CHAPTER THREE

THE EXTINCTION OF STATES

Mariano J. Aznar-Gómez*

1. Introduction

The state still is the clef de voute of the international system and of international law. Both social and legal layouts are based on the state. In several codification processes in the International Law Commission (ILC) – particularly with regards to the Declaration on the Rights and Duties of States, the Law of treaties or the Succession of States – attempts were made to clarify the legal meaning of the term ‘state’, but no definition was finally drafted. Actually, such a definition was qualified as controversial¹ or, even, non-useful.² A more recent definition, however, was given by the Badinter Commission: “The State is commonly defined as a community which consists of a territory and a population subject to an organised political authority; that such a State is characterised by sovereignty (…)”.³ Classical jurisprudence has also underlined these three core elements,⁴ as it has been done by conventional practice of states⁵ and doctrine.⁶

The state and the requisites for statehood – population, territory and government – have been interiorised as implied terms of art by tribunals, scholars

---

* The author would like to thank Carlos Jiménez Piernas for his most valuable comments on an earlier draft of this article, and Elena Pérez for her kind revision of the English text. The views expressed are solely those of the author, as are any errors. This contribution was prepared within the framework of the R+D Project DER 2009-13752-C03-03, of the Spanish Ministry of Science and Innovation.

⁴ Deutsche Continental Gesellschaft v. Polish State, (1929) 5 International Law Reports, p. 11.
⁵ See e.g. art. 1 of the 1933 Montevideo Convention, under which “[t]he 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’.
⁶ Jules Basdevant defined ‘state’ as “[l]e terme désignant, du point de vue du droit international, un groupement humain établi de manière permanente sur un territoire, ayant une organisation politique propre, dont l’existence politique dépend juridiquement de lui-même et relevant directement du droit international”; in: Dictionnaire de la terminologie du droit international, Paris: Sirey 1960, p. 264. However, for Krystyna Marek, Identity and Continuity in Public International Law, Geneva: Droz 1955, p. 14,”[t]he identity of states is the identity of its international rights and obligations”. 

and, most evidently, by states themselves when recognising other states. Interestingly, most states before the International Court of Justice (ICJ) in the recent advisory proceedings regarding the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo – and some of the judges in their dissenting or separate opinions – have accepted those three elements, reducing the discussion to the assessment of the effectiveness of some of them (particularly an independent government) and the weight to be given to recognition of Kosovo by other states. Existence and recognition of states are thus interlinked terms, notwithstanding their different scope.

The international community has witnessed (and still witnesses) situations in which some states might not deserve this legal qualification. The cases of the Congo around 1960 or Somalia since 1991 are paramount. However, in no case has the international community derived from these situations the extinction of a state as a logical consequence. The ‘pure’ extinction of a state has been scholarly refused due to some terror of sovereignty vacuum, hence labelling the state as ‘failed’. States have also preferred a somehow cynical presumption of statehood instead of admitting the disappearance of a state. Paradoxically, they use the same presumption for the admittance of ‘new members to the club’ barely fulfilling the criteria of statehood.

7 Hereinafter: Kosovo affair.
8 Recognition has been generally admitted as having a declaratory, non-constitutive character. See James Crawford, The Creation of States in International Law, Oxford: Oxford University Press 2006, passim. However, as a by-product of positivism, recognition used to be a constituent accepted criterion of statehood: see Oppenheim/Lauterpacht, International Law: A Treatise, London: Longman 1955, p. 125: “A state is, and becomes, an International Person through recognition only and exclusively.”
9 There are other cases that, in some moments of their recent history, could be equally labelled, like Afghanistan, Bosnia-Herzegovina in the first days of its independence, Haiti, Lebanon, Liberia, Rwanda during the days of genocide, Sudan or Sierra Leone, but also Cambodia after the 1991 Paris agreement, the Lebanon in the 1980s or, even, China during the 1930s.
10 However, two decades ago, Koskeniemmi put it simply: “[S]tatehood has its reasons it is not a naturalistic deus ex machina. If and when those reasons do not exist, statehood can claim no particular protection”; see Martti Koskeniemmi, ‘The Future of Statehood’, (1991) 32 Harvard International Law Journal, p. 407–8. Some years earlier, Kristyna Marek expressed a quite similar opinion: “There is a beginning and an end to the state, as to everything else’ (Marek, supra n. 6, p. 5). And even earlier, Kelsen opined that “a national legal order begins to be valid as soon as it has become – on the whole – efficacious; and it ceases to be valid as soon as it loses this efficacy” (Hans Kelsen, General Theory of Law and State, Cambridge (Mass.): Harvard University Press 1945, p. 220).
12 France recognising the United States in 1778 (protested by the UK), the United States recognising Panama in 1903 (protested by Colombia), more than 80 states recognising