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# State Continuity in the Absence of Government: The Underlying Rationale in International Law

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## Abstract

*The traditional criteria for statehood assume that a state must have a government that enables state effectiveness. In the absence of a separate criterion for state continuity, the 'constitutive elements' for state creation have been regarded as also 'continuative elements' that preserve a state from extinction. However, practice has shown that a state can continue to exist even in the absence of government, which implies that simple assumptions on state continuity, paralleling rationale developed in the discourse of state creation, are inadequate as an explanatory framework for the situation and should thus be reconsidered. To this end, the article examines the underlying rationale for state continuity in the absence of a government, drawing a distinction between constitutive and continuative elements of statehood. Further, it suggests reframing the element of government as an entitlement belonging to the people and apprehending the state as a legally framed concept that cannot be simply determined by its effectiveness. In so doing, the article explores the role of international law in supporting the legal continuity of the state beyond effectiveness.*

## 1 Introduction

According to Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, '[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'.<sup>1</sup> The Montevideo

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<sup>1</sup> Montevideo Convention on the Rights and Duties of States 1933, 165 LNTS 19 at 25.

Convention is generally a starting point for discussing statehood as ‘a textual representation of the traditional criteria [for statehood] recognized by customary international law’.<sup>2</sup> The elements detailed in the Montevideo Convention are regarded as, *prima facie*, constituting the ‘formal’ definition of the state in international law, and this stance has remained unchanged, notwithstanding the fact that the composition of states in the international community has radically changed since its articulation in 1933.<sup>3</sup> Although the fourth element has been criticized for not being unique to states, but, rather, a consequence of statehood,<sup>4</sup> the first three elements articulated in the Montevideo Convention do indeed correspond to commonly accepted component elements constituting the definition of state since the 19th century.<sup>5</sup> Thus, the concept of ‘state’ employed in international law is generally recognized to contain, and be constituted of, population, territory and government.<sup>6</sup> Meanwhile, it is assumed that the essential feature of the concept of the state embodied in the Montevideo Convention is grounded in the notion of ‘effectiveness’.<sup>7</sup> According to George Abi-Saab, the effectiveness of these elements is what integrates them into an operative whole and determines the state’s being taken into consideration by international law.<sup>8</sup> The existence of these elements is considered a factual issue that is objectively discernible, reflecting the traditional understanding of statehood as essentially a question of ‘fact’ dependent upon effectiveness.<sup>9</sup> Since the factual exercise of power over the population and the territory has been regarded as a prerequisite for the attribution of legal status of statehood, ‘government’ has been regarded as a central and indispensable element representing the effectiveness of statehood.

What happens, then, if one of the elements in the definition of statehood becomes entirely absent? Considering that component elements substantively construct the conceptual framework of the state applicable during its continued existence, later deficiency of the elements would logically result in the discontinuance of the existence of the state being defined as such.<sup>10</sup> Traditional doctrine generally equates the elements required for the continuation of statehood with the constitutive elements required for an entity to obtain

<sup>2</sup> Wallace-Bruce, ‘Taiwan and Somalia: International Legal Curiosities’, 22 *Queens Law Journal* (1996–1997) 453, at 455; see also D. Raič, *Statehood and the Law of Self-Determination* (2002), at 24; Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’, 37 *Columbia Journal of Transnational Law* (1999) 403, at 413, 405–422.

<sup>3</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 39. Opinion no. 1, Conference on Yugoslavia, Arbitration Commission, 29 November 1991, 92 ILR 162, 165 (1993).

<sup>4</sup> J. Crawford, *The Creation of States in International Law* (2nd edn, 2007), at 61; Yusuf, ‘Government Collapse and State Continuity: The Case of Somalia’, 13 *Italian Yearbook of International Law* (2003) 11, at 18.

<sup>5</sup> Doehring, ‘State’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1992), vol. 4, at 600–601.

<sup>6</sup> Higgins, *supra* note 3, at 39.

<sup>7</sup> Crawford, *supra* note 4, at 45–46; Raič, *supra* note 2, at 49.

<sup>8</sup> Abi-Saab, ‘Conclusion’, in M.G. Kohen (ed.), *Secession: International Law Perspectives* (2006) 470, at 471.

<sup>9</sup> Roth, ‘The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order’, 4 *East Asia Law Review* (2009) 91, at 96–98.

<sup>10</sup> L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law* (2003), at 14.

statehood and thus seeks to simplify the problem by affirming that a state becomes extinct with the disappearance of one of its constitutive elements.<sup>11</sup> Thus, if the entire territory is submerged, the whole population emigrates or the state falls into protracted anarchy without even the shell of a government, it would be logical to assume that the state becomes extinct. In practice, however, and contrary to this seemingly logical conclusion, it has been witnessed that a state may in fact sustain its legal existence even for a prolonged period in the total absence of government, which is one of the constitutive elements of statehood and also one of the component elements in the concept of state in international law.

It is well known that the Federal Republic of Somalia, although it fell into protracted anarchy without any authority claiming to be the government of the state, continued to exist during the period when it experienced a total absence of government in the 1990s and also in the subsequent transitional phase characterized by a lack of effectiveness.<sup>12</sup> The case of Somalia indicates that the state can continue even in the complete absence of government for a decade. At the same time, it presents inconsistency with the traditional understanding of the state as comprising three elements – territory, population and government – based on the principle of effectiveness under international law. Meanwhile, in so far as an internally effective government is often referred to as representing the effectiveness of statehood, the traditional perception embodied in the notion of ‘statehood as effectiveness’ is also challenged. Accordingly, state continuity in the absence of government prompts the questions how this situation can be explained in international legal discourse and what it implies in terms of our understanding of statehood.

Against this backdrop, this article aims to explore the underlying rationale for state continuity in the absence of government and, further, to rethink its implications on the understanding of the state in international law. Among the three criteria for statehood, the focus of the discussion is on the element of government: first, because it is directly interrelated to the presumption of statehood as effectiveness and, second, because, so far, the disappearance of either the whole population or the entire territory remains hypothetical, although the submergence of the territory of a sovereign state has become more plausible due to climate change and rising sea levels.<sup>13</sup> The article begins by presenting, in Section 2, the argument on state extinction in the situation of anarchy and how such an argument is challenged by the case of Somalia in the 1990s.<sup>14</sup> In order to explain state continuity in the absence of government,

<sup>11</sup> K. Marek, *Identity and Continuity of States in Public International Law* (1968), at 7. Marek provides: ‘Traditional doctrine generally seeks to simplify the problem by affirming that a State becomes extinct with the disappearance of one of its so-called “elements”, – territory, population, legal order’.

<sup>12</sup> Geiss, ‘Failed States: Legal Aspects and Security Implications’, 47 *German Yearbook of International Law* (2005) 457, at 465.

<sup>13</sup> See McAdam, ‘“Disappearing States”, Statelessness and the Boundaries of International Law’, in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (2010) 105. However, so far, there are no historical precedents of deterritorialized states. Bílková, ‘A State without Territory?’, 47 *Netherlands Yearbook of International Law* (2017) 19.

<sup>14</sup> As a methodological note, while this case represents the only instance of total absence of government extending over a notable period, it is nonetheless worth considering as it implies what has been assumed in understanding the state in international law. Given this absence of sufficient state practice, the article

Section 3 suggests the necessity of distinguishing between constitutive and continuative elements of statehood, and Section 4 attempts to reframe the central criterion for statehood around the people entitled to reconstruct a government. Based on this discussion, Section 5 re-examines the presumption of ‘statehood as effectiveness’ and goes on to argue the legally circumscribed existence of the state in terms of the state as a legal fact. Section 6 then looks at how international law supports and favours state continuity. In summation, the article thus posits that a state may continue to exist even in the factual absence of government so long as the people entitled to reconstruct the government remain.

## 2 ‘Can Anarchy Be a State?’: Baty’s Argument and the Somalia Challenge

In the early 20th century, when statehood was predominantly comprehended based on the notion of effectiveness, it might have been taken as ‘an axiom of international law’ that a state must have a government and continue to have one.<sup>15</sup> In contemplation of state continuance in a condition of anarchy, Thomas Baty asserted that a state cannot subsist in the absence of a government without high probability of the reconstitution of a government within a short period – ‘a few days’, in his words.<sup>16</sup> Although he agreed that the temporary loss of government in a civil war does not necessarily mean state extinction, he reaffirmed that this acknowledgement does not contradict the proposition that ‘the entire absence of government is incompatible with the nature of a state’.<sup>17</sup> Accordingly, he confirmed that ‘[i]f a recognized government falls, and no single new government at once succeeds throughout the whole extent of its territory, the state must ipso facto cease to exist’.<sup>18</sup> Baty’s argument was reinforced in that there was no precedent of a state existing without a government in a situation of anarchy: ‘No case can be cited where a state has been recognized as still existing after the fall of its government, unless a new government has at once (i.e., within a few days) succeeded to its power throughout its territory’.<sup>19</sup> In the absence of separate continuative elements of statehood, it was assumed that all constitutive elements are required for the continued existence of statehood and that, otherwise, the state would become extinct. Thus, ‘permanent anarchy within a State’ is simply noted as the circumstance where a state ceases to be an international person, without further inquiry into the point at which the situation can be considered as permanent.<sup>20</sup>

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uses both inductive and deductive methods to arrive at potential conclusions. To extend the knowledge, the article draws inferences from a specific observable phenomenon that may be applicable to our general understanding of statehood. At the same time, general principles of international law applicable in other contexts are employed to expound the specific case.

<sup>15</sup> Baty, ‘Can an Anarchy Be a State?’, 28 *American Journal of International Law (AJIL)* (1934) 444, at 444.

<sup>16</sup> *Ibid.*, at 445.

<sup>17</sup> *Ibid.*, at 444.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, at 445.

<sup>20</sup> L. Oppenheim, *International Law: A Treatise*, vol. 1: *Peace* (2016), at 146, para. 79.

However, a contradictory precedent arose in the 1990s that challenged this simple assumption on state extinction. The situation in Somalia was undoubtedly a condition of anarchy from the fall of the Siad Barre government in January 1991 until the establishment of the Transitional National Government (TNG) in 2000.<sup>21</sup> Prolonged internal conflicts never supported the expectation of the reconstitution of government; the interregnum lasted a decade. During this period, there was no government identifiable by the international community that could externally represent and take responsibility for Somalia.<sup>22</sup> The central government institutions had disappeared, and control over the territory and population was left to the un-integrated local clan-based forces and warlords. With respect to the existence of state authority and degree of control, Somalia stands out as being characterized by the total absence of government for a decade; other cases, such as Liberia and Afghanistan in the 1990s, at least featured transitional or interim governments able to represent the state externally.<sup>23</sup> In terms of the duration of absence of government, 10 years is certainly more than a 'temporal' incident. In this context, it has been argued that Somalia cannot enjoy the presumption of state continuity when examined 'even through the most forgiving analytical lens'.<sup>24</sup> Moreover, the absence of government was not brought about forcefully or involuntarily in violation of international law by acts of other states, being instead derived from internal disintegration deeply rooted in societal and political fragmentation of the state. Thus, the continuity of the Somalian state in the absence of government cannot be completely explained as the consequence of *ex injuria jus non oritur*, as would apply in cases of belligerent occupation or illegal annexation, where the relevant acts generating or changing the status of statehood are disallowed under the principle prohibiting the use of force.<sup>25</sup>

<sup>21</sup> In terms of the existence of 'effective government', the period of absence could be considered to extend until the establishment of the Transitional Federal Government (TFG) in October 2004 or until the TFG entered the city of Mogadishu in 2006. Regarding the political development of Somalia, see Rim, "'State Failure": Implications for International Law' (2014) (PhD thesis on file at the Graduate Institute of International and Development Studies, Geneva, Thesis no. 1041), 38–52.

<sup>22</sup> Notably, the English Queen's Bench judgment in *Somalia v. Woodhouse Drake & Carey (Suisse) S.A.* in 1993, which regarded Ali Mahdi's provisional government as not entitled to represent Somalia. *Republic of Somalia v. Woodhouse Drake and Carey (Suisse) S.A. and Others*, England, High Court, Queen's Bench Division, 13 March 1992, 94 ILR 608, at 608–623 (1992). The United Nations (UN) Security Council also explicitly noted 'the absence of a government in Somalia' as an exceptional circumstance that threatens peace and security. See SC Res. 954 (1994).

<sup>23</sup> In the case of Liberia, within a month of the collapse of Samuel Doe's government in September 1990, the Interim Government of National Unity was formed with the support of the Economic Community of West African States and the Organisation of African Unity. In the case of Afghanistan, after the fall of the Najibullah government in April 1992 the transitional government – the Islamic Council – was established as the result of an interim peace and power-sharing agreement signed in Peshawar by major *mujahideen* faction leaders. Rim, *supra* note 21, at 52–72.

<sup>24</sup> Wallace-Bruce, *supra* note 2, at 480.

<sup>25</sup> The illegal annexations or belligerent occupations that occurred in the late 1930s – of Ethiopia and Albania by Italy, of Austria and Czechoslovakia by Germany, of Poland and the Baltic States by the Soviet Union – have not been treated as affecting the continuity of statehood. The presumption of state continuity in the context of illegality has been consolidated in the post-UN era, with the fundamental principle on the prohibition of use of force embodied in Article 2(4) of the UN Charter as well as other legal materials. Under this principle, loss of one of the constitutive elements of statehood (either territory or

Nonetheless, ‘Somalia’ subsisted during its total absence of government in the 1990s and the subsequent transitional process. None of the hypothetical consequences that may follow state extinction have in fact occurred in Somalia: the territory has never been considered to be unoccupied by any sovereign authority, nor was it considered as *terra nullius*, and Somali nationality remains effective.<sup>26</sup> Moreover, the boundaries of the state have remained unchanged regardless of its lack of effective control.<sup>27</sup> The territorial integrity of Somalia has always been supported, whereas the attempted secession movement of Somaliland has been continuously ignored and remains unrecognized by the international community.<sup>28</sup> The state of Somalia remains as a single unitary entity for international legal relations; its legal personality remains intact, and its seat at the United Nations (UN) has been secured despite its decade-long vacancy.<sup>29</sup> The international community has respected its sovereignty; deference to sovereignty has been emphasized in the resolutions on Somalia in the UN.<sup>30</sup> As the situation has become ‘not a figment of imagination’<sup>31</sup> but, rather, a reality exhibited in a specific case, international practice has confirmed that the absence of government for a substantial period does not automatically render a state extinct. A state in such a situation may be termed a ‘failed state’, but it remains a state nonetheless.<sup>32</sup>

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government) through forceful occupation, resulting in the absence of effectiveness or independence, is no longer considered as affecting the continuity of a state. O’Connell, ‘Enforcing the Prohibition on the Use of Force: The U.N.’s Response to Iraq’s Invasion of Kuwait’, 15 *Southern Illinois University Law Journal* (1990–1991) 453.

<sup>26</sup> Somali nationality remains effective, easily found in the categories provided for the nationality of a person in institutions of other states, and the lack of valid state authority to issue a passport does not prevent a person from claiming Somali nationality *per se*, notwithstanding the factual difficulties in proving it – an issue that may be raised in respect of refugee status.

<sup>27</sup> The 2012 Provisional Constitution reaffirmed that the boundaries of the Federal Republic of Somalia were unchanged from those described in the 1960 Constitution of Somalia, which situates the boundary to the north at the Gulf of Aden; to the northwest at Djibouti; to the west Ethiopia; to the southwest, Kenya; and to the east, the Indian Ocean. See Federal Republic of Somalia, Provisional Constitution, Art. 7 (adopted in Mogadishu on 1 August 2012, English text available at: [http://www.constitution.org/cons/somalia/120708\\_ENG\\_constitution.pdf](http://www.constitution.org/cons/somalia/120708_ENG_constitution.pdf)).

<sup>28</sup> Somaliland declared independence from Somalia in 1991 and reasserted its sovereignty in 2011. Notwithstanding the fact that Somaliland enjoys relatively stable authority and effectiveness compared to Somalia, since its unilateral declaration of independence from Somalia in 1991, it has not gained any recognition from the international community and remains only an autonomous region of Somalia. On Somaliland’s claim for recognition and secession and a brief historical background, see Poore, ‘Somaliland: Shackled to a Failed State’, 45 *Stanford Journal of International Law (SJIL)* (2009) 117; Kreuter, ‘Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession’, 19 *Minnesota Journal of International Law* (2010) 363.

<sup>29</sup> Daphna Shraga, ‘La qualité de membre non représenté: le cas du siège vacant’, 45 *Annuaire français de droit international* (1999) 649, at 650–656. G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (2004), at 71; Yusuf, *supra* note 4, at 24.

<sup>30</sup> For instance, SC Res. 897 (1994): ‘Bearing in mind respect for the sovereignty and territorial integrity of Somalia in accordance with the Charter of the United Nations and recognizing that the people of Somalia bear the ultimate responsibility for setting up viable national political institutions and for reconstructing their country’.

<sup>31</sup> Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, *General Course on Public International Law*, 281 *Recueil des Cours (RdC)* (1999) 9, at 121.

<sup>32</sup> The concept of ‘failed state’ has become a familiar term employed in various contexts of scholarly and political discourse since its introduction in the article ‘Saving Failed States’ by Gerald B. Helman and Steven R. Ratner in 1992. According to Helman and Ratner’s concept, a failed state refers to a state that

Government is primarily a political entity and an administrative institution of the state and is generally composed of a subdivided state apparatus, delivering the basic functions of the state from the internal perspective. From the external perspective, it is the agent of the state that legitimately represents and acts on behalf of the state in the international sphere.<sup>33</sup> Government manifests the legal existence of a state in a functional way: rights and duties imposed upon the state are realized through acts of the government. Such a government is one of the constitutive elements of statehood and fulfils and realizes the core features of the state both internally and externally. The absence of government therefore means the elimination of one of the constitutive elements of statehood: in such a situation, the state cannot perform its basic functions nor can it interact on the international level with other states. Although the case of Somalia in the 1990s, with its total absence of government, was unique in the 20th century and remains so to date in the 21st century, it implies that the traditional criteria for statehood, which are also referred to as constitutive elements of the state, cannot be directly applied as necessary elements for state continuity. The questions then arise as to what makes the state continue even in the absence of government and of effectiveness and how state continuity is supported by, and framed in, international law.

### 3 Distinction between the Constitutive and the Continuative Elements of Statehood

Discussion about the criteria for statehood in international law, on the one hand, has evolved around the 'constitutive elements' of statehood applicable in the context of the creation of the state. On the other hand, the question of whether an existing 'state' can be defined as such and whether it meets the criteria for statehood has rarely been posed. Indeed, the state was initially conceptualized by inductive reasoning from the common features of existing entities referred to as such.<sup>34</sup> 'State' has in fact never been precisely defined but has remained an abstract conception while continuously reflecting the societal challenges in its perception. In this regard, the concept of state inevitably expands in the process of embracing new states.<sup>35</sup> This being so, perhaps questioning whether an existing 'state', already referred to as such, is in fact a state might be seen as somewhat self-contradictory. It is perhaps partly for this reason that the discussion about the criteria for statehood has been largely conducted without distinguishing the elements that an entity must have to constitute a new state from

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is 'utterly incapable of sustaining itself as a member of the international community', suffering from various degrees of 'civil strife, government breakdown, and economic privation'. Helman and Ratner, 'Saving Failed States', 89 *Foreign Policy* (1992) 3, at 3.

<sup>33</sup> *German Settlers Poland*, Advisory Opinion, 1924 PCIJ Series B, No. 6, 1, at 22.

<sup>34</sup> See Nedjati, 'Acts of Unrecognised Governments', 30 *International Comparative Law Quarterly* (ICLQ) (1981) 388, at 388, n. 3.

<sup>35</sup> See R. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019), at 85–86.

those that an existing state must have to continue to be ‘a state’. Consequently, aside from the enumeration of specific situations not affecting the continuity and identity of states,<sup>36</sup> the ‘continuative elements’ of statehood have not been framed nor separately considered in international law.<sup>37</sup>

Constitutive elements and continuative elements, however, are by their nature non-identical and therefore need to be distinguished. Constitutive elements are requirements that an entity must have in order to be regarded as a state in international law, while continuative elements are requirements that an already existing legal entity – a state – must have to subsist without extinction. Said differently, while constitutive elements deal with an entity that is not yet a principal subject of international law, continuative elements pertain to the existence of a state that is already recognized as such and that has rights and obligations under international law. Once established, what constructs the state may be more than an assemblage of constitutive elements; vested rights and privileges arising from its legal existence should also be considered in addressing statehood and its continuative elements. Identifying state continuity with the constitutive elements of statehood is grounded on apprehending the state as purely a matter of fact that is objectively discernible, assuming that only the actual circumstances are relevant to the assessment of statehood.<sup>38</sup> In this sense, it may be speculated that the pre-existing legal status of statehood may offset the absence of one of the constitutive elements initially required when the entity is claimed to be a state.

Considering the legal subjectivity of a state, creation and extinction are certainly separate legal processes: what is required for the purpose of creation of an international legal person cannot be identical to what is required for the extinction of such an entity. This analogy may be inferred from the legal framework of the corporation, a notable legal person in domestic law having a distinct incorporation process and a liquidation process. In addition to internal interests in the allocation of residual property between shareholders, external interests or trust (in the case of listed companies) related to bonds and liabilities arising from legal activities during the period of existence are considered in the liquidation process of the company. Creation primarily

<sup>36</sup> Consistent with both doctrine and practice, the International Law Association (ILA) summarized events that do not affect the identity and continuity of states: (i) changes of the name of the state and the location of its capital; (ii) changes of regime (including unconstitutional changes); (iii) partial territorial or demographical changes; and (iv) illegal foreign occupation or attempts at annexation. ILA, *Aspects of the Law of State Succession*, Rio De Janeiro Conference, Draft Final Report (2008), at 65–66, available at [www.ila-hq.org/en/committees/index.cfm/cid/11](http://www.ila-hq.org/en/committees/index.cfm/cid/11).

<sup>37</sup> The continuity of a state cannot of course be separate from the issue of extinction, falling as it does between the endpoints of creation and extinction of the state. Thus, the question of what makes the state continue may also be framed as what makes a state not extinct. However, if the extinction element is to be framed, it can only be done passively, as ‘not having criteria’, rather than having certain criteria in a positive way. Furthermore, what is supposed in the discussion of state continuity is ‘continuity’ as a conclusion, while the discussion of state extinction does not have such connotation. With this in mind, this article attempts to frame the discussion in terms of state continuity and continuative elements, under the rationale that a positive frame of elements in terms of state continuity, rather than a negative or passive frame for extinction, is perhaps better suited to reveal the central elements of statehood.

<sup>38</sup> See Section 5 below.

concerns a congregate of facts that is required in order to be recognized as having legal personality under international law, whereas continuity or extinction concerns the extinction of legal personality that has already been apprehended by the international legal system. Moreover, in so far as a sovereign state is a 'creator and [the] main addressee' of international law,<sup>39</sup> with the ability to formulate customary international law through its practice, up to and including the very criteria of its 'existence', the underlying rationale for elements required for an entity to be a state may differ from the corresponding rationale for elements justifying state continuity.<sup>40</sup> As noted by Matthew Craven, international law is not prepared to provide a complete elucidation on state extinction, and it is undeniable that 'the conditions for the extinction of the state are particular, and more complex' than for the creation of the state.<sup>41</sup> Furthermore, the difficulties are enhanced since there is no competent international institution to decide on the extinction of states.<sup>42</sup>

Not all of the considerations employed in the context of the creation of a state are applicable to the already legally existing state. For instance, there has been a range of discussion on whether the creation of a state must be in accordance with international law, and, thus, the 'legality' of its emergence is suggested as an additional criterion for statehood.<sup>43</sup> However, this cannot continue to be a consideration applicable to the discussion of the statehood of an existing state because once its legal personality as a state is recognized in international law, its existence *per se* moves beyond the discussion of legality and illegality. In such a case, states would be involved in the discussion of the fate of a certain other state treated equally under international law. Although the discussion is still worth noting, as it lays out how statehood is understood in the current international legal framework, whether the state 'exists' in accordance with international law is an issue that is inappropriate to invoke. Thus, neither a positive nor a negative answer can be construed as affecting the legal status of a state. In summary of this discussion, it may therefore be suggested that state continuity would neither be determined by simply referring to the factual existence of constitutive elements of state nor by applying the relevant discourse considered in the context of state creation.

Where then are we to look for the determinants of state continuity? While the need for distinction between constitutive and continuative elements of statehood does not necessarily imply finding a novel element of statehood, the distinction does offer an opportunity to reframe these elements in the context of state continuity. As discussed, the traditional criteria for statehood prescribed in Article 1 of the Montevideo Convention were initially framed in reference to the definition of the state that had

<sup>39</sup> Kohen, 'Definition of "State"', in G. Hafner et al. (eds), *State Practice Regarding State Immunities* (2006), at 2.

<sup>40</sup> See R. Nicholson, *Statehood and the State-Like in International Law* (2019), at 102–106.

<sup>41</sup> Craven, 'The Problem of State Succession and the Identity of States under International Law', 9 *European Journal of International Law* (1998) 142, at 158–159.

<sup>42</sup> A. Yannis, 'State Collapse and the International System: Implosion of Government and the International Legal Order from the French Revolution to the Disintegration of Somalia' (2000) (PhD dissertation presented at Université de Genève, Thesis no. 604), at 144–145.

<sup>43</sup> Wallace-Bruce, *supra* note 2, at 456; Crawford, *supra* note 4, at 97.

been commonly acknowledged.<sup>44</sup> Although these prescribed elements were applied generally in the context of the creation of a state, and are rarely discussed in the context of an already legally existing state, Article 1 is indeed the definition set out in the context of the discussion of rights and duties of ‘states’ that may encompass previously legally existing states.<sup>45</sup> In this regard, it may be assumed that elements prescribed in Article 1 of the Montevideo Convention are not solely aimed at the constitutive elements of the state, in the context of an entity to be regarded as a state in international law, but can be more broadly framed to infer the qualifications required for the legal existence of a state.

This assumption would imply that the traditional criteria for statehood cannot be left behind in this discussion: territory, people and government can be considered *prima facie* continuative elements of statehood. The necessity for distinction between constitutive and continuative elements of statehood may thus be seen to necessitate further examination of our understanding of the core elements: starting with whether the existence of these elements is to be examined in terms of effectiveness and/or on the basis of the practical nature discernible as a matter of fact or, otherwise, as a matter of legal determination that concerns international law in virtue of legal subjectivity. As a purely academic investigation, then, and lacking empirical examples beyond the case of Somalia, the discussion that follows will rethink the relationship between the three elements in order to uncover a central criterion for statehood, on the one hand, and the legal feature of statehood beyond effectiveness, on the other.

## 4 Reframing the Central Criterion for Statehood

Conceptually, government and the state mutually frame each other. The term ‘government’ presupposes the existence of the sovereign independent state. Thus, the term is carefully employed when the legal status of an entity as a sovereign state is controversial.<sup>46</sup> ‘Government’ is one of the essential constitutive elements of statehood and is a prerequisite to being an entity that is termed ‘a state’ in international law – although, in the context of the prerequisite constitutive elements for statehood, the term is employed in a broader sense, referring to an authority in effective control over the given territory and population.<sup>47</sup> In the process of the creation of the state, the state requires a government that can make it a discrete political community, and a government

<sup>44</sup> Doehring, *supra* note 5, at 600–601.

<sup>45</sup> Hereto, as an illustration supporting the position, it is worth noting that ‘[t]he very actors that prescribe law have attempted to make law regarding the grounds for participation in that law making – for who may join the club or lose membership in it and how the obligations of membership might change if the member itself undergoes changes’. Jeffrey L. Dunoff et al., *International Law: Norms, Actors, Process* (2nd edn, 2006), at 115.

<sup>46</sup> See Talmon, ‘Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law’, in G. Goodwin-Gill and S. Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 499, at 501.

<sup>47</sup> Crawford, *supra* note 4, at 55, n. 85.

requires the existence of the state to be termed as such.<sup>48</sup> Although they might appear as conceptually constructing each other, however, ‘state’ and ‘government’ are to be distinguished once the state legally exists. This distinction is the fundamental assumption enshrined in the international legal framework, exemplified in the separate processes of recognition of government and of state, in the legal position of a government in exile and also in the concept of representation of the state in international organizations.<sup>49</sup> It is indeed the state, and not the government, that is the subject of international law and that holds rights and obligations in the international arena.<sup>50</sup>

Government has been regarded as the central criterion for statehood, in that all the other criteria are dependent upon it: territory is defined by reference to the extent of governmental power exercised or capable of being exercised;<sup>51</sup> and population connotes a stable political community that is best evidenced with the existence of government.<sup>52</sup> Territorial sovereignty refers to the governing power with respect to territory and population, and population as a concept is associated with the territory that is delineated through the governmental power.<sup>53</sup> In this context, it has been noted that, ‘if the basis for population and territory is to be empirical, the four criteria collapse to one: such population and territory as are found under the effective control of an independent government’.<sup>54</sup> Further, when ‘[t]he State is defined in terms of power’, ‘effective control by a government over a population and territory’ becomes an indispensable criterion for state continuity.<sup>55</sup>

Notwithstanding the importance of government for statehood, however, there is no specific requirement prescribed in international law concerning the form and structure of government<sup>56</sup> nor concerning the nature and extent of its control.<sup>57</sup> There has

<sup>48</sup> In a similar context, Roth has explained a two-sided conceptual relationship between the state and its government where an authority will be termed a government only once the state is regarded as a discrete political community that effectively stands, while concurrently such an effective authority is prerequisite for the state’s very existence. Thus, Roth notes the logic triggered under this conceptual framework: ‘[J]ust as there is no government without a state, there is no state without a government.’ See B.R. Roth, *Governmental Illegitimacy in International Law* (2000), at 130.

<sup>49</sup> Crawford, *supra* note 4, at 34–35.

<sup>50</sup> Kohen, ‘Création d’Etats en droit international contemporain’, in *Cours euro-méditerranéens Bancaja de droit international* (2002), vol. 6, 546, at 630–631.

<sup>51</sup> Crawford, *supra* note 4, at 55–56.

<sup>52</sup> I. Brownlie, *Principles of Public International Law* (7th edn, 2008), at 70–71.

<sup>53</sup> *Ibid.*

<sup>54</sup> Roth, *supra* note 48, at 130.

<sup>55</sup> Knop, ‘Statehood: Territory, People, Government’, in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2012) 95, at 101.

<sup>56</sup> ‘Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State’. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970. In its *Western Sahara* advisory opinion, the Court noted that there is ‘no rule of international law ... [that] requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today’. *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, at 43–44, para. 94.

<sup>57</sup> Crawford, *supra* note 4, at 59. Crawford noted that ‘international law lays down no specific requirements as to the nature and extent of this control, except that it include some degree of maintenance of law and order and the establishment of basic institutions’. In this regard, Parfitt asked: ‘[W]hat type of control

nonetheless been a common understanding of the inherent nature of government as embracing a certain degree of effectiveness in its capacity to govern and administer the given jurisdiction.<sup>58</sup> However, in practice, the interpretation of the element of government, or of its effectiveness, has depended a great deal on context when it comes to the claim to statehood. It has generally been applied strictly in the creation of a new state, but specific contexts may evince a more subtle interpretation of whether the claim, for instance, runs counter to territorial integrity or is supported by the principle of self-determination. While effective government has been required in a general sense, the development of doctrine and relevant state practice have modulated this effectiveness regarding the continuity of an already created state.<sup>59</sup> Furthermore, with an empirical case of state continuity in the total absence of government, the assumption of situating the element of government as a central criterion for statehood and measuring its existence by its effectiveness is challenged.

These discussions suggest that the government may not be the central criterion for statehood or, at the very least, that its effectiveness may not be a determinative element for its continuity. Ensuing questions are thus whether the government can still be regarded as a continuative element of statehood, and, if so, whether it should be construed solely in terms of effectiveness and of its factual existence. Indeed, the element of government has never been abandoned in defining statehood,<sup>60</sup> and neither could it be, given the intertwined conceptual relationship between the two. If it stands as an indispensable notion for statehood and thereby remains a continuative element, subsequent enquiry must address how the concept of government can be apprehended and its existence perceived. As discussed, international legal discourse remains silent on the criteria to be adopted for determining the existence of government, other than for effectiveness. In practice, the absence of government has been measured by objectively discernible consequences such as the collapse of institutions and the loss of effective control. However, the very ambiguity of the abstract conception of government, the lack of specific requirements and its non-static interpretation in practice paradoxically provide flexibility in the understanding of its substance.<sup>61</sup>

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counts as “law and order”, and what type of arrangements meet the benchmark of “basic institutions” and responded to these questions by examining the principle of effectiveness beginning with the *Island Palmas* case. Parfitt, *supra* note 35, at 87–90.

<sup>58</sup> As Higgins noted, ‘international law has said nothing about governments – which have also been the subject-matter of recognition – or whether all that is required under international law for a government to be recognized is that it is in effective control of the state concerned. And it is for each state to appreciate in good faith whether an entity claiming to be the government of another state is indeed in effective control of the territory’. Higgins, *supra* note 3, at 43.

<sup>59</sup> Aznar-Gómez, ‘The Extinction of States’, in E. Rieter and H. de Waele (eds), *Evolving Principles of International Law* (2011) 25, at 30.

<sup>60</sup> For instance, Crawford notes that ‘government as a precondition for statehood is, ... beyond a certain point, relative’. Crawford’s interpretation, however, does not submit that the government is not a necessary element for state continuity, maintaining that ‘continuity of government in a territory is an important factor determining continuity of the State concerned, as well as continuity between different forms of legal personality’. Crawford, *supra* note 4, at 60–61.

<sup>61</sup> In the discussion of statehood without territory, a ‘government-in-exile’ is considered, although not an example for the entire absence of government, as proof of a non-static interpretation in state practice of what is sufficient to bridge a shortcoming of a state criterion of ‘a government’. F. von Paepcke, *Statehood in Times of Climate Change: Impacts of Sea Level Rise on the Concept of States* (2015), at 195–196.

Considering that the element of government has been interpreted relatively, in the absence of legal requirements concerning its form and structure, one possible approach could involve interpreting the element of government not by the physical substance or factual condition objectively discerned but, rather, by ‘the will of the people [which] shall be the basis of the authority of government’.<sup>62</sup> If the authority of government is based on the will of the people, the element of government in terms of statehood may also be interpreted and measured so as to be able to consider the holder of that will, rephrasing it as an ‘entitlement’ of the people to exercise that authority. Moreover, where the *raison d’être* of government is concerned – that is, why government is necessary – the people behind the government emerge as salient, in that a government internally delivers basic functions to the people and externally represents the state that is composed of its people. The element of government as a continuative element of statehood may thus be construed not by its physical existence as a government *per se* but, rather, by its possibility as an entitlement given to the people within a territory since the power belongs to the people to make and reconstruct a political structure of their own.

It may thus be suggested that the factual exercise of authority over the territory and population could be replaced by the entitlement of the people to exercise that authority. Indeed, a similar interpretation has been attempted in the understanding of a new-born state established in the absence of effective government, concerning which James Crawford noted that ‘government’ has two aspects: ‘the actual exercise of authority and the right or title to exercise that authority’.<sup>63</sup> Such right or title to exercise this authority would be coined as an entitlement belonging to the people in respect of government. In the absence of government, such an entitlement to reconstruct a government would stand in for the element of government necessary for state continuity. In practice, the importance of entitlement belonging to the people has often been emphasized in the state-building process, as can be inferred from the emphasis on the consent of the people as a basis for the reconstruction of government. Moreover, such entitlement would bear responsibility. In the series of resolutions adopted for external assistance with Somalia’s reconstruction, the UN Security Council stressed the fundamental premise that ‘the people of Somalia bear the ultimate responsibility for national reconciliation and reconstruction of their own country’.<sup>64</sup> This statement further serves to indicate that such entitlement is not forfeited or lapsed as a consequence of institutional collapse or continued absence of central state authority; instead, this entitlement is supported by the international community.

Reinterpretation of the element of government as an entitlement belonging to the people suggests that the central criterion of the state is no longer the government; ‘the people’ moves to the centre of statehood as the holder of this entitlement. The centrality of the people was most eloquently conveyed by Judge Cançado Trindade, who described human beings – ‘population’ or the ‘people’ – as ‘the most precious

<sup>62</sup> Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948, Art. 21(3) at 71.

<sup>63</sup> Crawford, *supra* note 4, at 57.

<sup>64</sup> SC Res. 814 (1993); see also SC Res. 923 (1994); SC Res. 954 (1994).

constitutive element of statehood'.<sup>65</sup> Situating the people as a central criterion for statehood has indeed been addressed or implied by many scholars in the discourse of state continuity. In this context, Giorgio Cansacchi suggested that the continuity of the state as an international subject is determined by the permanence of its people who constitute the state, under the envelope of the legal order and under successive governments.<sup>66</sup> Andreas Zimmerman has also contended that the ultimate stage of the state is determined by the perishing of the population who could claim self-determination and that, therefore, while the population remains, the state cannot be extinct.<sup>67</sup> As a central criterion for statehood, the people may also be construed as an obvious requirement for state continuity. This is further weighted by the emphasis on the principle of self-determination and the increasing awareness and consensus on democratic entitlement, which are both concepts that focus on the people beyond the boundary of state sovereignty.

## 5 Rethinking the Presumption of 'Statehood as Effectiveness'

In so far as the existence of effective government represents effectiveness of statehood, state continuity in the absence of government also challenges the presumption of statehood as effectiveness. Traditionally, it has been the general understanding that 'effectiveness plays a crucial role in respect of the unity between reality and ideas and the legal concepts that rest on it (being the bridge between fact and norm), including that of the State'.<sup>68</sup> Designating 'effectiveness' as a legally relevant notion or rule in respect of statehood is grounded on the underlying proposition that the state is 'a fact', and, thus, the legal status of being a state as a person of international law can be attributed as the consequence of effectiveness based on the factual elements.<sup>69</sup> This posture has long been considered a principle of public international law and is also reflected in the opinion of the Arbitration Commission in 1991, which considered 'the

<sup>65</sup> In his separate opinion regarding the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institution of Self-Government of Kosovo, Judge Cancado referred to 'the most precious constitutive element of statehood: human beings, the "population" or the "people"'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, at para. 77, Separate Opinion of Judge Cancado Trinate.

<sup>66</sup> Cansacchi, 'Identité et continuité des sujets internationaux', 130 *RdC* (1970-II) 1, at 88: '[L]a continuité du sujet international est déterminée par la permanence de son peuple, dans son indépendance étatique et dans son individualité ethnique-historique; c'est le peuple qui constitue, sous l'enveloppe de l'ordre juridique toujours changeant et sous les gouvernements qui se succèdent, la 'personne réelle' de l'Etat.'

<sup>67</sup> Zimmerman clarified the 'permanent and definitive' stage to determine its termination as one in which 'there is no longer a population which could exercise its right of self-determination in order to reorganize the "failed state"'. Zimmerman, 'Continuity of States', in *Max Planck Encyclopedia of Public International Law* (August 2006), at para. 11.

<sup>68</sup> See Kreijen, *supra* note 29 at 178.

<sup>69</sup> See Christakis, 'The State as a "Primary Fact": Some Thoughts on the Principle of Effectiveness', in M.G. Kohen (ed.), *Secession: International Law Perspectives* (2006) 138, at 139.

existence or disappearance of the State is a question of fact'.<sup>70</sup> Emphasis on this aspect has been summarized in the term 'statehood as effectiveness'.<sup>71</sup>

Since effectiveness conveys a variety of meanings, authors have viewed this notion and its effect relevant to statehood in different ways and with different emphasis. It seems that the notion of effectiveness is employed involving two different aspects of statehood, although these often merge. The first aspect of effectiveness is engaged in the process of the creation or extinction of a state under the principle of *ex factis jus oritur*. This aspect specifically denotes that satisfying and possessing the factual criteria for statehood in effect may result in the creation of a state as a person of international law. At the same time, it may also imply that the state may cease to exist when it loses one of the factual criteria. In either case, effectiveness is involved in the process, directly relating the factual situation to the legal consequence. The second aspect of effectiveness is involved in its relation to the factual effects derived from the existence of effective government. In this sense, the existence of a centralized governmental authority with effective control over the territory and the population, having capacity to carry out basic state functions, becomes a specifically required precondition for the existence of statehood.

The equation of statehood with effectiveness has already been challenged by the creation of a state in the context of decolonization when the principle of self-determination supports its independence. Since the 1960s, several states have been created not by the effectiveness of factual criteria but, rather, as a legal right under the principle of self-determination in the context of decolonization. The case of the Republic of the Congo in 1960 is often cited as a notable example in that 'the lack of effectiveness cannot impede the creation of the state' when there is 'a legal basis for statehood, for instance the principle of self-determination'.<sup>72</sup> In addition, in terms of state continuity in the absence of effectiveness, with the notable case of Somalia's existence throughout the 1990s, it was proved that the state might be sustained in the absence of effectiveness. Such a factual phenomenon inconsistent with the traditional position of statehood ultimately challenged the underlying assumption that equated statehood with effectiveness. Although there have been concerns over the attenuation of Somalia's factual legal capacity, its continuing legal personality has never been challenged.<sup>73</sup> The state continues to exist as a subject of international law, even in the absence of government, with accompanying rights and duties attached.<sup>74</sup> It was not

<sup>70</sup> Opinion no. 1, Conference on Yugoslavia, Arbitration Commission, 29 November 1991, 92 ILR 162, at 165–165 (1993).

<sup>71</sup> Crawford, *supra* note 4, at 37.

<sup>72</sup> Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo', 12 *Max Planck Yearbook of United Nations Law* (2008) 1, at 10. In 1960, struggling to prevent the secession in Katanga and elsewhere, the government of the Congo was able to control only the capital. See Craven and Parfitt, 'Statehood, Self-determination, and Recognition', in M.D. Evans (ed.), *International Law* (5th edn, 2018) 177, at 199.

<sup>73</sup> See Osinbajo, 'Legality in a Collapsed State: The Somali Experience', 45 *ICLQ* (1996) 910, at 910–911.

<sup>74</sup> N. Akpinarli, *The Fragility of the 'Failed State' Paradigm: A Different International Law Perception of the Absence of Effective Government* (2009), at 106.

by way of a later legal appraisal constructed on a ‘legal fiction’,<sup>75</sup> but throughout the entire period of loss of its effectiveness, that Somalia remained a sovereign state. The absence of effective centralized state authority over its entire territory and population has not resulted in the demise of the Somali state, and external appreciation of its sovereignty safeguards continuance of the country.<sup>76</sup> Accordingly, it could be argued that not only in the creation of the state, but also in its continuation, effectiveness may no longer be the sole relevant notion determining statehood in international law.

State continuity in the absence of government can be apprehended in recognition of statehood as ‘a legal fact’ whose existence is legally circumscribed, instead of the simple traditional understanding of statehood as effectiveness. Many authors have attempted to apprehend statehood in terms of its legal subjectivity. For instance, Humphrey Waldock has discussed that ‘the possession of legal personality in any legal system is a mixed question of law and fact. Certain facts must exist and the law must recognise those facts to constitute a person for legal purposes’.<sup>77</sup> The state is a ‘primary fact’ that precedes the law in the sense that it requires ‘materialization’ of required elements based on effectiveness that cannot be directly created in law.<sup>78</sup> To be sure, before it is acknowledged in law, and, thus, is conceptualized as ‘the state’ in legal parlance, the factual existence of a certain sociological, political or historically framed territorial entity is necessary. The state as a ‘primary fact’ will become a ‘legal fact’ once its legal existence is acknowledged by international law. Once a state exists as a legal fact, its fate is not simply determined by the factual existence of elements that *prima facie* constitute the state. As a legal fact, it is associated with the rights and duties of statehood and is protected as a legal subject in international law. Its legal existence is not solely determined by its empirical existence of constitutive elements that once constructed the state; only legal determination on extinction under the process of international law can make the state cease to exist. As noted by Josef Kunz, ‘[i]nternational law, like every legal order, must determine who its subjects are and what

<sup>75</sup> State continuity as ‘a legal fiction’ was recognized by the Supreme Court of Bavaria in Germany regarding the continuity of the Czechoslovak State where the Court held: ‘For even a State which has been temporarily extinguished and then re-established can in any case, by virtue of its sovereignty, effectively decree for its territory, by way of legal fiction, that its new legal order with the contents of the previously valid norms shall resume directly and in continuity the legal order existing up to the time of ending of the previous State.’ *Land Registry of Waldsassen v. The Towns of Eger (Cheb) and Waldsassen (Federal Republic of Germany, Supreme Court of Bavaria)*, 23 March 1965, 44 ILR 50, at 58 (1972).

<sup>76</sup> Yusuf, *supra* note 4, at 23.

<sup>77</sup> Waldock, ‘General Course on Public International Law’, 106 RdC (1962) 1, at 146.

<sup>78</sup> Abi-Saab, *supra* note 8, at 470. However, this does not mean that international law remains apart from the creation of a state. The state is a subject of international law, and this means that international law cannot be isolated in the matters of determining whether an entity becomes a subject of international law. In accordance with the development of international law, the legal status of the state has become closely interrelated with the principles of self-determination and the prohibition of the threat or use of force. International law has mattered for statehood, and standards of legality enshrined in international law can work either for impeding or facilitating the acquisition of statehood. See Kohen, *supra* note 50, at 562–563. Peters, ‘Statehood after 1989: “Effectivités” between Legality and Virtuality’, in J. Crawford and S. Nouwen (eds), *Select Proceedings of the European Society of International Law*, (2012), vol. 3, 171, at 175.

the conditions are for their coming into existence, extinction, and for their remaining identical in law'.<sup>79</sup> When the state is defined as a legal fact, and given that its existence relies upon legal determination, how and whether such existence is recognized and supported by international law becomes more critical for the state's continuity.

## 6 Role of International Law in Supporting State Continuity

Understanding the state as a legal fact, and reframing the element of government as an entitlement to reconstruct a government belonging to the people, leads us to contemplate the role of international law in supporting state continuity. In early 1982, focusing on the empirically vulnerable states in Africa that exercise only tenuous control over their territory and population, Robert Jackson and Carl Rosberg posed the question of how such states could persist without their juridical boundaries being challenged: either disintegrated into smaller jurisdictions or deprived of their territory by another sovereign state.<sup>80</sup> After theoretically examining the distinction between the sociological and legal conception of the state, the authors contended that the existence of such states is protected by international law based on their juridical statehood, regardless of the destruction of their empirical statehood through loss of internal monopoly of power.<sup>81</sup> Meanwhile, a state existing in such a condition was specifically termed a 'juridical state' in reference to its reliance 'not on its material attributes but on its legal basis'.<sup>82</sup> This insightful observation is indeed worth noting in discussing state continuity in the absence of government, moving us to consider the role of international law in supporting the legal existence of statehood.

In fact, the question of whether a state becomes extinct or continues to exist is rarely posed in practice until the situation is conceived as serious enough to endanger the legal existence of the state in question. Meanwhile, even in such situations, it has been observed that the continuity of states is, although not in every case, protected by international law.<sup>83</sup> International law cannot keep a state eternally extant. However, international law *prima facie* works in favour of sovereignty; it may prevent the extinction of a state. This is not because of the existence of a supposed right of the state to survival but, rather, by virtue of the application of principles of international law.<sup>84</sup>

<sup>79</sup> Kunz, 'Identity of States under International Law', 49 *AJIL* (1955) 68, at 71.

<sup>80</sup> They presented the issue by noting that '[t]here have been times when Angola, Chad, Ethiopia, Nigeria, Sudan, Uganda and Zaire have ceased to be "states" in the empirical sense – that is, their central governments lost control of important areas in their jurisdiction during struggles with rival political organisations. [...] However,] the serious empirical weakness and vulnerabilities of some African states have not led to enforced jurisdictional change'. Jackson and Rosberg, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood', 35 *World Politics* (1982) 1, at 1.

<sup>81</sup> *Ibid.*; see also Jackson and Rosberg, 'Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis', 24 *Journal of Modern African Studies* (1986) 1, at 13–14.

<sup>82</sup> Warbrick, 'States and Recognition in International Law', in M.D. Evans (ed.), *International Law* (2003) 205, at 205.

<sup>83</sup> Marek, *supra* note 11, at 547.

<sup>84</sup> Kohen, *supra* note 50, at 557; Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 73 *Nordic Journal of International Law* (2004) 1, at 6.

State continuity is *a priori* supported by the notion of sovereignty *per se*, in that no other superior authority exists to determine the fate of a sovereign state. In a similar vein, the principle of non-intervention prohibits other states from interfering with the fate of a sovereign state as an entity equally existing under the principle of sovereign equality. State continuity is also indirectly supported by the principle prohibiting the use of force. When illegality is involved in the apparent loss of factual effectiveness of the state, international law will favour the continuity by nullifying the cause that results in changed circumstances in respect of effectiveness of the state.<sup>85</sup> Although there have been inevitable controversies over the continued legal personality when the situation has been too prolonged, as was the case for the Baltic states,<sup>86</sup> in shorter instances the changed circumstances during that period have never been seen to interrupt the continuity of statehood nor to change the legal status of being a state.<sup>87</sup> Accordingly, there have been very few cases of a state being extinguished since the era of the UN Charter.<sup>88</sup> In this context, Crawford has noted that '[t]here is a strong presumption against extinction of states once firmly established'.<sup>89</sup>

State continuity is also indirectly supported by the principle of legal stability reflecting interests of other states. International law is framed under the concern for practical interests of states, which require a certain degree of order and predictability, and stability in relations with other states.<sup>90</sup> Thus, practical concerns over the legal uncertainty on the part of other states cannot be ignored. As the continuity of a state is directly related to the continuity of rights and obligations, which affects the stability of international legal relations, strong presumption on the continuity of statehood may further be explained in terms of practical necessity and importance, from the perspective that state extinction may pose problems for other states in discontinuance of previous legal relations. What is more, state continuity in the absence of government

<sup>85</sup> Kohen, *supra* note 50, at 631. The legal continuity of a state has been supported when illegality is involved in terminating the effectiveness of statehood, since *ab initio* invalidity will annul the subsequent consequence of termination or suspension of effectiveness of a state. In such a circumstance the continuity of statehood is *prima facie* the 'consequence or effect' of the rejection of external illegal acts conducted against sovereignty, thus subsequently resulting in the rejection of a *de facto* situation that seems to affect the legal status of a sovereign state.

<sup>86</sup> See controversies in the 1990s over the continuity of the Baltic states (after their independence on 6 September 1991 under the recognition of the State Council of the Soviet Union) linked to the pre-1940 personality (1918–1940), T.D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (2009), at 231–232.

<sup>87</sup> Crawford, *supra* note 4, at 691–692.

<sup>88</sup> *Ibid.*, at 715–716. Since 1945, only eight cases of extinction of states are listed: Hyderabad (involuntary merger with India in 1949); Somaliland (voluntary union with Somali Republic in 1960); Tanganyika/Zanzibar (voluntary merger into United Republic of Tanganyika and Zanzibar in 1964); Republic of Vietnam (merger into Socialist Republic of Vietnam, after forcible change of government, in 1975); Yemen Arab Republic/Peoples Democratic Republic of Yemen (voluntary merger into Republic of Yemen in 1990); German Democratic Republic (voluntary union after plebiscite in 1990); Socialist Federal Republic of Yugoslavia (involuntary dissolution after 1991, precise date uncertain); and Czech and Slovak Federative Republic (voluntary dissolution in 1993).

<sup>89</sup> *Ibid.*, at 715.

<sup>90</sup> Charney, 'Universal International Law', 87 *AJIL* (1993) 529, at 532.

may also be explained in light of the very nature of international law, which favours the continued existence of the state.<sup>91</sup> International law is mainly framed in reference to the legal relations of independent states co-existing under the decentralized legal order. Although states are not the only subjects of international law, and the basis of legal order is not exclusively structured by sovereign states, it cannot be denied that states remain the main actors having international legal relations, thus principally constructing and sustaining the legal order. In this regard, Krystyna Marek further notes that 'the protection afforded to states by international law is not only in their own interest, but in that of the international community as a whole'.<sup>92</sup> The reluctance of international law to readily concede state extinction may be seen as partly stemming from its concern for 'self-preservation', in that the existence of international law may also be construed as depending upon the continued existence of states.<sup>93</sup>

International law has been deeply involved not only in the process of creation of a new state but also in its continuity as a subject of international law. While international law operates as the legal hurdle for the creation of a state (except in cases where such creation is supported based on the principle of self-determination in the process of decolonization), it also functions as the legal hurdle for the extinction of existing statehood. International law has a strong presumption towards maintaining the *status quo*, which is the inherent feature of law. As with all legal systems, international law reflects society's values and is constructed by the consent of that society, and a certain level of new consent must be reached in order to change the existing structure based on previously accepted and presented consent. This same rationale applies to consideration of the subjects of international law. The state exists as a subject of international law. It exists with all rights and obligations attached, once it is recognized as a legal person under international law. At the same time, since all other legal rights and duties are presumed to continue under the necessity of legal stability, the legal personality of a state may also enjoy this presumption of continuity. As Hersch Lauterpacht clearly notes, '[i]t is, in fact, international law which preserves the legal continuity of the state. It does so by laying down the rule that the state and its obligations remain the same notwithstanding constitutional or governmental change, revolutionary or other. This is a principle which goes back to Grotius'.<sup>94</sup> Thus, it is indeed understandable that international law has a strong presumption in favour of the continuity of states, which are the subjects of international law and which prescribe the legal structure as well.

## 7 Conclusion

International legal discourse on the issue of state continuity has been framed in a passive way. It does not answer the question of what makes a state continue or what

<sup>91</sup> See, e.g., Marek, *supra* note 11, at 548; Schachter, 'State Succession: The Once and Future Law', 33 *Virginia Journal of International Law* (1992–1993) 253, at 258–260; Mushkat, 'Hong Kong and Succession of Treaties', 46 *ICLQ* (1997) 181, at 183–187.

<sup>92</sup> Marek, *supra* note 11, at 548.

<sup>93</sup> Wallace-Bruce, *supra* note 2, at 477.

<sup>94</sup> Sir H. Lauterpacht, *Recognition in International Law* (1947), at 92–93.

is required for it to continue. Instead, specific cases are listed, by inductive method, as not affecting the continuity of a state. For instance, territorial change is generally excluded in raising the issue of extinction of the state.<sup>95</sup> Neither changes concerning the size of population of the state nor changes involving the structure of the state or its authority are considered to affect state continuity.<sup>96</sup> Revolutionary changes in the composition of a state's government are also recognized, through a well-established doctrine, as not affecting state continuity.<sup>97</sup> The total absence of government, by contrast, does not appear to neatly fit into any recognized category of situations that do not affect the continuity of the state.

Underlying rationale for state continuity in the absence of government can be understood from the perspective that the state exists as a legal fact that is framed and circumscribed under international law. Considering its legal subjectivity, therefore, the legal status of statehood stands on more than aggregates of factual elements. Furthermore, the factual loss of elements considered in the creation of an entity does not necessarily result in the extinction of the legal existence of the state. As a legal fact, only legal determination on extinction of a state in accordance with international law can make the state cease to exist. Neither is the existence of statehood determined only by effectiveness. What constitutes statehood is more complicated than effectiveness represented by the factual existence of government. As clearly noted by Crawford, 'statehood is not simply a factual situation. It is a legally circumscribed claim of right, specifically to the competence to govern a certain territory'.<sup>98</sup> The competence to govern a certain territory, in this context, does not solely concern the factual capacity to exercise governance; it implies the entitlement that is exclusively given to the people within the territory. This being so, the government is no longer located as the central and indispensable element for statehood; it is instead the people that are centrally positioned. In the context of state continuity, the factual manifestation of government can be replaced by the entitlement of the people to reconstruct a government, and this entitlement does not disappear even when there is no factual exercise

<sup>95</sup> In the discussion of state continuity in terms of continued state identity, Kunz noted: '[U]nder the rule of general international law, territorial changes do not affect the identity of the state, except if they legally lead to the extinction of the state.' Kunz, *supra* note 79, at 73. However, as Kunz further noted: '[I]nternational law does not contain universally valid and obligatory criteria as to what must be the extent or the nature of territorial changes in order to lead to the extinction of the state. The international norm does not specify the exceptions to its general principle.'

<sup>96</sup> Crawford, *supra* note 4, at 673, 678; ILA, *supra* note 36, at 65–66.

<sup>97</sup> Bundu, 'Recognition of Revolutionary Authorities: Law and Practice of States', 27 *ICLQ* (1978) 18, at 41. Although unconstitutional changes or drastic changes in the structure of the regime through social revolution may influence the position of the state in international relations, this was not considered as affecting the identity and continuity of the state. For instance, there have been different perspectives on the identity and continuity of the Soviet Union with the former Tsarist Russian Empire. Although the majority of authors confirm that a revolution occurring within the same territory and population does not modify the state identity, there does exist a different view. Notably for Kelsen, consistent with his view on the Grandnorm determining state identity, the social revolution towards a communist regime changed the Grandnorm constituting the basis for the state, and, thus, the state identity is also altered. ILA, *supra* note 36, at 66–67.

<sup>98</sup> Crawford, *supra* note 4, at 61.

of it. Moreover, the legal existence of a state is supported by principles of international law irrespective of its loss of effectiveness.

Such analysis leads to the fundamental questions of the circumstances in which an existing state becomes extinct and the criteria by which international law determines the extinction of a state. Although a full examination of these issues lies beyond the purpose of this article, some initial remarks can be made. First of all, a sovereign state cannot be made extinct by external determination; it can only disappear through the determination of its own people who hold the right to constitute and continue the state. In practice, many states have disappeared through voluntary union, merger or dissolution based on the consent of the people. Likewise, the people of a state in the absence of government may decide on the extinction of the state. Considering that a state exists until becoming extinct as a sovereign entity, this cannot be done against the will represented by that sovereignty. States are the main subjects of international law and construct international law through their practices in the course of making relations with other subjects of international law. In the absence of a centralized international authority to determine the fulfilment of the requirements for statehood, all the existing states are empowered to ascertain the fulfilment of the relevant requirements for themselves.

In this context, a state that is the subject also becomes the object for determination. Therefore, for a state that is still sovereign to become extinct, its consent by the exercise of sovereignty might be a prerequisite. What, then, if the state is unable to give its consent one way or the other? Interestingly, under this assumption, the absence of legitimate authority of the state would also prevent the state from ceasing to exist, such as when there is no representative authority to provide the state consent on behalf of the state. Government is generally entitled to express and convey externally the will of the people as 'the depository of state's sovereignty'.<sup>99</sup> In the absence of government, the genuine will of the people to extinguish the state could scarcely be declared, with their very lives being unsecured and under siege. A referendum may be suggested as another means to present the will of the people, but this situation also necessitates an organization capable of conducting such a referendum – for example, by international administration; in this case, the cost is upon the international community to make a state extinct.<sup>100</sup> Paradoxically, not only does the absence of government not make a state cease to exist, but, in fact, it also creates a situation where the state cannot become extinct or, at least, where it is more difficult for this to occur.

<sup>99</sup> Talmon, *supra* note 46, at 501. S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998), at 16.

<sup>100</sup> This can be inferred from international practice on election monitoring by the UN in post-conflict states. See, e.g., Stoelting, 'The Challenge of UN-Monitored Elections in Independent Nations', 28 *SJIL* (1991–1992) 371; Reisman, 'International Election Observation', 4 *Pace Yearbook of International Law* (1992) 1.

