. 4, 2012), [www.icj-cij.org/docket/files/137/17206.pdf#view=FitH&pagemode=none&search=%22December%204%202012%22](http://www.icj-cij.org/docket/files/137/17206.pdf#view=FitH&pagemode=none&search=%22December%204%202012%22).

<sup>57</sup> Lauterpacht, *supra* note 24, at 66.

<sup>58</sup> M. Weiler, “Modesty can be a virtue: judicial economy in the ICJ Kosovo opinion?”, 24 *Leiden J. Int’l L.* (2011), 127, 129.

<sup>59</sup> Vidmar, *supra* note 38, at 8.

*1.3.2 Territorialization* It will not come as a surprise that international life seems a much more intelligible process when constructed in territorial units. The law of statehood – and some of its affiliates like sovereignty and territorial integrity – comes with models that recognize the world in territorial terms. For instance, the effectiveness found behind the so-called criteria of statehood is territorial effectiveness.<sup>60</sup> Likewise, the “ineradicable”<sup>61</sup> catchwords constantly referred to by international legal scholars in this context – like sovereignty and territorial integrity<sup>62</sup> – bring about, if not a structuring of the world along territorial lines,<sup>63</sup> at least a territory-based narrative. It is in this sense that the law of statehood can be seen as conveying a territorialization of the world that, in turn, enhances the explanatory appeal of the law of statehood. Territorialization facilitates understanding of the world and that of international law, which it makes more intelligible and operable.

An important remark logically follows this point. Certainly, the structuring of the world along territorial lines which comes with the law of statehood is not surprising. It could even be seen as tautological, for the law of statehood is primarily about defining territorial units. Yet, at least from a theoretical perspective, the territorialization of international law should not be taken for granted. First, there are now a growing number of actors whose behaviors have been incorporated in the ambit of international law without these actors being recognized in territorial terms.<sup>64</sup> Second, it must be acknowledged that the central subjects of the system of international law could well be defined according to non-territorial categories. The day the oceans expunge some states from the map, international lawyers may be forced to rethink the world on a non-territorial basis.<sup>65</sup> For the time being, territorialization and the law of statehood remain linked, the former consolidates the success of the latter because of its powerful explanatory virtues.

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<sup>60</sup> For a critical review of these criteria, see Crawford, *supra* note 6, at 95.

<sup>61</sup> *Id.* at 32.

<sup>62</sup> For a critical analysis of some of these common catchwords, see G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), 25–61.

<sup>63</sup> Sovereignty is “a somewhat unhelpful, but firmly established, description of statehood; a brief term for the State’s attribute of more-or-less plenary competence”. Crawford, *supra* note 6, at 32.

<sup>64</sup> See generally J. d’Aspremont, *Participants in the International Legal Systems: Multiple Perspectives on Non-State Actors in International Law* (2011).

<sup>65</sup> R. Rayfuse and S.V. Scott, *International law in the Era of Climate Change* (2012); D. Badrinarayana, “Global warming: a second coming for international law?”, 85 *Wash. L. Rev.* (2010) 253, 255.



## 2. Regulatory Ambitions

The second driving force behind the law of statehood is more managerial, in that the law of statehood has a proclivity to expand its control on the volatile phenomenon of state creation. The legalization of the state creation inherent in the law of statehood and the proceduralization discussed above can simultaneously be understood as an endeavor to regulate political power. In that sense, the last fifty years of international legal scholarship dedicated to the question of statehood has constituted a heroic conquest, led by international lawyers, to secure a voice in one aspect of international life. The production of scholarly work on the matter can thus be construed as the attempted rise to power of an academic aristocracy on questions that were previously reserved for chancelleries.

Such a regulatory agenda can be delineated in several versions. There is first a general undertaking to control and program the births and deaths in the international society. One also witnesses a quest for a completeness of the international legal system. Each of these inclinations is briefly reviewed and illustrated. This section then turns to two of the main tools by which the regulatory virtues of the law of statehood are maintained: legalism and, again, proceduralization.

### 2.1 Control (and programming) of the death and birth of states

Controlling membership of the international legal system has long been a pipe dream of international lawyers. This is a fantasy about gaining power to determine the happy few, who will enjoy the privileges attached to membership in the international legal system as well as an ability to filter out the many who do not deserve entry into the elite club. As part of this regulatory agenda, scholars seek a certain type of ordering that, at least on the surface, guarantees formal equality between the members admitted to the club.<sup>66</sup> This yearning for controlling entry into the international legal system even seems a natural and intuitive penchant among international lawyers.<sup>67</sup> Accordingly, it is not surprising that the law of statehood is not the only manifestation of such a pursuit of control

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<sup>66</sup> For a critical and illuminating examination of this question outside the law of statehood, see G. Simpson, *Great Powers and Outlaw States* (2004). For the anti-pluralistic moves found in the law of statehood in connection with democracy, see generally J. d'Aspremont, *L'Etat Non Démocratique en Droit International. Étude Critique du Droit International Positif et de la Pratique Contemporaine* (2008).

<sup>67</sup> Ryngaert and Sobrie, *supra* note 23, at 469.

over the composition of the international society found in international legal scholarship and practice. The international law of succession is another good example.<sup>68</sup> Whether such a pursuit will ever succeed is a different question, one which does not need to be addressed here.

## **2.2 Completeness of international law**

It is argued here that the law of statehood also is an attempt within the larger quest of international lawyers for a comprehensive paradigm in which they seek a normative order regulating all aspects of the international life. This endeavor is often premised on the idea that international law cannot qualify as a legal system properly if it does not regulate all the important aspects of international life, including births and deaths of its most important actors.<sup>69</sup> From this perspective, there is no place for black holes in the international legal space as they would create the risk of absorbing the whole legal universe and the profession organized around it. This “fear of the dark” and the thirst for completeness to the international legal system that comes with it are, according to the argument made here, strong underpinnings of the law of statehood. Indeed, the law of statehood can be understood as an indispensable element to allow and realize the completeness to the international legal system and the ability of such a system to control the main aspects of international life. It is noteworthy that international lawyers and experts in the law of statehood are sometimes completely transparent about this dimension of the law of statehood. For example, James Crawford, who

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<sup>68</sup> It is interesting to note that, read as a project for the control of the births and deaths in the international society, the project of the international law of succession has been the object of severe criticism, notably because of its denial of the political question of identity of states inevitably preceding the formal determination of the consequences of identity changes. Many would contend that there simply is no possibility to locate the notion of continuity or succession in advance. See M. Craven, “The problem of state succession and the identity of states under international law”, 9 *Eur. J. Int’l L.* 142, 152–62 (1998) (defining considerations about whether or not the state concerned retains its legal identity in each case); M. Koskenniemi, “Report of the director of studies of the English-speaking section of the centre”, in 1 *State Succession: Codification Tested Against the Facts* 65, 122–4 (1997). But see d’Aspremont, *supra* note 53, at 1–16 (2008).

<sup>69</sup> Crawford, *supra* note 6, at 5 (“Fundamentally, the question is whether international law is itself, in one of its most important aspects, a coherent or complete system of law.”); see also Ti-Chiang Chen, *The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States* 18–19 (L.C. Green ed., 1951).

has been very open about this aspect of his scholarship on statehood, describes his work as an “attempt to defend formal coherence and completeness of international law as a system of law.”<sup>70</sup>

### 2.3 Regulatory instruments of the law of statehood

The two aspects of the law of statehood that are the most conducive to the regulatory project of the law of statehood are legalism and proceduralization. The last fifty years of international legal scholarship can even be read as an attempt to shore up these two features of the law of statehood with an eye towards maximizing the regulatory grip that international lawyers can claim on the international life.

*2.3.1 Legalism* The turn to legalism is the most common tactic to which international lawyers have resorted in order to give weight to the regulatory project behind the law of statehood. Here, legalism is not merely meant as a turn to the narrative of law.<sup>71</sup> In this context, legalism more specifically constitutes the attempt by some international lawyers to legalize state creation and to define statehood by criteria of legality rather than effectiveness. Such a legalism comes to confer upon the law of statehood “some defined time, space and subject matter for its ‘proper’ (albeit not autonomous) operation”,<sup>72</sup> without which it could not perform its regulatory function.

Such an endeavor is particularly present among those international lawyers with objectivist inclinations, that is, those who affirm, as was explained above, that statehood, once captured by the international legal system, is opposable in all parts of that system and to all stakeholders.<sup>73</sup> If statehood operates objectively within the legal system, the legal system in turn can objectively regulate statehood. This is where the strong support for the idea of legality-based criteria of statehood finds its roots.

The way such a legalism operates and manifests itself can be succinctly described as follows. According to that legalist view, “success or failure”<sup>74</sup> can no longer be the determinative factor. A whole series of criteria come to supplement or even overwrite the traditional

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<sup>70</sup> See F. Johns, *Non-legality in International Law: Unruly Law* (2013).

<sup>71</sup> See generally M. Koskenniemi, “What is international law for?”, in *The Politics of International Law* (2011), 241.

<sup>72</sup> Johns, *supra* note 9, at 8.

<sup>73</sup> Cf. *supra* 1.2.

<sup>74</sup> Anzilotti, *supra* note 8, at 154.

effectiveness-based criteria of statehood and can bar statehood.<sup>75</sup> If one of these conditions is disregarded, access to the international legal system, is denied. Denial takes the form of nullifying statehood<sup>76</sup> – envisaged as a legal act.<sup>77</sup> Some other criteria can even offset the absence of effectiveness<sup>78</sup> and provide a direct access to the international legal system. Such a legalism usually comes with a compelling narrative built on a wide variety of concepts and principles, like *ex injuria jus non oritur*,<sup>79</sup> principle of territorial integrity,<sup>80</sup> the concepts of *ius cogens*, the prohibition to use force,<sup>81</sup> self-determination,<sup>82</sup> democracy,<sup>83</sup> and the

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<sup>75</sup> Peters, *supra* note 7 (“[A] middle ground. Effectiveness and legality are not simple opposites, because, as explained, effectiveness is itself a legal principle which performs normative functions. But to the extent that effectiveness has an a-legal quality, considerations of effectiveness and of legality form a system of communicating vessels. Put differently, there is a dialectics of ‘might’ and ‘right’. A relative weakness of effective government can be compensated by a surplus of legality/legitimacy. Effectiveness is a necessary, but no sufficient criterion of statehood. It must be complemented by criteria of legality and of legitimacy. Still, effectiveness remains indispensable. It must not be substituted by indices of legality or legitimacy, because such an approach would transform the international legal system into a purely virtual one which could not perform its ordering function. However, because effectiveness is a relative concept, it is difficult to call a government arrangement completely non-effective.”).

<sup>76</sup> *Id.*

<sup>77</sup> For a rejection of this approach, see “On the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo” (Req. for Advisory Op.) (Dec. 4), [www.icj-cij.org/docket/files/141/15718.pdf#view=FitH&pagemode=none&search=%22Burundi%22](http://www.icj-cij.org/docket/files/141/15718.pdf#view=FitH&pagemode=none&search=%22Burundi%22).

<sup>78</sup> Peters, *supra* note 7; see also Crawford, *supra* note 6, at 97–9.

<sup>79</sup> T. Christakis, “The state as a primary fact: some thoughts on the principle of effectiveness”, in *Secession: International Law Perspectives* 138, 139 (Marcelo G. Kohen (ed.), 2006).

<sup>80</sup> O. Corten, “Territorial integrity narrowly interpreted: reasserting the classical inter-state paradigm of international law”, 24 *Leiden J. Int’l L.* (2011), 87, 87–94.

<sup>81</sup> Crawford, *supra* note 6, at 107; see also A. Peters, “Membership in the global constitutional community”, in *The Constitutionalization of International Law* 153, 180–81 (J. Klabbers et al. eds, 2009) (arguing that the same effect should be granted to all peremptory norms).

<sup>82</sup> R. Wilde, “Self-determination, secession and dispute settlement after the Kosovo advisory opinion”, 24 *Leiden J. Int’l L.* (2011), 149, 149–54; see generally Theodore Christakis, *Le droit à l’autodétermination en dehors des situations de décolonisation* (1999), 253–6.

<sup>83</sup> See Peters, *supra* note 7, at 171.

obligation not to recognize. Legality criteria are also said to originate in special regimes.<sup>84</sup> Legalism also manifests itself in the vindication of primary obligations, like the right to a name.<sup>85</sup>

Although subject to strong objections,<sup>86</sup> this legalism has been one of the dominant features of the last fifty years of scholarship. The idea that criteria of legality impact statehood is now widely accepted among scholars.<sup>87</sup> It is argued here that this approach is the best manifestation of the regulatory project which undergirds the law of statehood. This is openly acknowledged by the proponents of the legalist approach to statehood.<sup>88</sup>

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<sup>84</sup> See M.G. Kohen and K. Del Mar, “The Kosovo Advisory Opinion and UNSCR 2144 (1999): A declaration of ‘independence from international law’?”, 24 *Leiden J. Int’l L.* 109 (2011) (discussing the legality of the declaration of the independence of Kosovo in the light of Security Council Resolution 1244 (1999)). For a different opinion, see Wilde, *supra* note 82 at 149–54; M. Weller, “Modesty can be a virtue: judicial economy in the ICJ Kosovo opinion?”, 24 *Leiden J. Int’l L.* (2011), 127.

<sup>85</sup> *Application of the Interim Accord of 13 September 1995* (Maced. v. Greece), Judgment, 2011 I.C.J. 644 (Dec. 5); I. Bantekas, “The authority of states to use names in international law and the Macedonian affair: unilateral entitlements, historic title, and trademark analogies”, 22 *Leiden J. Int’l L.* 563 (2009); F. Messineo, “Maps of ephemeral empires: the ICJ and the Macedonian name dispute”, 1 *Cambridge J. Int’l & Comp. L.* (2012), 169.

<sup>86</sup> See B. Roth, “Secessions, coups and the international rule of law: assessing the decline of the effective control doctrine”, 11 *Melb. J. Int’l L.* (2010) 393; Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Op.) at 58 (Dec. 8), available at <http://www.icj-cij.org/docket/files/141/15726.pdf> (“Now, Serbia and its supporters claim that the rule of territorial integrity and consent of the parent State regulate the process of independence. But surely this is both conceptually and historically wrong? Was the United States born out of a legal process that peaked in the consent of Britain? Or Russia or Germany? Venezuela, Algeria or Bangladesh or indeed Serbia? Did any of the republics formerly part of the SFRY emerge from a process that respected the integrity of the mother State or out of the consent of the latter? They did not.”); see also Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Op.) (Dec. 4), available at <http://www.icj-cij.org/docket/files/141/15738.pdf> [hereinafter Verbatim Record CR 2009/28].

<sup>87</sup> Crawford, *supra* note 6, at 97–173. According to Crawford, “there is nothing incoherent about the legal regulation of statehood on a basis other than that of effectiveness” and “there is now a considerable amount of practice in favour of regulations of this type.” *Id.* at 106.

<sup>88</sup> This is expressly acknowledged by Crawford, *supra* note 6, at 99.

2.3.2 *Proceduralization (bis)* Mention has already been made of the proceduralization that is instrumental in the performance of explanatory functions by the law of statehood. Interestingly, the proceduralization witnessed in the law of statehood is also valued for the regulatory tools it provides to international lawyers. Indeed, elevated into a procedure, state creation lends itself more easily to regulation. For instance, a proceduralized law can be subjected to democratization.<sup>89</sup> Likewise, a reading of the creation of states – and especially for secession processes<sup>90</sup> – as being that of a formal procedure that can be null or invalid provides a great sense of control over the process of disintegration of states. It is no surprise that this reading of the Kosovo advisory opinion delivered by the International Court of Justice<sup>91</sup> has gathered strong support among scholars.<sup>92</sup>

### 3. Epistemological Self-rehabilitating Ambitions

The explanatory and regulatory agendas behind the law of statehood described above are probably more conspicuous than controversial. Other epistemological moves behind the construction at the heart of the law of statehood are less perceptible. They pertain to the internal dynamics of groups of professionals who dedicate their lives to the study (and construction) of international law. Most of such driving forces are geared towards the rehabilitation of the profession of international lawyers. They must now be briefly described. Special attention is paid to the search for sophistication (3.1), the obfuscation of interdisciplinary study (3.2), the production of new materials of study (3.3) and the quest for the ubiquity of international law as a discipline (3.4).

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<sup>89</sup> Vidmar, *supra* note 38.

<sup>90</sup> See generally T. Christakis, “The state as a primary fact: some thoughts on the principle of effectiveness”, in *Secession: International Law Perspectives* 138 (M.G. Kohen (ed.), 2006); A. Tancredi, “A normative due process in the creation of states through secession”, in *Secession: International Law Perspectives* 171 (M.G. Kohen ed., 2006).

<sup>91</sup> See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 437 (July 22).

<sup>92</sup> Christakis, *supra* note 56, at 73–86; see also A. Peters, “Does Kosovo lie in the lotus-land of freedom?”, 24 *Leiden J. Int’l L.* 95, (2011), 105–7; but see J. d’Aspremont, *supra* note 53; see also Verbatim Record CR 2009/28, *supra* note 86 (statements from the Republic of Burundi).

### 3.1 Sophistication as redemption

Within the law of statehood, sophistication often constitutes a self-indulging scholarly ambition. It is cherished and generated by international legal scholars themselves. Sophistication is not only sought after for the above-mentioned potentially greater explanatory force it conveys. It is now common for international lawyers to seek sophistication for its salutary character. Sophistication is now elevated as the indicator of the value and intellect of international lawyers. It is through sophistication that the international lawyer secures intellectual and communitarian salvation.

In the particular context of the law of statehood, sophistication is mostly definitional, or procedural. It is definitional when it manifests itself through multiplication of the criteria of statehood,<sup>93</sup> for example by elevating democracy in a criterion of statehood.<sup>94</sup> Definitional sophistication is similarly found in attempts to design subtle taxonomy, like those distinguishing states from para-states,<sup>95</sup> de facto states,<sup>96</sup> state-like entities<sup>97</sup> or de facto regimes.<sup>98</sup> Sophistication is procedural when, as mentioned above, state creation is construed as an “international law-governed process of overcoming an applicable counterclaim to territorial integrity”<sup>99</sup> or when secession is thought of as “a regulated process which

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<sup>93</sup> See Crawford, *supra* note 6, at 96–173 (discussing the possibility of additional criteria for Statehood).

<sup>94</sup> See A. Peters, “Statehood after 1989: effectivités between legality and virtuality”, in *Select Proceedings of the European Society of International Law 171* (J. Crawford and S. Nouwen (eds), 2012) (discussing the possibility for democracy to be a new criterion for statehood).

<sup>95</sup> K. Pelczyńska-Nalecz, K. Strachota and M. Falkowski, “Para-states in the post-Soviet area from 1991 to 2007”, 10 *Int'l Stud. Rev.* (2008), 370.

<sup>96</sup> S. Pegg, *International Society and the De Facto State* (1998).

<sup>97</sup> “Independent international fact-finding mission on the conflict in Georgia, report” (“*Tagliavini-Report*”) of September 2009, vol. 2, at 134, available at [http://www.ceiig.ch/pdf/IIFFMCG\\_Volume\\_II.pdf](http://www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf).

<sup>98</sup> J.A. Frowein, “De facto regime”, in *Max Planck Encyclopedia of Public International Law* 4–5 (online ed., Mar. 2009); R. Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix*, (2003), 247–50.

<sup>99</sup> Vidmar, *supra* note 38, at 3–11 (seeking to “demonstrate that the act of recognition was not crucial for the emergence of new states in the territory of the federation (of SFRY)”, arguing that it “was rather that the international involvement led to an internationalized extinguishing of the SFRY’s personality which made its claim to territorial integrity inapplicable”; state creation is “international law-governed process of overcoming an applicable counterclaim to territorial integrity. This process is influenced by the statehood criteria, among other

prescribes peaceful and democratic procedures”<sup>100</sup> and which can potentially be null or invalid.<sup>101</sup>

This is certainly not the place to gauge the epistemological value of sophistication. However, as I have contended elsewhere,<sup>102</sup> sophistication can often reveal itself to be counter-productive when assessed in the light of its assigned objectives. In the context of the law of statehood, sophistication may be seen as increasing the explanatory deficiency of the law of statehood and undermining its regulatory power. The inextricable and growing disconnection between the sophisticated modeling of the law of statehood and an incongruous practice often frustrates the ability of the law of statehood to explain and regulate such a practice.

### **3.2 Camouflaged interdisciplinarity**

As was mentioned above, legalism has been one of the main tools to promote and implement the regulatory agenda of the law of statehood. Legalism, however, has also been serving another aspect of the agenda behind the law of statehood. Indeed, through the above-mentioned legalism, international lawyers have been able to camouflage their craving for interdisciplinarity. Indeed, through the law of statehood, international lawyers interact with a wild international arena already patrolled by the experts of international relations and political theory.<sup>103</sup>

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factors. The process prescribes certain democratic procedures and may even result in the international imposition of democratic institutions”).

<sup>100</sup> Peters, *supra* note 92, at 107 (“Any extraordinary allowance to secede has to be realized in the appropriate procedures, notably under recourse to free and fair referendum on independence or after democratic elections, ideally under international supervision.”).

<sup>101</sup> Christakis, *supra* note 56, at 73–86; see Peters, *supra* note 92, at 105–7. But see d’Aspremont, *supra* note 56.

<sup>102</sup> J. d’Aspremont, “Wording in International Law”, 25 *Leiden J. Int’l L.* (2012), 575.

<sup>103</sup> Referring to the Kosovo Advisory Opinion, Koskenniemi writes:

[I]t was impossible to argue about the lawfulness of the unilateral declaration of independence without a general view of the significance of nationhood and sovereignty today, the role of international institutions and the experience of war and peacemaking in Europe and more widely. The (universal) legal concepts and the specific histories were then woven together by the legal “teams” in a proposal to decide the case one way or another. At the same time, the available legal concepts enabled the understanding of the differences in genuinely political terms – as differences about how to understand Balkan history and the relations of the several communities there – and the assessment of them through a vocabulary that, although it was open-ended,



In that context, the law of statehood is what allows international lawyers to enter into a new universe and to toy, on the basis of their own techniques and methods, with phenomena recognized and analyzed by other disciplines and inject therein their own dose of legalism.

The foregoing calls for an important remark. It seems no longer disputed that interdisciplinarity is relative in at least two senses. First, there is as much interdisciplinarity as the (relative and self-defined) boundaries of the involved disciplines allow. This is why interdisciplinarity often carries with it dubious politics.<sup>104</sup> Second, law, as an argumentative practice, necessarily seeks the design of universal standards applicable in the international world.<sup>105</sup> Importantly, for the sake of this argument, it is noteworthy that international lawyers often try to bridge law and politics, before taking a plunge into – and seeking to exert their influence on – the latter. As I noted elsewhere,<sup>106</sup> international legal scholars are uneasy when grappling with a given question without including it in the realm of international law. It is as if international legal scholars cannot zero-in on non-legal phenomena without feeling a need to label them as law. The law of statehood seems to epitomize this penchant of international legal scholars. One continues to wonder,

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reaffirmed the need to obtain some minimal agreement from the populations themselves about how to live together in the future.

M. Koskenniemi, “Law, teleology and international relations: an essay in counterdisciplinarity”, 26 *Int'l Rel.* (2012), 3, 25.

<sup>104</sup> See J. Klabbers, “The relative autonomy of international law and the forgotten politics of interdisciplinarity”, 1 *J. Int'l L. & Int'l Rel.* (2005), 355.

<sup>105</sup> As Koskenniemi wrote:

Much of the debate concerning the relation between international law and politics has focused on the applicability of universal standards in the international world. From Hans Morgenthau's Frankfurt doctoral thesis, to Hersch Lauterpacht's views of the completeness of the international legal system, to Julius Stone's defense of politics in a fragmented world and Thomas M. Franck's exploration of the “political questions” doctrine, lawyers have debated the wisdom of generalizing about the facts of the international world, supposedly the realm of the singular, the extreme, the historically specific. There are not many cases from international practice (in contrast to academic writing), however, where lawyers would have raised their hands in deference to “the political”.

Koskenniemi, *supra* note 103, at 22.

<sup>106</sup> J. d'Aspremont, “From a pluralization of international norm-making process to a pluralization of the concept of international law”, in *Informal International Lawmaking* (J. Pauwelyn, R. Wessel and J. Wouters. (eds), 2012).

however, why international legal scholars cannot study the phenomenon without portraying it as a legal phenomenon.

### **3.3 Epistemological ownership and quest for new legal materials**

Another set of professional dynamics that sustain the development of a law of statehood is an epistemological move I have already examined elsewhere. Indeed, the law of statehood brings to existence a new scholarly field. It allows the legalization of world politics and the elevation of the volatile phenomenon of state-creation as a rich muse for scholarly study. It is a treasure trove that helps scholars find new research materials and open new avenues for legal research.<sup>107</sup> It is simultaneously a tactic to deprive other social sciences of any monopoly on this aspect of the international life. Said differently, it not only feeds international lawyers' appetite for new subjects, but also allows them to claim ownership of a phenomenon that would otherwise fall exclusively in the ambit of other areas of study.<sup>108</sup> If it is construed, the law of statehood seems to be rich soil for future scholarly mushrooming. Practice, at least when constructed and deciphered through the categories of the law of statehood, provides abundant materials of study, thereby opening up huge fields of scholarly research.

The development of the law of statehood is, of course, an old scholarly endeavor. Its inception dates back to a time where international legal scholars were few and where imposing one's mark or leaving one's trace on the knowledge about international law was far less arduous than it is today. In that sense, the law of statehood, as an epistemological enterprise, pre-dates the current scholarly gluttony observed in the contemporary era of legal scholarship. This being said, it is hard to deny that contemporary scholarship exhibits an unprecedented investment in the expansion, fine-tuning and sophistication of the law of statehood. Such devotion has turned pathological, for the scholarly gluttony is currently exacerbated by the unabated difficulty for everyone to find a niche, the aggressive competition igniting a feeling of constriction.<sup>109</sup> Such a

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<sup>107</sup> For an illustration of that phenomenon, see D. Johnston, "Theory, consent and the law of treaties: a cross-disciplinary perspective", 12 *Aust. Y.B. Int'l L.* (1988–89), 109.

<sup>108</sup> On the battle for controlling the production of discourse, see M. Foucault, "The order of discourse", in *Untying the Text: A Post-Structuralist Reader* (R. Young (ed.), 1981), 48, 52.

<sup>109</sup> For more on this argument, see J. d'Aspremont, "Softness in international law: a self-serving quest for new legal materials", 19 *Eur. J. Int'l L.* (2008), 1075.

regulatory gluttony is certainly not unique and has been observed in other areas.<sup>110</sup> It would be of no avail to dwell on it here.

### 3.4 The dream of ubiquity of the discipline of international law

As the above-mentioned legalist tactics to which experts of the law of statehood have been resorting illustrate, the quest for universal standards in the international world is, from the perspective of international lawyers, a quest for ubiquity of international law. Indeed, it is the pursuit of the dream of having all aspects of international life, including the most volatile of them like births and deaths, regulated by international law. This enterprise is not only a regulatory one as was described above.<sup>111</sup> It is also an epistemological one, in that it is a way to ensure the omnipresence of the discipline of international law. In that sense, the law of statehood is a hegemonic disciplinary enterprise at the service of professionals who seek to make their expertise omnipresent in (the study of) international life.

## III. CONCLUDING REMARKS

All the scholars engaged in the law of statehood make different methodological moves and pursue different agendas. In that sense, the scholarship on the law of statehood is pluralistic in its nature and its ambitions. This chapter has attempted to expose such a plurality. Whether experts of the law of statehood are facticist, legalist, objectivists, or inter-subjectivists (as described in section I) and whether they pursue a regulatory, explanatory or epistemological agenda (as described in section II) matter little for the purpose of this chapter. There is no meta-criterion that elevates one approach or one agenda over the others. More fundamentally, there is no meta-criterion that can (in)validate the law of statehood altogether but the fact that the law of statehood is a social reality. It seems uncontroversial that a large majority of international lawyers write on the law of statehood, use its narratives and construct the world according to its cognitive paradigms.

As was already mentioned above, the law of statehood has been with international lawyers since the nineteenth century. The law of statehood, in its more than 100 years of existence, has offered a unique tool to make a (certain) sense of the international world. It has simultaneously

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<sup>110</sup> See *id.*; J. d'Aspremont, "The politics of deformalization in international law", 3 *Goettingen J. Int'l L.* (2011), 503.

<sup>111</sup> See *supra* section II.3.

provided a confidence-building framework for the moments of crisis or turbulences that inevitably follow attempts to apply law to the volatile phenomenon of state-creation. It is true that the success of the law of statehood has often been tempered by the self-created unintelligibility it has generated, as well as the limited grip it has offered on international life. However, the floundering of the regulatory and explanatory projects of the law of statehood should not alter the luster of this social reality. Indeed, the law of statehood remains an admirable and impressive enterprise of craftsmanship. By virtue of the level of sophistication it has reached in contemporary legal thinking, the scholarship on the law of statehood is closer to art than to a banal, naïve, managerialist and descriptive project. As in any art, fundamental discrepancies are observed in the techniques and the skills of professionals fluent in the law of statehood. After all, more than the aesthetics, variations of techniques and normative ambitions constitute the very reason why art is so fascinating.